CCH *Trade* CASES

1957

TRADE CASES

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Cited 1957 Trade Cases

Texts of decisions rendered by federal and state courts throughout the United States in cases involving antitrust, Federal Trade Commission, and other trade regulation law problems, with table of cases and topical indexes

COMMERCE CLEARING HOUSE, INC.
PUBLISHERS of TOPICAL LAW REPORTS

CHICAGO 46 NEW YORK 36 WASHINGTON 4

Printed in the United States of America

Library of Congress Catalog Card No.: 54-7169

FOREWORD

TRADE CASES reports the full, official texts of all decisions rendered by the higher courts, state and federal, in cases involving antitrust, Federal Trade Commission, and other trade regulation law problems. In addition, the more important lower court decisions and attorney generals' opinions are included, either in full text or in excerpt form. For good measure, Government antitrust consent decrees are included in full text.

The Sherman and Clayton Antitrust Acts, the Robinson-Patman Price Discrimination Act, and the Federal Trade Commission Act are the principal federal laws interpreted and applied by these decisions. The state fair trade acts (involving resale price maintenance), unfair practices acts (involving sales below cost), and price discrimination and basic antitrust laws are the state laws concerned in these cases.

This volume, cited 1957 TRADE CASES, contains exact reproductions of the decisions as reported in the "Current Court Decisions" volume of the CCH TRADE REGULATION REPORTS from January 25, 1957, to January 24, 1958.

Decisions are designated by the identical paragraph numbers under which they originally appeared in the TRADE REGULATION REPORTS, thus facilitating direct and cross reference.

Each decision is preceded by: the full name of the case; the name of the court, the docket number, and the date of the decision; the case (Blue Book) number in the Antitrust Division of the Department of Justice for antitrust suits brought by the United States; an accurate, succinct and informative headnote, with emphasis on the main issue; a reference to all paragraphs in the compilations of the Tenth Edition of TRADE REGULATION REPORTS which are pertinent to the subject matter of the case; the names of attorneys representing the litigants, whenever available; and a reference to any previously reported decision in the same case.

Effective indexing is provided to afford quick and convenient contact with any case by reference to its paragraph number. The indexing system includes:

(a) Table of Cases. Alphabetical, with complete listings under plaintiffs' names and cross references under defendants' names. The official and national reporter citations are included when available.

(b) Indexes. Complete and detailed. In addition to the General Topical Index, covering all of the decisions in the volume, special indexes are provided for:

  (i) Antitrust Consent Decrees
  (ii) Attorney Generals' Opinions
  (iii) Federal Trade Commission Cases
  (iv) Robinson-Patman Act Cases
  (v) State Fair Trade Act Cases
  (vi) State Unfair Practices Act Cases

This thorough indexing affords instant contact with any case (a) by case name, and (b) by subject matter.

In planning and producing TRADE CASES, the aim of the publishers throughout is to make this volume of the utmost utility in the important and extensive field of trade regulation. The user's time is saved by concentration on the subject of trade regulation (no time is lost leafing through irrelevant cases); by the single reporting medium for courts of all jurisdictions; and by the explanatory headnotes—clearly stated captions written by specialists in trade regulation law.

COMMERCE CLEARING HOUSE, INC.

TRADE CASES

A Comprehensive Reporter of Decisions Rendered by Federal and State Courts Throughout the United States on Antitrust, Federal Trade Commission, and Other Trade Regulation Law Problems

1957

TABLE OF CASES

for

1957 TRADE CASES

A COMPLETE LIST OF THE CASES REPORTED IN THIS VOLUME, ARRANGED ALPHABETICALLY BY NAMES OF PLAINTIFFS, WITH CROSS REFERENCES UNDER DEFENDANTS' NAMES *

Each case name is followed by the name of the court rendering the opinion, the official or national reporter citation if available at the time of printing, and the number of the paragraph in this volume at which the case is reported.

* Cases in which the "Federal Trade Commission" or the "United States" is a party are listed under the name of the other party only.

— M —

— N —

COURT DECISIONS

—Cited 1957 Trade Cases—

[¶ 68,584] Cardinal Films, Inc. v. Republic Pictures Corporation.

In the United States District Court for the Southern District of New York. Civ. 110-286. Filed January 4, 1957.

Clayton and Sherman Antitrust Acts

Combinations and Conspiracies—Monopolies—Exclusive Dealing—Copyright Licensing Agreement—Legality of Tying Provision.—A provision of a copyright licensing agreement under which a producer-processor of motion picture films required a distributor of motion pictures to order from the producer-processor exclusively all prints of films needed by the distributor for the distribution of the copyrighted motion pictures which the producer-processor had exclusively licensed to the distributor did not violate Section 3 of the Clayton Act or Section 1 or 2 of the Sherman Act. Under the copyright law, the producer-processor, as a copyright proprietor, could license the exhibition of its motion pictures and could license or retain the right to process and reproduce its own films. The copyright monopoly included the processing of the films; therefore, the provision was not within the "tie-in" prohibition of the Clayton Act. Since the exercise of the copyright monopoly did not go beyond the legitimate exploitation of the exclusive privilege of the producer-processor, there was no violation of the Sherman Act. There was no suppression of competition beyond that permitted by the copyright law.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.880; Monopolies, Vol. 1, ¶ 2610.550; Exclusive Dealing, Vol. 1, ¶ 4009.580.

Private Enforcement and Procedure—Suit for Civil Damages—Defenses—Statute of Limitations—Federal Statute—Applicability.—The Federal four-year statute of limitations was held to be applicable to a treble damage action which was commenced after the effective date of the statute, and claims accruing more than four years prior to the institution of the action were held to be barred.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.

Private Enforcement and Procedure—Suit for Civil Damages—Defenses—Federal Statute of Limitations—Tolling of Statute—Pendency of Government Action—Relation Between Private Suit and Government Suit.—The pendency of a Government antitrust action against a defendant in a private antitrust action did not suspend the running of the Federal statute of limitations in the private action since the matters complained of in the private action against the defendant were not based in whole or in part on any of the matters complained of in the Government antitrust action against the defendant. The Government action involved an alleged conspiracy to refuse to license motion picture films, while the private action involved an alleged illegal tying arrangement in the licensing and processing of copyrighted motion picture films.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.

Private Enforcement and Procedure—Suit for Civil Damages—Defenses—Federal Statute of Limitations—When Cause of Action Accrues.—Since an action does not lie for a conspiracy, but for the overt acts done in furtherance of the conspiracy, the Federal statute of limitations runs from the commission of the last overt act alleged to have caused damage. While an action does not lie for a continuing conspiracy as distinguished from the overt act that puts it into execution, an action does lie for a continuing violation of the antitrust laws. The continuing violation involved the defendant's conduct in continuing practices complained of under a contract.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.200.

For the plaintiff: Louis Kipnis, New York, N. Y.

For the defendant: Meyer H. Lavenstein, New York, N. Y.

Memorandum

[*Agreement Between Parties*]

EDELSTEIN, District Judge [*In full text*]: Defendant has moved for summary judgment, under Rule 56, Federal Rules of Civil Procedure, in an action for treble damages under the antitrust laws. Plaintiff, Cardinal Films, Inc., is engaged in the business of distributing motion pictures, prints and films in 16mm widths, for rental and exhibition by others throughout the United States. Defendant, Republic Pictures Corporation, is engaged in the production and distribution of motion pictures and in licensing the right to distribute them. In connection with its business, it processes film; that is, it develops negatives and makes the positive prints not only of its own motion pictures, but, on a commercial basis, of the motion pictures produced or distributed by others. The activities are admittedly in interstate commerce. On April 30, 1949, the plaintiff and defendant entered into an agreement in writing whereby Republic granted to Cardinal an exclusive license to distribute 16mm prints of 30 specified motion pictures, of which the defendant was and is the owner and copyright proprietor. Included in the agreement was a provision that the plaintiff was to order from the defendant exclusively all prints required by the plaintiff for the distribution of the pictures, at charges provided.

[*Alleged Antitrust Violations*]

It is this provision in the agreement which presents the nub of the controversy. Defendant furnished a total of 658 16mm prints to the plaintiff, and because Cardinal was unable to get the film processing done elsewhere, under the agreement, it alleges that Republic has, from the date of the contract to the date of the filing of the complaint, been in violation of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2, and Section 3 of the Clayton Act, 15 U. S. C. § 14, by monopolizing and restraining trade and by enforcing an illegal "tie-in" provision. The effect of the contract, it is contended, is a substantial and unreasonable restraint of competition in the processing of motion pictures, causing ultimate users and consumers of the prints of motion pictures to pay arbitrary and monopolistic prices. It is further alleged that the defendant charged higher prices for prints furnished than it charged to different purchasers of similar prints, and higher prices than other film processors would have charged the plaintiff, resulting in a loss of $7,000 to Cardinal.

A second cause of action seeks to recover, in the event that the contract should be decreed to be illegal and void, in contravention of the Sherman Act, triple the amount of an advance payment of $25,000 and of $12,000 Cardinal claims it had to expend to assure itself of prints of a commercially satisfactory quality, because of the poor quality of the prints furnished.

[*Scope of Copyright Monopoly*]

The first issue presented is whether the provision in the licensing agreement requiring the plaintiff to get its prints exclusively from the defendant is an abuse of the lawful copyright monopoly defendant has in the motion pictures subject to the contract. Under the copyright law, the defendant has the exclusive right, 17 U. S. C. § 1, "(a) To print, reprint, publish, copy and vend the copyrighted work; * * * (d) * * * and to exhibit, perform, represent, produce, or reproduce [a dramatic work] in any manner or by any method whatsoever * * *." It is clear that the defendant, as copyright proprietor, could license the exhibition of its motion pictures. It seems equally clear that the defendant could license or retain the right to process and reproduce its own films. That right is obviously one included in its monopoly. It is difficult to see how the scope of the monopoly is enlarged by the granting of the one license only. The block-booking aspect of *United States v. Paramount Pictures* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131, 156, wherein one copyrighted feature was licensed on condition that the exhibitor would also license another copyrighted feature or group of features, is easily distinguishable. The exhibitors' free choice of copyrighted features was restricted, but had they desired the features otherwise forced upon them, they would have had to license those features from the copyright proprietors. In the case at bar, the plaintiff wants the allegedly "Tied-in" service, but he objects to purchasing it from the copyright owner. Nor is the situation at all analogous to such cases as *Mercoid Corp. v. Mid-Continent Co.* [1944-1945 TRADE CASES ¶ 57,201], 320 U. S. 661; *Morton Salt Co. v. Suppiger Co.* [1940-1943 TRADE CASES ¶ 56,176], 314 U. S. 488; *International Business Machines Corporation v. United States* [1932-1939 TRADE CASES

¶ 55,112], 298 U. S. 131; *United Shoe Machinery Corporation v. United States,* 258 U. S. 451; or *Motion Picture Patents Co. v. Universal Film Mfg. Co.,* 243 U. S. 502. In those cases, the restrictions involved not materials within the patent monopoly, but rights to use or purchase materials not covered by patents. Here, any laboratory attempting to process one of defendant's films would be guilty of infringement. But in the *I. B. M.* case, *supra,* for example, the use in the patented machine of a card manufactured by someone else than the patentee would not constitute infringement. Here, the copyright owner derives his profit from an operation within the scope of the copyright monopoly. In the cited cases, the patent owners sought to derive profit, on the basis of their patents, not only from the patented devices, on which the law gave them a monopoly, but from unpatented materials used with the machines, thereby expanding the patent monopoly to cover the unpatented materials. The situation in the case at bar would be quite different, of course, if the copyright monopoly did not cover the processing of film.

[*Clayton Act*]

The patent case of *Steiner Sales Co. v. Schwartz Sales Co.,* (10 Cir.) [1932-1939 Trade Cases ¶ 55,187], 98 F. 2d 999, cert. den. 305 U. S. 662, is highly analogous to the instant case. There the patentee licensed the use of his device, but required the licensee to purchase it only from a manufacturer authorized by the licensor. The requirement was limited to the licensor's patented devices only. It was held that a patentee may condition the right of his licensee to purchase only from himself or his authorized manufacturer, and that the license agreement did not impose restrictions beyond the lawful monopoly of the patents. Here, the copyright owner licensed a certain use of its motion pictures, but the licensee was required to obtain the film from the copyright proprietor. The requirement is limited to those motion pictures owned by the licensor and the subject of the contract. It follows that the licensor may properly condition the right of his licensee to purchase only from the licensor the services necessary to bring the licensed use to fruition. The provision of the licensing agreement requiring plaintiff to order all prints exclusively from the defendant is not within the "tie-in" prohibition of the Clayton Act.

[*Sherman Act*]

By the same token, since the defendant's exercise of its copyright monopoly does not go beyond the legitimate exploitation of its exclusive privilege, there is no violation of the Sherman Act. It is true that an agreement illegal because it suppresses competition is not any less so because the competitive article is copyrighted. *Interstate Circuit v. United States* [1932-1939 Trade Cases ¶ 55,205], 306 U. S. 208, 231. But there is no suppression of competition here beyond that permitted by the copyright law. The only competition precluded by the agreement and the only monopolization or restraint of trade involved is in connection with the processing of defendant's films, an activity over which defendant has been granted exclusive domain by copyright. There is no attempt to enlarge that domain by the leverage of the copyright, as for example, where price fixing licenses are used as a means of extending the copyright monopoly so as to govern the admission price to exhibitions which include pictures not covered by the copyright, as was found in *Interstate Circuit v. United States, supra;* or where a copyright holder seeks to impose price control upon future sales of an article, after having divested himself of title to it, *Straus v. American Publishers' Ass'n.,* 231 U. S. 222; or where price maintenance on copyrighted films is shown to constitute a part of a general plan to restrain unreasonably interstate commerce in motion picture films or to monopolize or suppress competition in their exhibition, *United States v. Crescent Amusement Co.* [1944-1945 Trade Cases ¶ 57,316], 323 U. S. 173. Such agreements violate the Sherman Act and are afforded no immunity by the copyright laws. *United States v. Paramount Pictures* [1948-1949 Trade Cases ¶ 62,244], 334 U. S. 131. But an agreement which goes no further than to preserve the legitimate monopoly of a copyright is not vitiated by the antitrust laws.

[*Statute of Limitations*]

The defendant has also raised the statute of limitations as a bar to this suit. Title 28 U. S. C. § 15b provides that a suit for treble damages based upon a violation of the antitrust laws is barred unless commenced within four years after the cause of action

accrued. The effective date of the provision was six months after its enactment on July 7, 1955. The complaint in this case was filed on June 21, 1956, so that there can be no question of the applicability of the section. Any cause of action which accrued prior to June 21, 1952, therefore, is barred. Plaintiff contends, however, that under 15 U. S. C. § 16(b), the statute of limitations was tolled by the pendency, from July 22, 1952 to January 10, 1956, in the United States District Court for the Southern District of California, of the case of *United States v. Twentieth Century-Fox Film Corporation* [1955 Trade Cases ¶ 68,205], 137 F. Supp. 78, in which the defendant here was also a defendant. That section does provide for the tolling of the statute of limitations for private rights of action when a suit is instituted by the United States under the antitrust laws, where those private rights of action are "based in whole or in part on any matter complained of" in the Government's suit. But the matter complained of in that suit was a conspiracy to restrain interstate trade and commerce in 16mm films, pursuant to which the defendants refused to license the exhibition of those films in any place or manner that would compete with the exhibition of 35mm films. An analysis of the complaint in that action, a copy of which has been submitted by defendant, does not disclose that there were any acts of the defendants complained of by the United States common to the acts of the defendant complained of by the plaintiff in this case. See *Steiner v. 20th Century-Fox Film Corporation,* (9 Cir.) [1956 Trade Cases ¶ 68,304] 232 F. 2d 190, 196. The statute of limitations, therefore, was not tolled by the Government's suit in California.

Consequently, so much of the claim under the first cause of action as accrued more than four years prior to the filing of the complaint is barred. It appears that of the 658 prints of the licensed pictures furnished by defendant to plaintiff under the contract, only 46 were furnished within the four year period. Inasmuch as plaintiff complains of a continuing violation of the antitrust laws, only so much of his damages as are attributable to those 46 prints are beyond the bar of limitations, if he has a valid cause of action. The situation is not like those in cases involving a statute of limitations in connection with continuing conspiracies. Action does not lie for a conspiracy, but for overt acts done in furtherance of a conspiracy. *United States v. Pan-American Petroleum Co.,* (9 Cir.) 55 F. 2d 753. Consequently, in a civil conspiracy, the statute of limitations runs from the commission of the last overt act alleged to have caused damage. *Steiner v. 20th Century-Fox Film Corporation,* (9 Cir.) [1956 Trade Cases ¶ 68,304] 232 F. 2d 190, and cases cited at p. 194. While action does not lie for a continuing conspiracy as distinguished from the overt act that puts it into execution, action does lie for a continuing violation such as is here alleged. *Bluefields SS. Co. v. United Fruit Co.,* (3 Cir.) 243 Fed. 1. The continuing violation involves the defendant's conduct (if it be a violation) in continuing the practices complained of under the contract. If more affirmative action on the part of the defendant causing damage to the plaintiff is required, *Pastor v. American Telephone & Telegraph Co.,* 76 F. Supp. 781, it may be, as alleged in plaintiff's affidavit, the defendant's refusal to relieve the plaintiff of the restriction in the contract. At least an issue of fact on that point is raised.

On the second cause of action, the plaintiff seeks to recover treble the damages resulting from a $25,000 advance under the contract and a $12,000 expenditure because of poor quality of the prints furnished. But the $25,000 payment was made by September 15, 1949, and the $12,000 expenditure was made before June 21, 1952. Recovery on this cause of action is clearly barred by the statute of limitations.

[*Motion Granted*]

Accordingly, the motion for summary judgment will be granted.

[¶ 68,585] Honorable Walter J. La Buy v. Howes Leather Company, Inc. and Montgomery Ward & Co., Inc.

In the Supreme Court of the United States. October Term, 1956. No. 27. Dated January 14, 1957.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Sherman Antitrust Act

Private Enforcement and Procedure—Suits for Civil Damages—Appeal and Error—Review of Order Referring Cases to Master—Writ of Mandamus—Power of Court of Appeals.—A United States Court of Appeals had the power to issue writs of mandamus compelling a United States District Court Judge to vacate his orders, entered under Rule 53(b) of the Federal Rules of Civil Procedure, referring two antitrust cases to a master for trial. The judge had referred the cases to a master because they were very complicated and complex, they would take considerable time to try, and his calendar was congested. However, in view of the judge's knowledge of the cases at the time of the references, together with his long experience in the antitrust field, it was held that he could have disposed of the cases with greater dispatch and less effort than anyone else. Under the circumstances in the cases, the Court of Appeals was justified in finding that the orders of reference were an abuse of the judge's power under Rule 53(b). The parties were deprived of a trial before the court on the basic issues involved in the cases. The use of masters is "to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause," and not to displace the court. The exceptional circumstances in the cases warranted the use of the extraordinary remedy of mandamus. The "All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power.'" The Court of Appeals, in the instant cases, found a clear abuse of discretion.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013, 9015.12.

For the petitioner: Edward R. Johnston, James A. Sprowl, and Edward H. Hatton, Chicago, Ill.

For the respondents: Jack I. Levy, Chicago, Ill., for Howes Leather Co., Inc.; and Charles J. Barnhill, David L. Dickson, and John F. McClure, Chicago, Ill., for Montgomery Ward & Co., Inc.

Affirming a decision of the United States Court of Appeals, Seventh Circuit, 1956 Trade Cases ¶ 68,261.

[*Issue*]

Mr. Justice Clark delivered the opinion of the Court [*In full text*]:

These two consolidated cases present a question of the power of the Courts of Appeals, led to our grant of a writ of cerpel a District Judge to vacate his orders entered under Rule 53(b) of the Federal Rules of Civil Procedure referring antitrust cases for trial before a master. The petitioner, a United States District Judge sitting in the Northern District of Illinois, contends that the Courts of Appeals have no such power and that, even if they did, these cases were not appropriate ones for its exercise. The Court of Appeals for the Seventh Circuit has decided unanimously that it has such power and, by a divided court, that the circumstances surrounding the references by the petitioner required it to issue the mandamus about which he complains. 226 F. 2d 703 [1956 Trade Cases ¶ 68,261]. The importance of the question in the administration of the Federal Rules of Civil Procedure, together with the uncertainty existing on the issue among the Courts of Appeals, led to our grant of a writ of certiorari. 350 U. S. 964. We conclude that the Court of Appeals properly issued the writs of mandamus.

[*Antitrust Cases*]

History of the Litigation.—These petitions for mandamus, filed in the Court of Appeals, arose from two antitrust actions instituted in the District Court in 1950.[1] *Rohlfing*[2] involves 87 plaintiffs, all operators of independent retail shoe repair shops. The claim of these plaintiffs against the six named defendants—manufacturers, wholesalers, and retail mail order houses and chain operators—is identical. The claim asserted in the complaint is a conspiracy between the defendants "to monopolize and to attempt to

[1] *Rohlfing v. Cat's Paw Rubber Co.*, No. 50 C 229, U. S. D. C. N. D. Ill., and *Shaffer v. U. S. Rubber Co.*, No. 50 C 844, U. S. D. C. N. D. Ill.

[2] The figures indicated refer to the number of parties at the time of the petition for mandamus. When the action was originally filed there were 87 plaintiffs and 25 defendants.

monopolize" and fix the price of shoe repair supplies sold in interstate commerce in the Chicago area, in violation of the Sherman Act. The allegations also include a price discrimination charge under the Robinson-Patman Act. *Shaffer*[3] involves six plaintiffs, all wholesalers of shoe repair supplies, and six defendants, including manufacturers and wholesalers of such supplies and a retail shoe shop chain operator. The allegations here also include charges of monopoly and price fixing under the Sherman Act and price discrimination in violation of the Robinson-Patman Act. Both complaints pray for injunctive relief, treble damages, and an accounting with respect to the discriminatory price differentials charged.

The record indicates that the cases had been burdensome to the petitioner. In *Rohlfing* alone, 27 pages of the record are devoted to docket entries reflecting that petitioner had conducted many hearings on preliminary pleas and motions. The original complaint had been twice amended as a result of orders of the court in regard to misjoinders and severance; 14 defendants had been dismissed with prejudice; summary judgment hearings had resulted in a refusal to enter a judgment for some of the defendants on the pleadings; over 50 depositions had been taken; and hearings to compel testimony and require the production and inspection of records were held. It appears that several of the hearings were extended and included not only oral argument but submission of briefs, and resulted in the filing of opinions and memoranda by the petitioner. It is reasonable to conclude that much time would have been saved at the trial had petitioner heard the case because of his familiarity with the litigation.

[*References*]

The References to the Master.—The references to the master were made under the authority of Rule 53(b) of the Federal Rules of Civil Procedure.[4] The cases were called on February 23, 1955, on a motion to reset them for trial. *Rohlfing* was "No. 1 below the black line" on the trial list, which gave it a preferred setting. All parties were anxious for an early trial, but plaintiffs wished an adjournment until May. The petitioner announced that "it has taken a long time to get this case at issue. I remember hearing more motions, I think, in this case than any case I have ever sat on in this court." The plaintiffs estimated that the trial would take six weeks, whereupon petitioner stated he did not know when he could try the case "if it is going to take this long." He asked if the parties could agree "to have a Master hear" it. The parties ignored this query and at a conference in chambers the next day petitioner entered the orders of reference *sua sponte*.[5] The orders declared that the court was "confronted with an extremely congested calendar" and that "exception [*sic*] conditions exist for this reason" requiring the references. The cases were referred to the master "to take evidence and to report the same to this Court, together with his findings of fact and conclusions of law." It was further ordered in each case that "the Master shall commence the trial of this cause" on a certain date and continue with diligence, and that the parties supply security for costs. While the parties had deposited some $8,000 costs, the record discloses that all parties objected to the references and filed motions to vacate them. Upon petitioner's refusal to vacate the references, these mandamus actions were filed in the Court of Appeals seeking the issuance of

[3] The figures indicated refer to the number of parties at the time of the petition for mandamus. When the action was originally filed there were 10 plaintiffs and 20 defendants.

[4] Rule 53(b) provides:

"(b) REFERENCE. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

[5] The fact that the master is an active practitioner would make the comment of Chief Justice Vanderbilt with regard to the effect of references appropriate here. In his work, Cases and Materials on Modern Procedure and Judicial Administration (1952), at pages 1240-1241, he states:

"There is one special cause of delay in getting cases on for trial that must be singled out for particular condemnation, the all-too-prevalent habit of sending matters to a reference. There is no more effective way of putting a case to sleep for an indefinite period than to permit it to go to a reference with a busy lawyer as referee. Only a drastic administrative rule, rigidly enforced, strictly limiting the matters in which a reference may be had and requiring weekly reports as to the progress of each reference will put to rout this inveterate enemy of dispatch in the trial of cases."

writs ordering petitioner to do so. These applications were grounded on 28 U. S. C. § 1651(a), the All Writs Act.[6] In his answer to the show cause orders issued by the Court of Appeals, petitioner amplified the reasons for the references, stating "that the cases were very complicated and complex, that they would take considerable time to try," and that his "calendar was congested." Declaring that the references amounted to "a refusal on his [petitioner's] part, as a judge, to try the causes in due course," the Court of Appeals concluded that "in view of the extraordinary nature of these causes" the references must be vacated "if we find that the orders were beyond the court's power under the pertinent rule." 226 F. 2d, at 705, 706. And, it being so found, the writs issued under the authority of the All Writs Act. It is not disputed that the same principles and considerations as to the propriety of the issuance of the writs apply equally to the two cases.

[*Court of Appeals*]

The Power of the Courts of Appeals.—Petitioner contends that the power of the Courts of Appeals does not extend to the issuance of writs of mandamus to review interlocutory orders except in those cases where the review of the case on appeal after final judgment would be frustrated. Asserting that the orders of reference were in exercise of his jurisdiction under Rule 53(b), petitioner urges that such action can be reviewed only on appeal and not by writ of mandamus, since by congressional enactment appellate review of a District Court's orders may be had only after a final judgment. The question of naked power has long been settled by this Court. As late as *Roche v. Evaporated Milk Association* [1940-1943 Trade Cases ¶ 56,276], 319 U. S. 21 (1943), Mr. Chief Justice Stone reviewed the decisions and, in considering the power of Courts of Appeals to issue writs of mandamus, the Court held that "the common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court." *Id.*, at 25. The recodification of the All Writs Act in 1948, which consolidated old §§ 342 and 377 into the present § 1651 (a), did not affect the power of the Courts of Appeals to issue writs of mandamus in aid of jurisdiction. See *Bankers Life & Casualty Co. v. Holland* [1953 Trade Cases ¶ 67,626], 346 U. S. 379, 382-383 (1953). Since the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them. *Roche, supra,* at 25, and cases there cited. This is not to say that the conclusion we reach on the facts of this case is intended, or can be used, to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders. We pass on, then, to the only real question involved, *i. e.,* whether the exercise of the power by the Court of Appeals was proper in the cases now before us.

[*Court's Exercise of Power*]

The Discretionary Use of the Writs.—It appears from the docket entries to which we heretofore referred that the petitioner was well informed as to the nature of the antitrust litigation, the pleadings of the parties, and the gist of the plaintiffs' claims. He was well aware of the theory of the defense and much of the proof which necessarily was outlined in the various requests for discovery, admissions, interrogatories, and depositions. He heard arguments on motions to dismiss, to compel testimony on depositions, and for summary judgment. In fact, petitioner's knowledge of the cases at the time of the references, together with his long experience in the antitrust field, points to the conclusion that he could dispose of the litigation with greater dispatch and less effort than anyone else. Nevertheless, he referred both suits to a master on the general issue. Furthermore, neither the existence of the alleged conspiracy nor the question of liability *vel non* had been determined in either case. These issues, as well as the damages, if any, and the question concerning the issuance of an injunction, were likewise included in the references. Under all of the circumstances, we believe the Court of Appeals was justified in finding the orders of reference were an abuse of the petitioner's power under Rule 53(b). They amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation.

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[6] "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The use of masters is "to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause," *Ex parte Peterson,* 253 U. S. 300, 312 (1920), and not to displace the court. The exceptional circumstances here warrant the use of the extraordinary remedy of mandamus. See *Maryland v. Soper,* 270 U. S. 9, 30 (1926). As this court pointed out in *Los Angeles Brush Corp. v. James,* 272 U. S. 701, 706 (1927): ". . . [W]here the subject concerns the enforcement of the . . . [r]ules which by law it is the duty of this Court to formulate and put in force," mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked. As was said there at page 707, were the Court ". . . to find that the rules have been practically nullified by a district judge . . . it would not hesitate to restrain [him]. . . ." The *Los Angeles Brush Corp.* case was cited as authority in 1940 for a per curiam opinion in *McCullough v. Cosgrave,* 309 U. S. 634, in which the Court, summarily ordered vacated the reference of two patent cases to a master. The cases arose from the same District Court in which the *Los Angeles Brush Corp.* case originated and the grounds for the references largely followed that case. It is to be noted that the grounds there are much more inclusive than those set out here, alleging all of those claimed by the petitioner and, in addition, the prolonged illness of the regular judge and the fact that no other judge was available to try the cases. It appears to us *a fortiori* that these cases were improperly referred to a master.

[*Decisions Distinguished*]

It is claimed that recent opinions of this Court are to the contrary. Petitioner cites *Bankers Life & Casualty Co. v. Holland* [1953 TRADE CASES ¶ 67,626], 346 U. S. 379 (1953), and *Parr v. United States,* 351 U. S. 513 (1956). The former case did not concern rules promulgated by this Court but, rather, an Act of Congress, the venue statute. Furthermore, there we pointed out that the ". . . All Writs Act is meant to to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power'. . . ." 346 U. S., at 383. Certainly, as the Court of Appeals found here, there was a clear abuse of discretion. In the *Parr* case, the District Court had not exceeded or refused to exercise its functions. It dismissed an indictment because the Government had elected to prosecute Parr in another district under a new indictment. The effect of the holding was merely that the dismissal of the first indictment was not an abuse of the discretion vested in the trial judge.

[*Review of Interlocutory Orders*]

It is also contended that the Seventh Circuit has erroneously construed the All Writs Act as "conferring on it a 'roving commission' to supervise interlocutory orders of the District Courts in advance of final decision." Our examination of its opinions in this regard leads us to the conclusion that the Court of Appeals has exercised commendable self-restraint. It is true that mandamus should be resorted to only in extreme cases, since it places trial judges in the anomalous position of being litigants without counsel other than uncompensated volunteers. However, there is an end of patience and it clearly appears that the Court of Appeals has for years admonished the trial judges of the Seventh Circuit that the practice of making references "does not commend itself" and ". . . should seldom be made, and if at all only when unusual circumstances exist." *In re Irving-Austin Building Corp.,* 100 F. 2d 574, 577 (1938). Again, in 1942, it pointed out that the words "exception" and "exceptional" as used in the reference rule are not elastic terms with the trial court the sole judge of their elasticity. "Litigants are entitled to a trial by the court, in every suit, save where exceptional circumstances are shown." *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.,* 131 F. 2d 809, 815. Still the Court of Appeals did not disturb the reference practice by reversal or mandamus until this case was decided in October 1955. Again, Chief Judge Duffy in *Krinsley v. United Artists Corp.* [1956 TRADE CASES ¶ 68,424], 235 F. 2d 253, 257 (1956), in which there was an affirmance of a case involving a reference, called attention to the fact that the practice of referring cases to masters was ". . . all too common in the Northern District of Illinois . . . ." The record does not show to what extent references are made by the full bench of the District Court in the Northern District; however, it does reveal that petitioner has referred 11 cases to masters in the past 6 years. But

even "a little cloud may bring a flood's downpour" if we approve the practice here indulged, particularly in the face of presently congested dockets, increased filings, and more extended trials. This is not to say that we are neither aware of nor fully appreciative of the unfortunate congestion of the court calendar in many of our District Courts. The use of procedural devices in the heavily congested districts has proven to be most helpful in reducing docket congestion. Illustrative of such techniques are provision for an assignment commissioner to handle the assignment of all cases; the assignment of judges to handle only motions, pleas, and pretrial proceedings; and separate calendars for civil and criminal trials in cases that have reached issue. We enumerate these merely as an example of the progress made in judicial administration through the use of enlightened procedural techniques. It goes without saying that they can be used effectively only where adaptable to the specific problems of a district. But, be that as it may, congestion in itself is not such an exceptional circumstance as to warrant a reference to a master. If such were the test, present congestion would make references the rule rather than the exception. Petitioner realizes this, for in addition to calendar congestion he alleges that the cases referred had unusual complexity of issues of both fact and law. But most litigation in the antitrust field is complex. It does not follow that antitrust litigants are not entitled to a trial before a court. On the contrary, we believe that this is an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis and ordinarily not experienced in judicial work. Nor does petitioner's claim of the great length of time these trials will require offer exceptional grounds. The final ground asserted by petitioner was with reference to the voluminous accounting which would be necessary in the event the plaintiffs prevailed. We agree that the detailed accounting required in order to determine the damages suffered by each plaintiff might be referred to a master after the court has determined the over-all liability of defendants, provided the circumstances indicate that the use of the court's time is not warranted in receiving the proof and making the tabulation.

[*Affirmed*]

We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here. Its judgment is therefore affirmed.

[Dissenting Opinion]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON and MR. JUSTICE HARLAN join, dissenting.

[*Issue*]

The issue here is not whether Judge La Buy's order was reviewable by the Court of Appeals. The sole question is whether review should have awaited final decision in the cause or whether the order was reviewable before final decision by way of a petition under the All Writs Act for the issuance of a writ of mandamus addressed to it. I do not agree that the writ directing Judge La Buy to vacate the order of reference was within the bounds of the discretionary power of the Court of Appeals to issue an extraordinary writ under the All Writs Act.[1] Only last Term, in *Parr v. United States*, 351 U. S. 513, this Court restated those bounds:

> "The power to issue them is discretionary and it is sparingly exercised. . . . This is not a case where a court has exceeded or refused to exercise its jurisdiction, see *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, 26, nor one where appellate review will be defeated if a writ does not issue, *cf. Maryland v. Soper*, 270 U. S. 9, 29-30. Here the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction. The extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals. *Roche v. Evaporated Milk Assn., supra*, at p. 30." 351 U. S., at 520.[2]

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[1] "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U. S. C. § 1651(a).

[2] *Cf. Bankers Life & Cas. Co. v. Holland* [1953 TRADE CASES ¶ 67,626], 346 U. S. 379; *Ex parte Fahey*, 332 U. S. 258.

The action of the Court of Appeals for the Seventh Circuit here under review is outside these limitations. The case before the Court of Appeals was "not a case where a court has exceeded or refused to exercise its jurisdiction. . . ." Rule 53(b) of the Federal Rules of Civil Procedure vested Judge La Buy with discretionary power to make a reference if he found, and he did, that "some exceptional condition" required the reference.[3] Here also "the most that could be claimed is that the district [court] . . . erred in ruling on matters within [its] jurisdiction." If Judge La Buy erred in finding that there was an "exceptional condition" requiring the reference or did not give proper weight to the caveat of the Rule that a "reference to a master shall be the exception and not the rule," that was mere error "in ruling on matters within [the District Court's] jurisdiction." Such mere error does not bring into play the power of the Court of Appeals to issue an extraordinary writ. Nor did Judge La Buy's order of reference present the Court of Appeals with a case "where appellate review will be defeated if a writ does not issue." The litigants may suffer added expense and possible delay in obtaining a decision as a consequence of the reference, but *Roche* settles that "that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable."[4]

[*Piecemeal Appeals*]

But, regrettable as is this Court's approval of what I consider to be a clear departure by the Court of Appeals from the settled principles governing the issuance of the extraordinary writs, what this Court says in reaching its result is reason for particularly grave concern. I think this Court has today seriously undermined the long-standing statutory policy against piecemeal appeals. My brethren say:

> "Since the Court of Appeals could at some stage of the antitrust proceedings entertain an appeal in these cases it has power in proper circumstances as here to issue writs of mandamus reaching them. . . . This is not to say that the conclusion we reach on the facts of this case is intended or can be used to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders."

I understand this to mean that proper circumstances are present for the issuance of a writ in this case because, if the litigants are not now heard, the Court of Appeals will not have an opportunity to relieve them of the burden of the added expense and delay of decision alleged to be the consequence of the reference. But that bridge was crossed by this Court in *Roche* and *Alkali*, where this very argument was rejected:

> "Here the inconvenience to the litigants results alone from the circumstance that Congress has provided for review of the district court's order only on review of the final judgment, and not from an abuse of judicial power, or refusal to exercise it, which it is the function of mandamus to correct." 319 U. S., at 31.

[*All Writs Act*]

What this Court is saying, therefore, is that the All Writs Act confers an independent appellate power in the Courts of Appeals to review interlocutory orders. I have always understood the law to be precisely to the contrary. The power granted to the Courts of Appeals by the All Writs Act is not an appellate power but merely an auxiliary power in aid of and to protect the appellate jurisdiction conferred by other provisions of law, *e. g.*, the power to review final decisions granted by 28 U. S. C. § 1291,[5] and to review specified exceptional classes of interlocutory orders granted by 28 U. S. C. § 1296.[6] This holding that an independent ap-

[3] It should be noted that the objection to references stated by Chief Justice Vanderbilt, as quoted in footnote 5 of the majority opinion, is reflected in New Jersey Revised Rules 4:54-1, which provides as follows: "No reference for the hearing of a matter shall be made to a master, except under extraordinary circumstances, *upon approval of the Chief Justice*, or for the taking of a deposition, or as to matters heard by a standing master appointed by the Supreme Court." (Emphasis added.) If the federal rule required a like consent by a chief judge, a reference without such consent would be outside the jurisdiction of the District Court, and, therefore, subject to correction by writ of mandamus. The vital distinction is that the federal rule as presently framed vests discretion in the District Courts.

[4] 319 U. S., at 30. *Cf. United States Alkali Export Assn. v. United States* [1944-1945 TRADE CASES ¶ 57,372], 325 U. S. 196, 202-203.

[5] "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court." 28 U. S. C. § 1291.

[6] Section 1292, in substance, confers upon the Courts of Appeals jurisdiction of appeals from interlocutory orders of the District Courts relating to injunctions, receivership, and certain admiralty and patent infringement cases.

pellate power is given by the All Writs Act not only discards the constraints upon the scope of the power to issue extraordinary writs restated in *Parr,* but, by the very fact of doing so, opens wide the crack in the door which, since the Judiciary Act of 1789, has shut out from intermediate appellate review all interlocutory actions of the District Courts not within the few exceptional classes now specified by the Congress in § 1292.

The power of the Courts of Appeals to issue extraordinary writs stems from § 14 of the Judiciary Act of 1789.[7] Chief Judge Magruder, in *In re Josephson,* 218 F. 2d 174, provides us with an invaluable history of this power and of the judicial development of its scope. He demonstrates most persuasively that "[t]he all writs section does not confer an independent appellate power; the power is strictly of an auxiliary nature, in aid of a jurisdiction granted in some other provision of law, as was sharply pointed out in *Roche v. Evaporated Milk Ass'n,* 1943, 319 U. S. 21, 29-31 . . . " 218 F. 2d, at 180.

[*Question for Court*]

The focal question posed for a Court of Appeals by a petition for the issuance of a writ is whether the action of the District Court tends to frustrate or impede the ultimate exercise by the Court of Appeals of its appellate jurisdiction granted in some other provision of the law. The answer is clearly in the affirmative where, for example, the order of the District Court transfers a cause to a District Court of another circuit for decision. That was *Josephson,* where the Court of Appeals for the First Circuit held that an order of a District Court in the circuit transferring a case to the District Court of another circuit was within the reach of the Court of Appeals' power under the All Writs Act because "the effect of the order is that the district judge has declined to proceed with the determination of a case which could eventually come to this court by appeal from a 'final decision'."[8] 218 F. 2d, at 181. In contrast, a District Court order denying a transfer would not come under the umbrella of power under the All Writs Act, since retention of the cause by the District Court can hardly thwart or tend to defeat the power of the Court of Appeals to review that order after final decision of the case. The distinction between the grant and denial of transfer was recognized in *Carr v. Donohoe,* 201 F. 2d 426, where the Court of Appeals for the Eighth Circuit denied a petition for writ of mandamus directed to an order of a District Court transferring the cause to another District Court within the same circuit. The Court of Appeals properly noted that the order was merely a nonappealable interlocutory order in nowise impairing its actual or potential jurisdiction to review that and any other action after final decision, observing:

> "It seems obvious that the transfer of the . . . action . . . to [another district in the same circuit] cannot in any way impair or defeat the jurisdiction of this Court to review any appealable order or judgment which eventually may be entered in the case."[9] 201 F. 2d, at 428-429.

[*Decisions Distinguished*]

This Court's reliance upon *Los Angeles Brush Corp. v. James,* 272 U. S. 701, and *McCullough v. Cosgrave,* 309 U. S. 634, is, in my opinion, misplaced. Those cases involved the power, not of the Courts of Appeals, but of this Court, to issue extraordinary writs. In *Josephson,* Chief Judge Magruder took pains to emphasize the "caution that decisions of the Supreme Court of the United States, at least prior to 1948, supporting the issuance, *by that Court,* of a writ of mandamus directed to a lower federal court, may not safely be relied upon by an intermediate court of appeals as authority for the issuance by the latter court of a writ of mandamus directed to a district court within the circuit. The reason is that the Supreme Court might have been exercising a different sort of power from the strictly auxiliary power given to us under the all writs section." 218 F. 2d, at 179. This "different sort of power" derived from § 13 of the Judiciary

[7] 1 Stat. 81, substantially re-enacted in § 262 of the Judicial Code of 1911, 36 Stat. 1162.

[8] Accord, *Wiren v. Laws,* 90 U. S. App. D. C. 105, 194 F. 2d 873; *Gulf Research & Development Co. v. Harrison,* 185 F. 2d 457.

[9] In the *Josephson* case, Chief Judge Magruder said much the same thing:

"If the district judge had held on to the case, *i. e.,* had denied the motion for transfer, such action would have preserved, not frustrated, any potential appellate jurisdiction which we might have had; and we are at a loss to understand how we could properly review on mandamus an order denying a transfer, on the pretense that such a review would be in 'aid' of our appellate jurisdiction." 218 F. 2d, at 181.

Act of 1789, granting the Supreme Court power to issue writs of mandamus "in cases warranted by the principles and usages of law." [10] This provision, unlike the All Writs Act, was not restricted in its use to aiding the jurisdiction of the appellate court, and therefore might be deemed to have granted a broader power to this Court than that conferred on the Courts of Appeals by the latter statute.

Furthermore, *Los Angeles Brush Corp.* was a case where a reference was made, not because a district judge decided that the particular circumstances of the particular case required a reference, but pursuant to an agreement among all the judges of that District Court always to appoint masters to hear patent cases regardless of the circumstances of particular cases. The *McCullough* situation was much the same. As that case was delimited in *Roche,* this Court was there confronted by a case of "the persistent disregard of the Rules of Civil Procedure prescribed by this Court." 319 U. S., at 31.

The key to both *Los Angeles Brush Corp.* and *McCullough* is found in the language in the former in 272 U. S. at 706:

> ". . . we think it clear that where the subject concerns the enforcement of the Equity Rules which by law it is the duty *of this Court to formulate and put in force,* and in a case in which this Court has the ultimate discretion to review the case on its merits, it may use its power of mandamus and deal directly with the District Court in requiring it to conform to them." (Italics added.)

In other words, neither of those cases can be accepted as supporting what the Court of Appeals undertook to do here, both because of the absence in old § 234 of the "in aid of" jurisdiction limitation now contained in § 1651, and of anything approaching a wholesale disregard of the rules prescribed by this Court, such as was involved there. I subscribe fully to Chief Judge Magruder's conclusion in *Josephson:*

> "Contrary to the view which seems to have been occasionally taken, or at least *sub silentio* assumed, in other courts of appeals, we do not think that 28 U. S. C. § 1651 [the All Writs Act] grants us a general roving commission to supervise the administration of justice in the federal district courts within our circuit, and in particular to review by a writ of mandamus any unappealable order which we believe should be immediately reviewable in the interest of justice." 218 F. 2d, at 177.

[*Federal Appellate Procedure*]

The view now taken by this Court that the All Writs Act confers an independent appellate power, although not so broad as "to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders," in effect engrafts upon federal appellate procedure a standard of interlocutory review never embraced by the Congress throughout our history, although it is written into the English Judicature Act [11] and is followed in varying degrees in some of the States.[12] That standard allows interlocutory appeals by leave of the appellate court. It is a compromise between conflicting viewpoints as to the extent that interlocutory appeals should be allowed.[13] The federal policy of limited interlocutory review stresses the inconvenience and expense of piecemeal reviews and the strong public interest in favor of a single and complete trial with a single and complete review. The other view, of which the New York practice of allowing interlocutory review as of right from most orders is the extreme example, perceives danger of possible injustice in individual cases from the denial of any appellate review until after judgment at the trial.[14]

The polestar of federal appellate procedure has always been "finality," meaning that appellate review of most interlocutory actions must await final determination of the cause at the trial level. "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any

[10] 1 Stat. 80, 81, substantially re-enacted in § 234 of the Judicial Code of 1911, 36 Stat. 1156.

[11] Judicature Act, 1925, 15 & 16 Geo. 5, c. 49, § 31(1)(i).

[12] *E. g.,* Miss. Code Ann., 1942, § 1148; N. J. Rev. Rules 2:2-3.

[13] See, *e. g.,* the discussion by Mr. Justice Jacobs in *Appeal of Pennsylvania R. Co.,* 20 N. J. 398, 120 A. 2d 94; Crick, The Final Judgment as a Basis for Appeal, 41 Yale L. J. 539; Note, 50 Col. L. Rev. 1102; Note, 58 Yale L. J. 1186; Report, Special Meeting of Judicial Conference of the United States, p. 7 (March 20-21, 1952); Report, Regular Annual Meeting of Judicial Conference of the United States, p. 27 (1953).

[14] N. Y. Civ. Prac. Act, § 609.

review at all." *Cobbledick v. United States* [1940-1943 TRADE CASES ¶ 56,011], 309 U. S. 323, 324-325. The Court's action today shatters that statutory policy. I protest, not only because we invade a domain reserved by the Constitution exclusively to the Congress,[15] but as well because the encouragement to interlocutory appeals offered by this decision must necessarily aggravate further the already bad condition of calendar congestion in some of our District Courts and also add to the burden of work of some of our busiest Courts of Appeals. More petitions for interlocutory review, requiring the attention of the Courts of Appeals, add, of course, to the burden of work of those courts. Meanwhile final decision of the cases concerned is delayed while the District Courts mark time awaiting action upon the petitions. Rarely does determination upon interlocutory review terminate the litigation. Moreover, the District Court calendars become longer with the addition of new cases before older ones are decided. This, then, interposes one more obstacle to the strong effort being made to better justice through improved judicial administration.[16]

The power of the Court of Appeals to correct any error in Judge La Buy's reference is found exclusively in the power to review final decisions under § 1291. The Court of Appeals erred by assuming a nonexistent power under the All Writs Act to review this interlocutory order in advance of final decision. Insofar as the Court approves this error, I must respectfully dissent.

[¶ 68,586] Robert Demeulanaere, et al. v. Rockwell Manufacturing Co., et al.

In the United States District Court for the Southern District of New York. Civil 74-115. Filed January 2, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Intervention.—An application by three individuals to intervene in a treble damage action based upon an alleged conspiracy to monopolize interstate and foreign commerce in cash registers was granted where all of the questions of law and fact indicated by the proposed complaint of the applicants were identical with the questions of law and fact already at issue in the action, the defendants conceded that the proposed complaint was identical with the complaint of prior intervenors, except for the parties and amount of interest, and the proposed complaint was substantially similar to the complaint of the plaintiffs. The applicants agreed to be bound by all prior proceedings on the action, with certain exceptions. However, the order of intervention was to be entered only in the event that the defendants' pending motion to dismiss the action is denied.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.535.

For the plaintiffs: Amen, Gans, Weisman & Butler, New York, N. Y.

For the defendants: Shearman, Sterling & Wright; Fulton, Walter & Halle; and Cahill, Gordon, Reindl & Ohl, all of New York, N. Y.

[*Intervention*]

PALMIERI, District Judge [*In full text*]: This is an application by three individuals, Raymond Flasselaerts, Andre Matthyssens and Auguste Lambiotte, to intervene in this action pursuant to Rule 24 of the Federal Rules of Civil Procedure. The action is under the Sherman Act for treble damages based upon an alleged conspiracy on the part of defendants to monopolize interstate and foreign commerce in cash registers. See 15 U. S. C. §§ 1-15 (1952).

It appears that the intervener-plaintiffs already in this action, whose interests are identical with those of the applicants, were permitted to intervene by order of Judge

[15] U. S. Const., Art. III, § 1.

[16] The seriousness of the problem of calendar congestion in both federal and state courts prompted the Attorney General of the United States, in May 1956, to call a conference on court congestion and delay. This conference resulted in the appointment of a distinguished committee to formulate a frontal attack upon the problem. Rogers, Towards Eliminating Delayed Justice, an address prepared for delivery before the Mid-Atlantic Regional Meeting of the American Bar Association, October 11, 1956.

Bondy pursuant to stipulation of the parties. It further appears that all the questions of law and fact indicated by the proposed complaint of the applicants are identical with the questions of law and fact already at issue in this action. Indeed, it was conceded upon the argument by counsel for the defendants that the proposed complaint is identical with the complaint of the prior interveners, except for the parties and amount of interest. Moreover, it is substantially similar to the complaint of the plaintiffs.

Since I can discern no prejudice or delay to the defendants in view of the applicants' expressed willingness to be bound by all proceedings, discovery and stipulations performed to date in this action, except as to those portions thereof made by plaintiffs with respect to applicants' ownership or interests in the patents involved, the application is granted as an exercise of discretion pursuant to the permissive provisions of Rule 24(b). See *Moore, Federal Practice*, 2d Ed. Vol. 4, p. 59 *et seq.*

[*Motion to Dismiss*]

I understand there is now pending before Judge McGohey a motion by defendants to dismiss this action. The order herein should abide the entry of the order pursuant to Judge McGohey's decision and shall be entered only in the event the motion is denied and on two days' notice.

[¶ 68,587] C. E. Niehoff & Co. v. Federal Trade Commission.

In the United States Court of Appeals for the Seventh Circuit. September Term, 1956, September Session, 1956. No. 11526. Dated January 9, 1957.

Petition to Review an Order of the Federal Trade Commission.

Robinson-Patman Price Discrimination Act

Price Discrimination—Practices Constituting Discrimination—Discounts Based on Prior Year's Purchases.—A Federal Trade Commission finding that a manufacturer of automotive products unlawfully discriminated in prices by granting discounts from its jobber price list on the basis of each of its customer's purchases during the preceding year was affirmed. The manufacturer classified its customers according to their prior purchases and established discounts for each classification. However, the Commission's cease and desist order against the manufacturer was modified so as not to make the order effective until such time as the reviewing court directs because it appeared that the manufacturer would be forced out of business if similar orders were not entered against its competitors, who were engaged in similar pricing practices. The reviewing court also ruled that there was substantial evidence to support the Commission's findings that the manufacturer failed to cost justify its prices and failed to establish that its prices were made in good faith to meet the equally low prices of competitors.

See Price Discrimination, Vol. 1, ¶ 3508.448, 3508.730.

Price Discrimination—Justifications for Discrimination—Differences in Cost—Sufficiency of Evidence.—A Federal Trade Commission finding that a manufacturer of automotive products failed to justify its price differentials by differences in costs of sale and delivery was affirmed on the ground that the Commission's finding was supported by substantial evidence. Although the manufacturer had introduced evidence concerning sales expenses, advertising expense, and costs of processing orders, the Commission rejected the manufacturer's claim that its price differentials were cost justified.

See Price Discrimination, Vol. 1, ¶ 3510.01.

Price Discrimination—Defenses—Meeting Competition—Sufficiency of Evidence.—A Federal Trade Commission finding that a manufacturer of automotive products failed to establish that its price differentials were made in good faith to meet the equally low price of a competitor or competitors was affirmed on the ground that the Commission's finding was supported by substantial evidence. The Commission had rejected the manufacturer's claim that its price discriminations were justified under the good faith proviso on the basis of its findings that the manufacturer did not establish any price in response to a particular competitor, that the manufacturer did not deviate from its price structure to

meet prices of particular competitors, and that the net prices accorded by the manufacturer were a reflection of its nation-wide pricing system formulated to meet competition generally and not designed to meet any particular competitor's prices.

See Price Discrimination, Vol. 1, ¶ 3515.65.

Federal Trade Commission Enforcement and Procedure—Enforcement of Prohibition Against Price Discrimination—Federal Trade Commission Order—Postponement of Effective Date of Order—Injury to Respondent Where Similar Orders Not Entered Against Competitors.—A Federal Trade Commission cease and desist order prohibiting a manufacturer of automotive products from engaging in certain discriminatory pricing practices was modified by a United States Court of Appeals so as not to make the order effective until such time in the future as the Court may direct, since certain competitors of the manufacturer were engaged in pricing practices similar to those condemned in the order against the manufacturer and the Commission had not, as yet, obtained orders or initiated proceedings against such competitors. In view of the lapse of time involved in proceedings before the Commission, the manufacturer's business would suffer economic extinction before the Commission adjudicates upon the pricing practices of the manufacturer's competitors. This would result if the manufacturer were required, by the elimination of its present selling methods, to charge higher prices for its products than the prices charged by its competitors against whom the Commission has not yet ruled. Under Section 11 of the Clayton Act, the Commission has the power to postpone the time at which an order is to take effect, and a Court of Appeals has the power to modify an order of the Commission. The power of the Court to enforce, modify, or set aside an order of the Commission is an exercise of original jurisdiction, rather than appellate jurisdiction, and the Court may by its own order protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do in an injunction suit.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8801.

Federal Trade Commission Enforcement and Procedure—Enforcement of Prohibition Against Price Discrimination—Court Review of Commission Order—Sufficiency of Evidence.—Findings of the Federal Trade Commission in a price discrimination proceeding were affirmed by a Court of Appeals. The court held that while there may be some conflict in the evidence, there was substantial evidence to support the findings of the Commission. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is not the law that the Court may displace the Commission's choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before the Court initially.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8801.410.

For the petitioner: Charles R. Sprowl, Whitney Campbell, and James J. Magner, Chicago, Ill.

For the respondent: Robert B. Dawkins and James E. Corkey, Washington, D. C.

Modifying and affirming Federal Trade Commission cease and desist order in Dkt. 5768.

Before MAJOR, FINNEGAN and SCHNACKENBERG, Circuit Judges.

[*Review of FTC Order*]

SCHNACKENBERG, Circuit Judge [*In full text*]: Petitioner, sometimes referred to herein as Niehoff, asks us to review an order to cease and desist issued by the respondent, sometimes referred to herein as the commission, upon a complaint charging violation of section 2(a) of the amended Clayton Act.[1]

[*Complaint*]

The complaint charges that Niehoff, in its nationwide sale of automotive ignition and hydraulic brake parts to automotive

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases in-

jobbers competitively engaged in the resale of such products, discriminates in price between its small quantity purchasers and its large quantity purchasers, and that the effect thereof may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which Niehoff and its favored purchasers are engaged, or to injure, destroy or prevent competition with Niehoff, said favored purchasers or with customers of either of them.

[*Answer*]

Niehoff's amended answer admits that it is engaged at Chicago, Illinois, in the manufacture, sale and distribution in interstate commerce of automotive products and supplies to different purchasers and that it is in active and substantial competition with other companies similarly engaged in manufacturing and selling automotive products and supplies; admits that Niehoff sells its products to different purchasers at different price differentials, but alleges that such differentials are openly available to all of its purchasers and are not discriminatory, and denies that the effect thereof may be substantially to lessen competition and create a monopoly in its line of commerce; alleges that such price differentials make only due allowance for differences in the cost of sale or delivery resulting from the differing methods of quantities in which such products and supplies are sold or delivered to its purchasers; and also alleges that such price differentials as were granted by Niehoff were granted in good faith to meet equally low prices of its competitors.

[*Findings of Fact*]

Following extensive hearings before an examiner, he entered findings of fact. He concluded "that petitioner sold its products of like grade and quality to customers at different prices, that the customers competed with one another in the resale of these products, and that the different prices were discriminatory and in violation of section 2(a) * * *"; that "* * * the differentials in price were not justified by differences in cost under the cost proviso of section 2(a)" (except in a minor particular which the commission on review set aside); and that "* * * the discriminations were not justified under the 'good faith' proviso of section 2(b) of the Act." Accordingly the examiner entered a provisional order to cease and desist. Upon cross appeals to the commission by both parties, the commission, on May 17, 1955, affirmed the findings and order of the examiner with slight modification and entered the order now under review. Summarized, the basic facts, which are not in real dispute, are now stated.

[*Business*]

Niehoff sells and distributes in commerce certain automotive products and supplies. There are many different items classified into three lines: an ignition line, a hydraulic line, and a testing equipment line.

Niehoff's total sales volume in the sample year 1949 was $2,068,499, and of this amount approximately 90% represented sales in the ignition line, 3 to 6% in the hydraulic line, 2% in the testing equipment line, and 2% in rebuilt items.

[*Discounts*]

Its domestic sales were made to some 866 jobber accounts. The prices paid by these customers were based in the first instance on Niehoff's jobber price list which is the base price schedule. Niehoff grants discounts from this schedule which vary the net prices actually paid by its several jobber accounts. For discount purposes Niehoff classified its jobber customers at the beginning of each year on the basis of the purchases made during the preceding year. A 2% discount for prompt payment is accorded to all accounts regardless of classification. Niehoff grants uniform freight allowances to all jobber customers and treats all accounts uniformly in the handling of merchandise returned for credit. As found

volved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States * * *, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly received the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *." 15 U. S. C. A. § 13.

by the examiner, the various accounts are placed in one of four classifications:[1a]

1. Jobbers whose annual purchases are less than $1,200 are classified as "jobbers without agreement"[2] and who pay the regular jobber list price.

2. Jobbers whose annual purchases range from $1,200 to $3,600 receive Niehoff's "jobbers agreement" and as such receive the following discount and allowances from the base jobber price:

Annual volume of purchases	Discount allowance, percent
$1,200-$2,400	5
$2,400-$3,600	7
$3,600 and over	10

3. Jobbers whose annual purchases range from $3,600 to $6,000 are classified as "distributors without agreement" and receive a 10% discount off Niehoff's base jobber price on all purchases.

4. Jobbers whose annual purchases are in excess of $6,000 are classified as "distributors with agreement" and as such receive 10% discount off Niehoff's base prices on all purchases and the following additional discount allowances in the form of merchandise credits:[3]

Annual volume of purchases	Discount allowance, percent
$6,000-$8,400	5
$8,400-$12,000	6
12,000 and over	7[4]

[*FTC Findings*]

The commission found, and it is not disputed, that this system of pricing provided different net purchase prices. It also found, and the record shows, that Niehoff sold to more than one account in a single city or trading area and that the net prices paid by accounts within given trading areas varied. It was further found that accounts within trading areas competed with one another in selling Niehoff's products.

The commission found that Niehoff's price differentials constituted discriminations in price. It was further found that the effect of these discriminations may be to substantially lessen, injure, destroy or prevent competition in the resale of Niehoff's products. This finding took into account the size of the differentials, amounting to as much as 16% in net purchase price; the fact that the record shows that the automotive parts business is highly competitive; that jobbers stock many lines ranging from 15 or 20 for the small operator to more than 100 for the large operator and these lines generally consist of thousands of items; that net profit depends on the accumulation of small margins on the numerous items handled; and that the record also shows that the margin of profit generally runs about 4% of sales.

The commission also found that Niehoff's discounts to favored distributors contribute a direct and powerful advantage to the recipient and concluded that there was a reasonable probability that Niehoff's pricing practices substantially lessened competition at the secondary level and that the effect of discriminations may be to injure, destroy or prevent competition between purchasers receiving the benefit of the discriminations and those to whom they were not accorded.

[*Defenses*]

Niehoff introduced evidence for the purpose of justifying its price differentials by differences in costs of sale and delivery. This evidence pertained to sales expenses, advertising expense, and costs of processing orders. Upon consideration of all this evidence the commission rejected Niehoff's

[1a] The classifications referred to are somewhat confusing, there appearing to be overlapping of the classes. This circumstance is in our view of the case immaterial.

[2] In 1950 the designations used to describe the accounts in each classification were changed but the basis of classification and the buying prices remained the same for each class.

[3] The additional discount allowances do not apply to purchases of service stocks, equipment and brake fluid.

[4] In 1949, 299 accounts were in class 1 and purchased at jobber list less cash discount. 228 were in class 2; 241 accounts were in class 3 and 98 accounts in class 4. There was a deviation from the stated price plan in that Niehoff sold to one buying group known as Cotton States, Inc., which in 1949 was composed of nine jobbers. Niehoff treats this group as a single purchaser, selling on its class 4 basis. The jobber member pays the invoice to group headquarters and it in turn remits monthly for all purchases by its members during that month. Except for one monthly billing instead of 9, the operation saves Niehoff nothing. In 1949 the annual purchases of only one member would individually have justified the discount given.

claim that its differentials were cost-justified within the meaning of the proviso of section 2(a).

Niehoff also introduced evidence to prove that its price differentials were made in good faith to meet the equally low price of a competitor or competitors within the meaning of the good faith proviso of section 2(b) of the Act.[5] The commission found that Niehoff did not establish any price or prices as a response to a particular competitor, and that, once the base price structure was established with reference to general competitive conditions, Niehoff did not deviate to meet the prices of particular competitors. It also found that the net prices accorded by Niehoff were a reflection of its nation-wide pricing system formulated to meet competition generally and not designed to meet any particular competitor's prices. On the basis of this finding the commission rejected the claim that Niehoff's price discriminations were justified under the good faith proviso of section 2(b).

[*Controlling Decisions*]

I. With the exception of certain phases of this case with which we shall hereinafter deal specially, our holding in this case is controlled by our decisions in *Whitaker Cable Corporation v. Federal Trade Commission*[6] [1956 TRADE CASES ¶ 68,559] and *E. Edelmann & Co. v. Federal Trade Commission*[7] [1956 TRADE CASES ¶ 68,558]. We adhere to the views expressed in those cases.

[*Cost Justification—Meeting Competition*]

II. We have made a thorough search of the record and considered the evidence introduced by both parties on the issues involving cost justification and the alleged good faith of Niehoff in meeting equally low prices of its competitors. While there may be some conflict in the evidence upon these issues, we find that there is substantial evidence to support the findings of the commission.[8] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229.

It is not the law that we may displace the commission's choice between two fairly conflicting views, even though we would justifiably have made a different choice had the matter been before us *de novo*. *Universal Camera Corp. v. N. L. R. B., supra*, 488.

[*Order Affirmed*]

For the reasons herein set forth, the commission's order to cease and desist will be affirmed, subject to a modification to which we now refer.

[*Effect of Order*]

III. At this point we consider Niehoff's prediction that it "would be forced out of business if the traditional pricing practices which it now follows were denied to it while its competitors are free to continue such practices." There is uncontradicted evidence in the record to factually support this prediction.

[*Action Against Competitors*]

The record shows that, as to the automotive ignition line which constitutes at least 90% of Niehoff's business,[9] it has 19 competitors, and included in this group are 3 competitors who presently have complaints or orders to cease and desist pending against them before the commission, the other 16 competitors being free to continue their present pricing practices unless and until cease and desist orders are entered against them in proceedings not yet commenced.

It thus appears that the order against Niehoff was entered at a time when the commission had acted against only a few of this firm's competitors. We are per-

[5] "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U. S. C. A. § 13(b).

[6] No. 11494 (C. C. A. 7) decided 12-14-56.

[7] No. 11500 (C. A. 7) decided 12-14-56.

[8] 5 U. S. C. A. § 1009(e)(5); *Universal Camera Corporation v. N. L. R. B.*, 340 U. S. 474, 488.

[9] Another 6% of Niehoff's business is in the hydraulic line where it has 10 principal competitors.

suaded by Niehoff's argument that, in view of the lapse of time which is inevitably involved in proceedings before the commission, Niehoff's business will suffer economic extinction before the commission adjudicates upon trade practices of Niehoff's competitors, which in their purpose and effect are essentially similar to those condemned in the Niehoff order. This result will follow if Niehoff is required by elimination of its present selling methods to charge higher prices for its products than the prices charged by its competitors against whom the commission has not yet ruled.

[*Power to Postpone Effective Date*]

The commission takes the position that it has no power to stay compliance with its order. It relies upon a part of section 11 of the amended Clayton Act,[10] contending that it has no discretion as to the enforcement of the law. It fails to cite that part of section 11 which provides that the commission "shall issue * * * an order requiring such person to cease and desist from such violations * * * *within the time fixed by said order*." (Italics supplied for emphasis.) It is our opinion that this statutory language vests in the commission power to postpone the time at which an order is to take effect.

In any event, the commission in this case has not exercised this permissive power under section 11, and it argues that this court has no power to delay or postpone compliance with the commission's order. If this be true we are impotent to postpone the effective date of the order and, furthermore, under section 11 of the act we can be required to enforce the order in the manner therein provided without delay. In other words, according to the commission, we may witness and participate in, but not interfere with, the economic death of Niehoff while the commission machinery continues to operate toward cease and desist orders against Niehoff's competitors.

However, we do not admit judicial impotency in this situation. Section 11 of the Clayton Act[11] gives this court power, *inter alia,* to modify an order of the commission. This includes the power to change that part of an order stating when it shall take effect. We have held[12] that the power of a court of appeals to enforce, set aside or modify the commission's order is an exercise of original jurisdiction, rather than appellate jurisdiction, and that the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. The order in this case was issued on May 17, 1955 and directed that Niehoff "forthwith" cease and desist. This order is in the nature of an injunction. We have a right to consider its effect upon Niehoff in the light of equitable principles, and to grant relief accordingly. We have no way of knowing in advance what further proceedings, if any, will be had by the commission against Niehoff's competitors to whom we have heretofore referred. The fixing of the time at which the order against Niehoff shall become effective is a matter over which we now reserve jurisdiction, the exercise of which will depend upon the future course of the commission's proceedings against Niehoff's competitors. For that reason the order against Niehoff is hereby modified by striking the word "forthwith" therefrom and by adding to said order the following:

> "This cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission."

As thus modified, the order is affirmed.

Order, As Modified, Affirmed.

[Dissenting Opinion]

[*Suspension of Order*]

FINNEGAN, Circuit Judge. Dissenting. Affirming this order of the Commission and then directing its indeterminate suspension, causes me to diverge from the majority view. Section 11 of the Clayton Act, as amended, mandates that: "The findings of the Commission * * * as to the facts, if supported by substantial evidence, shall be conclusive," 64 Stat. 1127, 15 U. S. C. § 21(1952). If, as my brothers find, this order squares with the statutory yardstick then a violation of the Clayton Act has been established. But, on the other hand if

[10] 15 U. S. C. A. § 21.
[11] 15 U. S. C. A. § 21.
[12] *Natural Gas Pipeline Co. v. Federal Power Commission,* 128 F. 2d 481, 484.

the order, approved by the majority, requires modification for the reasons they state, then it would seem the Commission's order is defective since it is unsupported by evidence concerning petitioner's competitors. After all the matter involves an economic problem within a defined industry. In its opinion (T. R. 1027-1028) the Commission stated, inter alia:

"The initial decision in effect held that the status of the price of respondent's competitors as lawful or unlawful was not controlling to decision here . . . . The lawfulness or unlawfulness of its competitors' prices . . . are not in issue inasmuch as respondent's defense has been legally insufficient on other grounds."

We reach much too far into the administrative agency's province by reserving our jurisdiction contingent upon "the future course of the Commission's proceedings against Niehoff's competitors." Either such matters are now before us and we have failed to properly evaluate them in reviewing evidence of price discrimination, or, they are not, now, and in that state of affairs we have no business with them. Just when this Court will decide to infuse vitality into the Niehoff order, currently in suspended animation, escapes me entirely. It appears that the majority's modification compels the Commission to investigate, or complete examination of, Niehoff's competitors at the risk of forfeiting an otherwise approved order. Whether this entails all 19 competitors or a baker's dozen is unrevealed. My grave doubts that our statutory power to *modify* Federal Trade Commission orders can be converted into policing and supervising, though perhaps obliquely, the length, breadth and sequence of Commission investigations brings me to the position I now take. Certainly we would refuse to activate the Commission upon a bare petition for mandamus to investigate the automotive ignition industry. Responsibility of achieving enforcement of the statutes Congress assigned to the Commission lies elsewhere.

[¶ 68,588] San Antonio Retail Grocers, Inc. v. W. W. Lafferty.

In the Supreme Court of Texas. No. A-6012. Dated January 9, 1957.

On Direct Appeal.

Texas Sales Limitation Act

Sales Below Cost—Texas Sales Limitation Act—Grocery Stores—Constitutionality.— The Texas Sales Limitation Act, which makes it unlawful for grocery stores to sell any merchandise at less than cost if the number of units of such merchandise that may be purchased is limited to any quantity less than the entire supply or if the right to refuse to sell such merchandise to any willing purchaser is retained or exercised by such seller, was held unconstitutional. The Act is applicable only to grocery stores, and it contains no definition of a grocery store. Owners of grocery stores violate the Act if they offer to sell any merchandise at less than their cost basis, while owners of other types of stores, competing in the sale of many identical items of merchandise, can sell at less than their cost basis without violating the Act. Consequently, the Act discriminates against grocery stores and grants special privileges to other types of stores. The mere fact that the Act discriminates against grocery stores does not render it unconstitutional. However, there is no reasonable relationship between the class created and the purposes to be accomplished or the evils to be prevented, and, therefore, the Act is unconstitutional. There is no basis for the classification which could have seemed reasonable to the legislature.

See Sales Below Cost, Vol. 2, ¶ 7111.

For the appellant: Bruce Waitz, San Antonio, Tex.; Dan Moody, Austin, Tex.; and Carlton J. Smith, Waco, Tex.

For the appellee: Dodson, Duke, Branch & Davis, San Antonio, Tex.; Seipel & Seipel, San Antonio, Tex.; Greathouse & Zuercher, San Antonio, Tex.; Small, Small & Craig, Austin, Tex.; and Fulbright, Crooker, Freeman, Bates & Jaworski, Houston, Tex.

[*Sales Limitation Act*]

ROBERT W. CALVERT, Associate Justice [*In full text*]: This is a direct appeal from a judgment of the District Court of the 73rd Judicial District, Bexar County. Appellant was plaintiff and appellee was defendant in the trial court.

Appellant sought a judgment restraining and enjoining appellee from further violations of Article 1111m, Vernon's Texas Penal Code (Acts 1955, 54th Leg., p. 1622, ch. 524), known as the "Sales Limitation Act." By way of defense to the suit appellee attacked the constitutionality of the Act on several grounds, one of which was that it applied only to grocery stores and thus established an arbitrary and unreasonable classification and resulted in denying to the defendant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and Sections 3 and 19 of Article 1 of the Constitution of the State of Texas. The trial court sustained the foregoing contention, declared the Act unconstitutional and denied to the appellant any injunctive relief.

Article 1111m, V. T. P. C., contains eight sections. Section 1 provides that the Act shall be known as the "Sales Limitation Act." Section 2 contains eight paragraphs, lettered from (a) to (h), inclusive. Paragraph (a) defines the term "cost basis" as applied to merchandise offered for sale. Paragraph (b) provides that when two or more items are offered for sale at one price each item shall be regarded as being offered for sale and the cost basis of each shall be determined according to the formula set out in paragraph (a). Paragraph (c) defines the term "replacement costs," paragraph (d) the terms "sell at retail," "sales at retail," and "retail sale," paragraph (e) the terms "sell at wholesale," "sales at wholesale," and "wholesale sales," paragraph (f) the term "retailer," and paragraph (g) the term "wholesaler." Paragraph (h) reads: "This Act shall apply only to grocery stores."

Section 3 is the heart of the Act. It reads as follows:

"Sec. 3. No offer to sell any merchandise, however expressed or communicated, and no sale of any merchandise shall hereafter be made by any retailer or wholesaler at a price which is lower than the cost of same to the seller thereof as herein defined if the number of units of said merchandise that may be purchased by any customer is limited or curtailed to any quantity less than the entire supply of said article on hand or if the right to refuse to sell said merchandise to any willing purchaser thereof is retained or exercised by the prospective seller thereof. Any merchandise so offered for sale at a price below cost as herein defined shall be prominently displayed in the outlet offering same in sufficient quantities to meet any usual and reasonably expectable demand therefor."

Section 4 makes any retailer or wholesaler who violates the Act guilty of a misdemeanor and subject to a fine not exceeding Five Hundred Dollars. Section 5 authorizes the type of injunctive relief sought in this case. It provides that a suit for injunction may be maintained by anyone refused the right to purchase any quantity of merchandise offered for sale at a price below the seller's cost basis. Section 6 excepts certain transactions, not relevant here, from the provisions of the Act. Section 7 excepts sales made in good faith to meet the price of a competitor. Section 8 requires defendants and witnesses to testify in injunction proceedings and grants to such defendants and witnesses immunity from criminal prosecution.

[*Alleged Violation of Act*]

On the trial of the case it was stipulated that at all relevant times appellee owned and operated a store in San Antonio, Texas, known as "Kelly Food Center" at which he sold at retail "goods, wares and merchandise consisting of canned, frozen, cured, packaged and fresh meats, vegetables and fruits; bread, cake, cookies, and other bakery goods; milk, butter, eggs, cheese, ice cream, merlorine and other dairy products; oleomargarine, condiments, flour and soft drinks; soap, detergents and other cleaning materials; cigars, cigarettes, tobacco and beer; toothpaste, face powder, alcohol, cosmetics, first aid items such as bandages, mercurochrome, aspirin and other similar proprietaries commonly contained in drug departments; fertilizers, seeds and other garden equipment, supplies and tools." The parties also stipulated that on various days in the month of April 1956, the appellee offered for sale and sold at Kelly Food Center at less than his cost basis Tide and Oxydol, detergents, Snowdrift shortening,

Parkay margarine, Blue Bonnet margarine, Meadowlake margarine, Folger's coffee and Pioneer flour, and that he limited and curtailed the quantity of each such item of merchandise that might be purchased by a customer to less than his entire supply of said item on hand and refused to sell to appellant's agents who were willing and able to purchase the same.

[*Constitutionality*]

Appellant argues that in making the terms and provisions of the Act applicable to grocery stores only the Legislature but exercised its constitutional right and power to create a class for legislative purposes, and that in the absence of a showing that the classification is arbitrary and unreasonable the legislation must be held constitutional. We consider, then, whether there is any reasonable basis for applying the restrictive provisions of the Act to grocery stores only. We recognize that the test is whether there is any basis for the classification which could have seemed reasonable to the Legislature. *Clark v. Finley,* 93 Tex. 171, 54 S. W. 343, 346; *Gerard v. Smith,* Tex. Civ. App., 52 S. W. 2d 347, 350, writ refused.

[*Discrimination*]

The legislation is obviously intended to discourage, and indirectly to prohibit, the practice of attracting customers through the sale of what is generally referred to as "loss leaders." It is to be noted that while the restrictions of the Act apply to grocery stores only they are not limited to the sale of groceries. On the contrary they apply to sales of all merchandise. Owners of grocery stores are thus to suffer the burdens and the penalties of the Act if they offer to sell any merchandise at less than their cost basis while owners of other than grocery stores, competing in the sale of many identical items of merchandise, may sell at less than their cost basis with impunity. For example, a grocery store may not sell Bayer's aspirin at less than its cost basis while a drug store occupying an adjoining building or one across the street, with the same cost basis, can advertise and sell the item at any price it wishes.

The Act contains no definition of a grocery store. For opinion purposes we accept the statement of appellant's counsel, made in oral argument, that any store which sells groceries is a grocery store within the meaning of the Act. By that test Joske's Department Store of San Antonio is a grocery store because the record shows that Joske's sells groceries. The far-reaching impact of the discriminatory features of the Act is brought into bold relief when we consider that Joske's could not sell clothing below its cost basis without incurring the penalties of the Act while clothing stores all around and near Joske's, having no grocery departments, could sell the same brand, style and make of clothing at any desired price without suffering its penalties. It will thus be seen that the Act creates two classes of stores: those which sell groceries and must suffer the burdens and penalties it provides in the sale of all merchandise, and those which sell no groceries and are exempt from its burdens and penalties in the sale of all merchandise. Discrimination against grocery stores is too plain to admit of argument. Special privileges to other types of stores are obvious. But the mere fact that the Act discriminates against grocery stores does not render it unconstitutional. Before we may strike it down it must appear that there is no reasonable relationship between the classes created and the purposes to be accomplished or the evils to be prevented. *Dodgen v. Depuglio,* 146 Tex. 538, 209 S. W. 2d 588, 594; *Texas Co. v. Stephens,* 100 Tex. 628, 103 S. W. 481, 485.

[*Relation Between Class and Purpose of Act*]

The precise evil at which the Act is directed does not clearly appear from its terms. The emergency clause recites that an emergency is created by the fact that "the State has no law to protect producers, owners, distributors, dealers and consumers in the ordinary purchase and sale of commodities." In so far as the purpose of the Act may be the protection of the named groups "in the ordinary purchase and sale of commodities," the classes created bear no reasonable relationship thereto. If the groups are to be protected against evils arising from "the purchase and sale of *commodities*" they can only be protected by applying the restrictions of the Act to all who buy and sell commodities—grocery stores and other than grocery stores alike.

Appellant does not suggest the particular evils from which the named groups are to

be protected, unless such a suggestion may be found in the following quotation taken from appellant's brief:

> "The issue here is may the state prohibit the sale of groceries below cost in an attempt to injure his competitor. * * * May not the State of Texas * * * attempt to protect the wholesome quality of the foods sold in grocery stores by prohibiting the 'loss leader' practice of offering groceries for sale?"

The quoted language seems to assume, erroneously as we think, that the Act prohibits the sale of groceries only at less than cost. If that were the true interpretation of the Act and if all stores selling groceries are properly classed as grocery stores, conceivably its validity might be ruled by such cases as *Nebbia v. New York,* 291 U. S. 502, 78 L. Ed. 940, 54 S. Ct. 505, upholding the validity of New York legislation fixing minimum prices on milk, *Highland Farms Dairy, Inc. v. Agnew,* 300 U. S. 608, 81 L. Ed. 835, upholding the validity of Virginia legislation fixing minimum prices on milk and cream, and *May's Drug Stores v. State Tax Commission* [1950-1951 TRADE CASES ¶ 62,741], 242 Iowa 319, 45 N. W. 2d 245, upholding the validity of Iowa legislation fixing minimum prices on cigarettes. As to that we need not decide for we do not regard it as the true interpretation of the Act.

If the object of the legislation is to protect one merchant from injury through the loss of customers to a competitor who runs "loss leaders" sales, that object can hardly find fulfillment in an Act which prohibits the sale of "loss leaders" by grocery stores only. The Act can only result in injury to grocery stores through the loss of customers to other types of stores, none of which are prohibited from selling "loss leaders."

[*Prior Rulings*]

There are no Texas cases in point or on the subject. Cases cited by appellant bearing on the various legal problems arising out of this general type of legislation and held to be valid by courts of other jurisdictions fall into two categories: those involving legislation fixing minimum prices on particular products and items of merchandise, and those prohibiting the sale by all businesses of all products and merchandise at less than cost. Into the first category fall the *Nebbia, Agnew* and *May's Drug Stores* cases heretofore noticed. Into the second category fall *McElhone v. Geror* [1940-1943 TRADE CASES ¶ 56,042], 207 Minn. 580, 292 N. W. 414; *McIntire v. Borofsky* [1948-1949 TRADE CASES ¶ 62,266], 95 N. H. 174, 59 A. 2d 471; *Rust v. Griggs* [1932-1939 TRADE CASES ¶ 55,178], 172 Tenn. 565, 113 S. W. 2d 733; *Hill v. Kusy* [1948-1949 TRADE CASES ¶ 62,363], 150 Neb. 653, 35 N. W. 2d 594; *State v. Walgreen Drug Co.* [1940-1943 TRADE CASES ¶ 56,124], 57 Ariz. 308, 113 P. 2d 650; *Moore v. Northern Kentucky Independent Fruit Dealers* [1940-1943 TRADE CASES ¶ 56,115], 286 Ky. 24, 149 S. W. 2d 755; *Wholesale Tobacco Dealers v. National Candy & Tobacco Co.* [1932-1939 TRADE CASES ¶ 55,191], 11 Cal. 2d 634, 82 P. 2d 3; *Mering v. Yolo Grocery & Meat Market* (Cal.), 127 P. 2d 985; *Fournier v. Troianello* [1955 TRADE CASES ¶ 68,063], 332 Mass. 636, 127 N. E. 2d 167; *State v. Ross* [1950-1951 TRADE CASES ¶ 62,860], 259 Wis. 379, 48 N. W. 2d 460; *Carroll v. Schwartz* [1940-1943 TRADE CASES ¶ 56,055], 127 Conn. 126, 14 A. 2d 754; *Associated Merchants of Montana v. Ormesher* [1932-1939 TRADE CASES ¶ 55,209], 107 Mont. 530, 86 P. 2d 1031; *State v. Langley* [1932-1939 TRADE CASES ¶ 55,197], 53 Wyo. 332, 84 P. 2d 767 and *State v. Sears* [1940-1943 TRADE CASES ¶ 56,043], 4 Wash. 2d 200, 103 P. 2d 337. The instant case falls into neither category.

[*Act Unconstitutional*]

We can conceive of no reasonable basis for applying the provisions of the Act to grocery stores and exempting other stores therefrom. Neither can we conceive of any basis therefor which could have seemed reasonable to the legislature. We agree with the conclusion of the trial court that the Act is unconstitutional.

The judgment of the trial court is affirmed.

[¶ 68,589] Metropolitan Bag & Paper Distributors Association, Inc., et al. v. Federal Trade Commission.

Harlem Paper Products Corporation, et al. v. Federal Trade Commission.

Robins Paper Company of Baltimore City v. Federal Trade Commission.

In the United States Court of Appeals for the Second Circuit. Nos. 54, 55, 56—October Term, 1956. Docket Nos. 23372, 23373, 23676, respectively. Argued November 14, 1956. Decided January 9, 1957. Petition for rehearing denied and opinion modified (Dkt. No. 23373), February 18, 1957.

Three petitions by Metropolitan Bag & Paper Distributors Association, Inc., and others, by Harlem Paper Products Corporation and others, and by Robins Paper Company of Baltimore City, respectively, seek review of an order of the Federal Trade Commission finding the National Paper Trade Association of the United States, Inc., and its affiliates, including the petitioners, engaged in a conspiracy to fix prices and uniform discount terms in the sale and distribution of fine and wrapping paper products, contrary to § 5(a) of the Federal Trade Commission Act, 15 U. S. C. § 45(a), and directing them to cease and desist from specified activities to that end. Reversed as to Shuttleworth Wollny Co., Inc.; Imperial Bag & Paper Co., Inc.; Daniel W. Margolin; Robins Paper Company of Baltimore City; and Fred Free, Jr.; affirmed as to the remaining petitioners.

Federal Trade Commission Act

Unfair Practices—Combining or Conspiring to Fix Prices and Discounts—Participation in Conspiracy—Sufficiency of Evidence.—A Federal Trade Commission finding that a national trade association, regional trade associations, paper distributors, and others conspired to fix prices and uniform discount terms in the sale and distribution of fine and wrapping paper products in violation of the Federal Trade Commission Act was affirmed in part and reversed in part on a petition to review the Commission's finding filed by one of the regional trade associations, several paper distributors, and certain individuals. The Court, assuming the establishment of a national conspiracy to fix prices and discount terms, found that there was substantial evidence to support the Commission's finding that the regional trade association and certain of the paper distributors participated in the national conspiracy. But the Court reversed the Commission's finding of participation as to the other petitioners because the evidence of their participation in the conspiracy was insufficient. Also, the Court, in determining the sufficiency of the evidence concerning the participation of each of the petitioners in the national conspiracy, ruled that the Commission may not infer participation in a conspiracy from mere membership in a trade association which engaged in a conspiracy.

See Unfair Practices, Vol. 2, ¶ 5035.41, 5035.51, 5035.66; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.06, 8611.30.

Federal Trade Commission Enforcement and Procedure—Enforcement of Prohibition Against Unfair Practices—Cease and Desist Order—Defenses—Dismissal of Proceeding Against Competitors.—In reviewing a Federal Trade Commission finding that a regional trade association, paper distributors, and others conspired to fix prices and uniform discount terms in the sale and distribution of fine and wrapping paper products, the court ruled that the decision of the Commission not to proceed against other conspirators appears to be within the Commission's discretion, and, therefore, the parties subjected to the Commission's order have no ground for complaint on the review. The parties complained that they were unfairly discriminated against by the Commission's dismissal of the proceeding as to certain correspondents.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8621.

For the petitioners: Nathan Frankel, New York City (Barshay & Frankel, New York City, on the brief), for Metropolitan Bag & Paper Distributors Association, Inc., and others. Max Wechsler, New York City (Wechsler & Solodar and Albert L. Solodar, New York City, on the brief), for Harlem Paper Products Corporation and others. John D. Alexander, Baltimore, Md. (Duer & Taylor, New York City, and Wm. Pepper Constable, Baltimore, Md., on the brief), for Robins Paper Company of Baltimore City.

For the respondent: John W. Carter, Jr., Attorney, Federal Trade Commission, Washington, D. C. (Earl W. Kintner, General Counsel, and Robert B. Dawkins, Assistant General Counsel, Federal Trade Commission, Washington, D. C., on the brief).

On petition for rehearing: Wechsler & Solodar (Max Wechsler and Albert L. Solodar, of counsel), New York, N. Y., for Harlem Paper Products Corp. Robert B. Dawkins, Assistant General Counsel, FTC, and Jno. W. Carter, Jr., Attorney, FTC, Washington, D. C., for the FTC.

Affirming in part and setting aside in part a Federal Trade Commission cease and desist order in Dkt. 5592.

Before: Clark, Chief Judge, and Frank and Hincks, Circuit Judges.

Clark, Chief Judge [*In full text*]: These are three petitions to review a cease and desist order of the Federal Trade Commission, each petition being filed by paper merchants who belong to a different local trade association. The Commission's complaint had been directed against the National Paper Trade Association, its officers, 23 affiliated local associations, their officers, and some 941 paper merchant members, and charged them with conspiracy to fix uniform prices and discount terms in the sale and distribution of "fine paper" (printing and book paper, stationery) and "wrapping paper" (wrapping, toilet tissue, towels, drinking cups, etc.), in violation of § 5(a) of the Federal Trade Commission Act, 15 U. S. C. § 45(a).

The Commission found a conspiracy clustering around the efforts of National to (1) issue Blue, Yellow, and Brown (price) Books; (2) keep members' cash discounts uniform, despite a shift in manufacturers' credit terms in 1946; (3) co-operate with regional efforts at price-fixing. For the purposes of this review we must take the main conspiracy, spearheaded by National, as established and have to determine only whether the petitioners, operating somewhat on the periphery, have been properly implicated, i.e., whether as to each petitioner the Commission's finding of participation is supported by the necessary minimum of substantial evidence. *Excelsior Laboratory v. F. T. C.*, 2 Cir. [1948-1949 Trade Cases ¶ 62,345], 171 F. 2d 484, 486. The chief question is whether there was substantial evidence to link the petitioners to the second and third of National's goals which we have stated. A subordinate question the petitioners attempt to raise is that they were unfairly discriminated against by the Commission's order of dismissal entered in favor of various correspondents.

I. The New York City Petitioners

(1) *Metropolitan Bag & Paper Distributors Association, Inc.* Four local trade associations—"New Jersey," "New York," "Cosmopolitan," and "Metropolitan"—engaged in a regional conspiracy to fix prices and credit terms of wrapping paper products from 1934 to the time of the complaint. There were six points of contact between this regional conspiracy and the national one: (1) all four local associations were dues-paying members of the national association; (2) in January 1936 the national group gave information to a regional council composed of three of these local associations engaged in price-fixing; (3) in April 1940 the national group organized a regional council of these four local associations for illegal activities; (4) in November 1943 the president of Cosmopolitan urged its members to pay national dues; (5) in January 1947 Cosmopolitan's Board of Directors discussed writing the national group concerning proposed standardized credit terms; and (6) in 1948 and 1949 officers of Yorkville Paper Company, Inc. (a member of Metropolitan), and A. E. MacAdam & Co., Inc. (another member of Metropolitan), served as officers of the national group, as did an officer of Harlem Paper Products Corporation (a member of Cosmopolitan).

We must accept the inferences drawn by the Commission that (1) the regional council created in 1940 continued in existence until the filing of the complaint; (2) the members of the local councils who had dealings with the national group in 1936, 1940, and 1947 knew of its purposes and joined in the conspiracy to further them; and (3) these local trade associations on continuing to be members of National are to be charged with all they would have learned had they tried to discover what National was doing with their dues and moral support. *Phelps Dodge Refining Corp. v. F. T. C.*, 2 Cir. [1940-1943 Trade Cases

¶ 56,297], 139 F. 2d 393, 396. Metropolitan Bag & Paper Distributors Association, Inc., as one of these four local trade associations, can thus be found to be a national conspirator.

(2) *Yorkville Paper Company, Inc.* This company was a member of Metropolitan in December 1941; and Arthur H. Stein, an officer of Yorkville, was president of Metropolitan at that time. Stein was an officer of the national group for the year 1948-1949, and was a speaker at the 1948 national convention. He was also president of Metropolitan in 1942 when the organization was engaged in efforts at standardizing credit terms in the industry and similar practices. While Stein was Metropolitan's president that group paid at least $750 dues to the national association. Thus there was sufficient proof to link Yorkville to the national conspiracy.

(3) *A. E. MacAdam & Co., Inc.* This corporation was a member of Metropolitan in December 1941, June 1942, and at the time the complaint was filed. It was represented by Alfred E. MacAdam, III, at Metropolitan's meetings of December 1941 and June 1942. In 1941 Alfred E. MacAdam was appointed to Metropolitan's Finance Committee, charged with getting money to cover the expense of national dues and the local credit bureau. MacAdam was chairman of the local credit bureau committee which worked with other local trade associations to establish uniform regional credit terms. MacAdam was a speaker at the 1948 national convention and was a national officer for 1948-1949. Consequently there was enough evidence to connect this corporation with the national conspiracy.

(4) *John H. Free, Inc.* This corporation was a member of Metropolitan in 1941, 1942, and at the time the complaint was filed. It was represented at the December 1941 and June 1942 meetings of Metropolitan where the members discussed paying national dues; forming a credit bureau; distributing resale price tables; and establishing central control over all advertising done by members of Metropolitan.

The Commission could properly infer that this corporation knew the purposes of Metropolitan, knew of Metropolitan's connection with the national conspiracy, and continued to remain a member of Metropolitan and the National Association. John H. Free, Inc., was thus adequately linked to the national conspiracy.

(5) *S. Posner Sons, Inc.* The evidence against this corporate member of Metropolitan is identical with the evidence against John H. Free, Inc.

(6) *Shuttleworth Wollny Co., Inc.* This was another corporate member of Metropolitan, but there is no proof that its representatives attended any meetings, paid any dues, or participated in the activities of Metropolitan or the national group. There is no basis for inferring that the petitioner had any knowledge of Metropolitan's illegal activities. There is no evidence that Metropolitan was a small group, and the probability is that it was large inasmuch as the Commission began the action by naming four persons at random to represent the class of Metropolitan's members. The petitioner is one of the members so selected. Although the petitioner was in the same trade as Metropolitan and would presumably benefit from Metropolitan's illegal acts, the Commission may not infer participation in a conspiracy from mere membership in the trade association without more. *Phelps Dodge Refining Corp. v. F. T. C., supra,* 2 Cir. [1940-1943 TRADE CASES ¶ 56,297], 139 F. 2d 393, 396.

(7) *Fred Free, Jr.* The only evidence against this individual is his admission that he was secretary of Metropolitan at the time the complaint was filed—October 5, 1948. Metropolitan, as indicated previously, was last shown to have participated actively in the national conspiracy in 1940, and the Commission inferred continued participation in it because Metropolitan continued to pay national dues and several officers of Metropolitan's corporate members were national officers in 1948. The Commission argues that active participation in 1948 is shown by Metropolitan's attempt to fix the regional resale price of wrapping paper products in 1941 and National's adoption of that goal on a larger geographical scale in 1947-1948. Such delayed parallel action seems too meager evidence to be probative of conspiracy, even though two officers of Metropolitan's member corporations were officers of the national group for 1948-1949. Without proof of the role of these two officers in the national conspiracy we would hesitate to affirm a finding that Metropolitan was visibly engaged in the national conspiracy at the time when Fred Free became its secretary. Accepting such a finding, *arguendo,* there is still no substantial evidence that Free was a conspirator. *Phelps*

Dodge Refining Corp. v. F. T. C., supra, 2 Cir. [1940-1943 TRADE CASES ¶ 56,297], 139 F. 2d 393, 397. In the *Phelps Dodge* case we dealt with a "board member" rather than a "secretary," but there is nothing in the present record to suggest that Free knew about Metropolitan's illegal life; and to infer so much from his title is unwarranted.

(8) *Harlem Paper Products Corporation.* Harlem was a corporate member of Cosmopolitan—one of the four local trade associations in greater New York City. Mr. David Kasson, a leader in all aspects of restraint of trade in wrapping paper products in this region from 1934 to 1947, represented Harlem in 1948 on the Board of Directors of the National Association. There is sufficient evidence against Harlem.

(9) *David Kasson.* There is adequate evidence to connect this individual with the national activities, as well as regional efforts at unfair competition. In 1943 he urged members of Cosmopolitan to pay national dues, and in 1948 he was on the National Association's Board of Directors. He was the moving spirit in local efforts at uniform credit terms in 1941-1942, and he discussed a letter from the National Association in 1947 which dealt with the same topic.

(10) *Imperial Bag & Paper Co., Inc.; Daniel W. Margolin d/b/a Liberty Bag & Paper Co.* These two members of Cosmopolitan were selected at random to represent the class of members. The proof against them is identical with that against Shuttleworth Wollny Co., Inc., discussed previously, and is similarly insufficient.

II. THE BALTIMORE PETITIONER; ROBINS PAPER COMPANY

The sole petitioner from Baltimore is Robins Paper Company, a member of the local Maryland trade association. Maryland was engaged in restraint of trade in 1932 and during the NRA period—1933 through 1936. In 1947-1948 Maryland complied with a request of the National Association, of which it was a member, to submit its minutes to the national group for approval. The Commission is warranted in inferring that the "approval" amounted to censorship and that Maryland and National were then engaged in fixing prices of fine and wrapping paper products. This is borne out by the number of officers of Maryland's members who were on committees of National for 1948-1949.

The record reveals that Robins resigned from Maryland in 1936. In its answer Robins admitted being a member of Maryland at the time the complaint was filed in 1948. There is no evidence that Robins was an active member, paid dues, attended meetings, or had knowledge of Maryland's activities. None of Robins' officers were on the committees of the national trade association. Robins appears to be a member selected at random to represent the class of members of Maryland. Robins was represented at one meeting of Maryland in 1932 where local illegal trade practices were discussed. It continued membership during NRA days when similar practices were continued with government approval. This knowledge of Maryland's behavior during the depression was not so damning as to put Robins on notice at the time it rejoined the trade association that Maryland might be engaged in a national price-fixing conspiracy; consequently Robins cannot be charged with knowledge of all that diligent inquiry would have revealed concerning Maryland's role in this present conspiracy.

The remaining points raised by the petitioners we find without merit. The findings of the Commission were sufficiently detailed to permit appellate review; and the Commission's decision not to proceed against other conspirators appears to be within its discretion so as to give the present petitioners no ground for complaint on this review.

The order of the Commission on review is set aside as to petitioners Shuttleworth Wollny Co., Inc.; Imperial Bag & Paper Co., Inc.; Daniel W. Margolin d/b/a Liberty Bag & Paper Co.; Robins Paper Company; and Fred Free, Jr. It is affirmed as to the remaining petitioners, and an order of enforcement against them will be entered by us.

On Petition for Rehearing (No. 23373)

PER CURIAM [*In full text*]: *Petition for rehearing denied.* The second sentence of the paragraph on page 357 of the slip opinion headed "(8) *Harlem Paper Products Corporation.*" is changed to read: Mr. David Kasson, a leader in all aspects of restraint of trade in wrapping paper products in this region from 1934 to 1947, represented Harlem in 1948 on the Board of Directors of the National Association. [Reflected in place. CCH.]

[¶ 68,590] United States v. Erie County Malt Beverage Distributors Association; Erie County I. D. Malt Beverage Association, also known as Erie County Importing Malt Beverage Distributors Association; Kahkwa Beer Company; George B. Barber; Robert E. Carney; Ralph A. Deck; Anthony D. Marinelli; Harold J. Mulvihill; and Louis Sawicki.

In the United States District Court for the Western District of Pennsylvania. Criminal Action No. 14870. Dated January 3, 1957.

Case No. 1272 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Construction of Sherman Act—Applicability to Regulated Industries—Alcoholic Beverage Industry—State Liquor Control Laws.—In a criminal action charging that distributors of malt beverages conspired to suppress competition in the sale of such beverages to home consumers in Pennsylvania, the distributors' motion to dismiss the indictment on the ground that, under the 21st Amendment to the United States Constitution, the rights of the United States under the commerce clause were subordinated to the power of the state to control the traffic in liquor within its borders, and that the policy of Pennsylvania is to prevent competition in the sale of liquors, was denied. The Sherman Act continues to apply to commerce in liquor at least where it does not conflict with state policy, and the Act does not conflict with Pennsylvania policy insofar as this prosecution is concerned. No provision of Pennsylvania law permits the type of private combination charged in the indictment.

See Combinations and Conspiracies, Vol. 1, ¶ 2039.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Sufficiency of Indictment—Interstate Commerce.—In an action charging that distributors conspired to suppress competition in the sale of malt beverages to consumers in Pennsylvania, the distributors' contention that malt beverages coming into the state must, under state law, be delivered onto the licensed premises of a distributor, that any subsequent handling, after they have come to rest, is intrastate in nature, and that therefore the Sherman Act is inapplicable was rejected. The interstate flow of malt beverages from outside Pennsylvania from the brewers, through the various distributors, to the home consumer was not terminated by such delivery onto the premises of the distributor. But, whether or not the flow of interstate commerce has terminated, an agreement to fix the price in advance is an interference with interstate commerce, even though the sale is made at the local level.

See Combinations and Conspiracies, Vol. 1, ¶ 2035.153; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.620.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Sufficiency of Indictment—Uncertainty.—A motion to dismiss an indictment, charging distributors of malt beverages with conspiring to suppress and eliminate competition in the sale of such beverages to home consumers, on the ground that it violates the Fifth and Sixth Amendments to the United States Constitution and does not meet the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure because it is vague, indefinite, uncertain, and ambiguous was denied. In a conspiracy case, it is not necessary to set out in detail in the indictment the evidence of the conspiracy, nor is it necessary to describe the conspiracy with the same degree of particularity required in describing a substantive offense. The indictment sufficiently informed the defendants of the nature and scope of the charges against them so that they can properly prepare their defenses and be protected from further prosecution for the same offense.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.740.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Sufficiency of Indictment—Bill of Particulars.—A motion by defendants for a bill of particulars was denied on the ground that the allegations of the indictment, together with the information furnished in a voluntary bill of particulars filed by the Government, was sufficient

to enable the defendants to adequately prepare their defense without being prejudicially surprised at the trial.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.800.

For the plaintiff: William L. Maher and John E. Sarbaugh, Antitrust Division, Department of Justice.

For the defendants: Thomas W. Barger and Francis B. Quinn, Erie, Pa.

Opinion

[*Indictment*]

HERBERT P. SORG, District Judge [*In full text*]: Defendants were indicted on March 19, 1956, for violations of Section 1 of the Sherman Act, 15 U. S. C. § 1. The indictment charges that, beginning in or about the year 1951, the defendants have engaged in a combination and conspiracy to suppress and eliminate competition in the sale of malt beverages to home consumers in Erie County, Pennsylvania. The indictment charges that the combination and conspiracy consisted of a continuing agreement and concert of action to fix and maintain case lot prices, markups and delivery charges, to observe uniform closing hours, and to enforce the agreement by boycott.

[*Motion to Dismiss*]

Defendants have moved to dismiss the indictment, or, in the alternative, for a bill of particulars.

The motion to dismiss is based on the following grounds:

1. The indictment violates the Fifth and Sixth Amendments to the Constitution of the United States and does not meet the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure because it is vague, indefinite, uncertain and ambiguous.

2. The activity which is the subject matter of the offense charges is intrastate and thus Section 1 of the Sherman Act is inapplicable.

3. The activity and method of conducting business of the defendants is regulated by state laws, which laws make the business of defendants local and intrastate and thus make the Sherman Act inapplicable.

[*Constitution*]

The Fifth Amendment provides:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . ."

[*Rules of Criminal Procedure*]

Rule 7(c) of the Federal Rules of Criminal Procedure provides:

> "The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged . . . It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement . . ."

[*Sufficiency of Charges*]

The indictment in this case charges the offense substantially in the language of the Sherman Act. In addition it sets forth the terms of the "continuing agreement and concert of action." In a conspiracy case, it is not necessary to set out in detail in the indictment the evidence of the conspiracy. Nor is it necessary to describe the conspiracy with the same degree of particularity required in describing a substantive offense. *Mercer v. United States* [1932-1939 TRADE CASES ¶ 55,013], 61 F. 2d 97 (C. A. 3d. 1932); *United States v. Sherwin-Williams Co., et al.*, D. C. W. D. Pa. [1948-1949 TRADE CASES ¶ 62,405], 9 F. R. D. 69 (1949). The Court is of the opinion that the allegations of the indictment sufficiently apprise the defendants of the nature and cause of the charges against them so that they can properly prepare their defenses and be protected from further prosecution for the same offense.

[*Interstate Commerce*]

Defendants contend that malt beverages coming into the state must, under state law, be delivered onto the licensed premises of a distributor, and that any subsequent handling, after they have there come to rest,

is intrastate in nature and the Sherman Act has no application.

The indictment alleges that importing distributors of malt beverages produced out of state store them only for short periods of time prior to resale to other distributors, retail outlets and home consumers, because of a lack of storage facilities and because malt beverages tend to soon become stale. The Court is of the opinion that the interstate flow of malt beverages from outside Pennsylvania from the brewers, through the various distributors, to the home consumer is not terminated by such delivery onto the premises of the distributor. But, whether or not the flow of interstate commerce has terminated, the agreement to fix the price in advance is an interference with interstate commerce, even though the sale is made at the local level. In fact, the indictment alleges that as a result of the conspiracy, distributors and importing distributors, not participating in the conspiracy, are hindered and prevented from purchasing supplies.

The principles expressed in *United States [v.] Food and Grocery Bureau of Southern California, Inc. et al.,* 43 F. Supp. 966 (D. C. S. D. Calif. 1942) are applicable here. The Court had before it a retail price-fixing agreement on foods shipped into California to be sold in local grocery stores. The Court said at page 972:

> ". . . And if the effect of a policy be such, it matters not that the restraint occurs at the end of the interstate journey . . . But prices fixed in advance to effect a product at the end of its interstate journey are an interference with that commerce, although at the time the sale is actually made, the product originating in interstate commerce may actually have come to rest on the shelf of a retailer. It is the agreement on the price, in advance, which constitutes the violation, not the sale at the price."

As the Court said in *United States v. Women's Sportswear Manufacturers Association et al.* [1948-1949 Trade Cases ¶ 62,390], 336 U. S. 460, 464 (1948):

> "The source of a restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

[*State Control of Liquor*]

Defendants contend in their brief that under the 21st Amendment to the Constitution of the United States the rights of the United States under the commerce clause were subordinated to the power of the state to control the traffic in liquor within its borders, and that the policy of Pennsylvania, as expressed in state law, is to prohibit competition in the sale of intoxicating liquors.

A similar contention has been made in several cases. *United States v. Frankfort Distilleries, Inc.* [1944-1945 Trade Cases ¶ 57,338], 324 U. S. 293 (1945); *Washington Brewers Institute et al. v. United States* [1940-1943 Trade Cases ¶ 56,289], 137 F. 2d 964 (C. A. 9th, 1943); *United States v. Maryland State Licensed Beverage Association, Inc., et al.* [1956 Trade Cases ¶ 68,243], 138 F. Supp. 685 (D. C. D. Md. 1956). These cases hold that the Sherman Act continues to apply to commerce in liquor at least where it does not conflict with state policy. We find no provision of Pennsylvania law which permits private combinations to fix prices, delivery charges, and closing hours on malt beverages. The Court is of the opinion that the Sherman Act does not conflict with Pennsylvania policy insofar as this prosecution is concerned.

[*Motion Denied*]

The motion to dismiss the indictment will be denied.

[*Bill of Particulars*]

Defendants have moved in the alternative for a bill of particulars. The United States has filed a voluntary bill of particulars setting forth substantially all the information sought by defendants in their motion with the possible exception of minute details of evidence. The Government is not required to furnish defendants with its evidence in the case. The Court is of the opinion that the allegations of the indictment, together with the information furnished in the voluntary bill, is sufficient to enable the defendants to adequately prepare their defense without being prejudicially surprised at the trial.

The motion for a bill of particulars will be denied.

An appropriate order will be entered.

[¶ 68,591] **Burton-Dixie Corporation, John G. Sevcik, A. T. Burton, George S. Knott, Oscar D. Wiley and Ira W. Spackey v. Federal Trade Commission.**

In the United States Court of Appeals for the Seventh Circuit. September Term, 1956, January Session, 1957. No. 11570. Dated January 10, 1957.

Petition for Review of Order of the Federal Trade Commission.

Federal Trade Commission Act

Unfair Practices—Misrepresentations—Down Content of Pillows—Average of Analyses—Down Fiber—Expert Testimony.—A Federal Trade Commission finding that a manufacturer falsely represented that its pillows contain "all new material consisting of down" was reversed on the ground that the finding was not supported by substantial evidence. The hearing examiner, whose ruling dismissing the complaint against the manufacturer was reversed by the Commission, properly found that down fiber should be counted as a part of the down content of the pillows, and that the experts (on behalf of the manufacturer and the Commission) had conducted their analyses of the content of the pillows in the manner provided by the feather and down industry trade practice rules and were entitled to equal credibility. Also, the examiner correctly averaged the analyses submitted by the experts and arrived at an average down content of 85.8 per cent. Since this was within the 15 per cent tolerance prescribed by the rules, the examiner properly concluded that the misrepresentation charge was not supported by the evidence. The Commission erroneously disregarded the testimony of the manufacturer's expert witness and accepted the testimony of its own expert. Both witnesses qualified as experts, and their testimony was entitled to equal weight.

See Unfair Practices, Vol. 2, ¶ 5081.482; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.27.

Unfair Practices—Misrepresentations—Crushed Feather Content of Pillows—Accuracy of Analysis—Public Interest.—A Federal Trade Commission finding that a manufacturer falsely represented that its pillows contain all new material consisting of 50 per cent crushed chicken feathers and 50 per cent crushed duck quill feathers, or all new material consisting of 50 per cent crushed goose quill feathers and 50 per cent crushed turkey feathers, was reversed on the ground that the finding was not supported by substantial evidence. The hearing examiner, whose ruling dismissing the complaint against the manufacturer was reversed by the Commission, properly found that it was impossible to separate and analyze crushed feathers accurately and concluded that there was no substantial evidence to show that there is any public interest either in the matter of labeling the content of such pillows or in distinguishing between the various kinds of crushed feather content. An analysis made by an expert for the Commission did not furnish substantial support for the Commission's finding in view of the fact that the examiner's finding was based, in part, on admissions of the Commission's expert.

See Unfair Practices, Vol. 2, ¶ 5081.482; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.27, 8621.620.

For the petitioners: Kenneth F. Burgess and James E. S. Baker, Chicago, Ill.

For the respondent: Robert B. Dawkins, Washington, D. C.

Setting aside a Federal Trade Commission cease and desist order in Dkt. 6134.

Before DUFFY, Chief Judge, MAJOR and LINDLEY, Circuit Judges.

MAJOR, Circuit Judge [*In full text*]: This is a petition under Section 5(c) of the Federal Trade Commission Act, 15 U. S. C. A. Sec. 45(c), to review and set aside an order of the Federal Trade Commission (hereinafter referred to as the Commission), issued June 30, 1955, ordering petitioner Burton-Dixie Corporation (hereinafter referred to as Burton-Dixie) and certain of its officers to cease and desist from misrepresenting the identity of the type of filling material contained in its feather and down products or of the proportions of each type when the filling material is a mixture of more than one kind or type.

[*Complaint*]

The proceeding was commenced by the issuance of a complaint on October 28, 1953, which alleged that petitioners are engaged in the business of manufacturing and selling down and feather products, including pillows, to dealers for resale to the general public and are carrying on such business in interstate commerce in competition with others similarly engaged. The complaint further alleged that petitioners affix labels to their pillows purporting to state the kinds or types and proportions of filling materials contained therein; that typical of the representations as to the kind of such pillows are the statements:

"Trade Name of Pillow
'Countess'—
All new material consisting of Down
'Chatham'—
All new material consisting of 50% Crushed Chicken Feathers, 50% Crushed Duck Quill Feathers
'Spring'
'Keystone'—
All new material consisting of 50% Crushed Goose Quill Feathers, 50% Crushed Turkey Feathers."

The complaint charged that these representations are false, misleading and deceptive in that the "Countess" pillows contain substantial quantities of material other than down; the "Chatham" pillows contain substantially less than 50% crushed chicken feathers and substantially less than 50% crushed duck quill feathers, and the "Spring" and "Keystone" pillows contain substantially less than 50% crushed goose quill feathers and substantially less than 50% crushed turkey feathers. The complaint charged that these false, misleading and deceptive representations have the tendency and capacity to deceive dealers and the purchasing public as to the filling material of the pillows and to induce the purchase of substantial quantities of pillows because of such mistaken and erroneous belief; that as a result, substantial injury has been done to competition in commerce. Petitioners' practices were alleged to constitute unfair methods of competition and unfair and deceptive acts and practices within the meaning of the Federal Trade Commission Act.

[*Answer*]

Petitioners by answer admitted the jurisdictional averments of the complaint and that their pillows were labeled as alleged, but denied all other material allegations.

[*FTC Proceedings*]

Hearings were had before a designated Examiner of the Commission who, on December 3, 1954, issued his initial decision containing findings of fact, with his conclusions and an order that the complaint be dismissed. Counsel supporting the complaint appealed to the Commission from the Examiner's decision. After hearing the matter on the record, briefs and oral argument of counsel, the Commission rendered its decision, reversing the initial decision of the Examiner. Thereupon, the Commission issued its cease and desist order now under attack.

The instant action was one of eleven proceedings brought by the Commission, involving the feather and down products industry, ten of which were contemporaneously heard, considered and decided by the same Examiner. These related proceedings covered practically all pillow production in the industry. All ten cases heard by the Examiner were appealed to the Commission. In the instant case and in two others in which the complaints had been dismissed, the Commission reversed the decisions of the Examiner and issued cease and desist orders. As to the other seven cases, the Commission sustained the Examiner's issuance of similar orders. Thus, the Commission sustained the charges against each manufacturer without exception and irrespective of the conclusion of the Examiner in the separate cases.

[*Primary Issues*]

The primary issues on this review are two: (1) Whether the decision by the Commission that Burton-Dixie misrepresented the filling content of its down pillows, contrary to the findings of the Examiner, is supported by substantial evidence. This issue involves a number of subsidiary questions which we shall subsequently consider. (2) Whether the decision of the Commission that the contents of Burton-Dixie's crushed feather pillows were misrepresented (a) has any probative evidentiary support and (b) comports with the requirements of the Administrative Procedure Act, 5 U. S. C. A. Par. 1001 et seq., and the Commission's own rules of procedure.

[*Feather Processing Methods*]

Prior to a consideration of the issues, it appears pertinent to make some statement relative to the nature of feather and down products, together with the processing methods employed, about which there seems to be no dispute. Raw feathers are procured principally from Oriental and European sources of supply. In Europe, second-hand feathers are customarily mixed with new stock, while in the Orient there is no careful sorting, so that "a bale of feathers purchased as goose feathers may contain substantial quantities of duck or chicken feathers." After purchasing raw feathers, Burton-Dixie draws samples so as to insure that the stock contains the type of feathers represented, within acceptable limits.

The feathers are thoroughly washed, sterilized and dried, after which they are separated by mechanical means. The separator consists of five chambers divided by baffles of varying heights. The feathers are blown upwards by air currents, with the result that down and the lighter feathers are blown over the higher baffles while heavier feathers remain in the compartments separated by lower baffles. At the end of this process, the farthest compartment contains approximately 90% down and 10% small feathers; the next compartment contains about 80% very small feathers and approximately 20% down; the third chamber contains somewhat larger body feathers with approximately 5% down; the fourth contains large body feathers with almost no down; and the fifth contains wing and tail feathers, commonly known as quills. While it is possible in this manner to isolate a high percentage of down, it is physically impossible to separate some of the small, unmatured feathers from the down or to separate feathers according to type of fowl.

[*Pillow Production*]

Pillow production falls generally into three types: (1) the down pillow, which is always recognized to contain some light feathers, (2) the mixed whole feather or whole feather and down pillow, and (3) the crushed feather pillow. The instant case involves pillows of the first and third types.

Pillows are never filled singly but in batches. In filling a batch of down pillows, the down is taken from the separator and blown into a steamer, where it is agitated with paddles and live steam. From the mixing steamer, the material is blown into bins, and from these bins the pillows are filled by means of suction blowers. While the content of each pillow thus depends in part upon the mixture in the filling bin as a whole, it will vary from pillow to pillow despite the exercise of the greatest care.

The reason for this result is that feathers and down are unique in their lack of uniformity or homogeneity. They do not mix well. When mixed, they do not stay mixed. Thus, when blown into the filling bin, the feathers have a tendency to sift to the bottom of the bin and the down to the top, so that pillows filled from different parts of the bin always contain different proportions of the materials in the bin. The Examiner stated in this regard:

> "The exact amount or proportion of down and feathers going into any particular pillow cannot be controlled by any mechanical means. The expert whose testimony was presented in support of the complaint stated that the contents of pillows filled from the same bin will vary as much as 30%; that the same percentage will not be found in any two pillows; that the mixture in each pillow will vary from the mixture in the filling bin; that if any one pillow should contain exactly the same percentage of feathers and down as that originally placed in the filling bin it would be pure accident; and that the closest practical indication of the contents of a pillow product of a manufacturer and the correctness of its labeling will result if several different pillows are sampled, preferably pillows obtained at different times and places."

[*Crushed Feather Pillows*]

The crushed feather pillow is the least expensive product made by the industry from new material. This filling material consists of chicken and turkey feathers and waterfowl quills that would not otherwise be suitable for pillows, which are twisted and curled in a machine to increase their resiliency and prevent matting. A mixture of crushed feathers is made by first weighing the proper proportions of the various kinds of feathers that are to be mixed and then placing alternate handfuls of these feathers into the hopper of the crushing machine, after which the material goes into a filling bin from which the pillows are filled in the manner described above. With respect to this operation, the Examiner stated:

"Because of the nature of these larger feathers, they frequently go through the hopper in lumps, so that it is impossible to get a mixture with any degree of homogeneity. Despite agitation in mixing, slugs of chicken or turkey feathers and slugs of quill feathers will get into the pillows without ever being separated or mixed. The label 'Crushed Feathers', showing the types of feathers used, can indicate no more than that the mixture was made from the types or kinds of feathers stated on the label."

[*Industry Trade Practice Rules*]

On April 26, 1951, the Commission promulgated Trade Practice Rules (subsequently referred to as the Rules) for the feather and down products industry. (16 C. F. R. 1955 Supp., 200.) At this point we think it appropriate to refer to some of the more salient provisions and requirements contained therein. Rule 3 requires that feather and down products contain a label stating the identity of the filling material. Section III(a) of that Rule, entitled "Tolerance," provides that the filling material of a product may be represented as being of but one kind or type "when 85% of the weight of all filling material contained in the product is of the represented kind or type"; and that when the filling material consists of a mixture of different types, the proportions of which are stated on the label as percentages, the filling material may not vary by more than 15% from the stated percentages. Paragraph (b) of the same section, as to a filling material represented as being wholly of down, provides that any proportion within the tolerance percentage which is not down "shall consist principally of down fiber and/or small, light, and fluffy waterfowl feathers." The Rule further provides:

"It is the consensus of the industry that determination as to whether any representation is violative of the provisions of this Rule should be based on an average of the results of tests of at least two products of the same type when same are readily available for testing * * *."

The Rule also contains a formula for testing the filling material by providing "that samples of equal weight and size be drawn from at least three different locations in the product; that such samples be thoroughly mixed; and that a test be made of not less than 3 grams of the mixture."

[*Related Proceedings*]

As already noted, the instant proceeding was one of eleven similar proceedings contemporaneously heard by the Examiner. One of such proceedings, *Lazar et al., trading as Globe Feather & Down Co. v. Federal Trade Commission* (sometimes referred to as Globe), No. 11569, is now under review and awaiting decision by this court. Another of such proceedings, *Northern Feather Works, Inc. v. Federal Trade Commission,* has been reviewed and decided by the Third Circuit Court of Appeals [1956 TRADE CASES ¶ 68,366], 234 F. 2d 335. Still another, *Buchwalter etc. (National Feather and Down Co.) v. Federal Trade Commission,* has been reviewed and decided by the Second Circuit Court of Appeals [1956 TRADE CASES ¶ 68,425], 235 F. 2d 344. Each of those courts denied a petition to set aside the order of the Commission and directed its enforcement. By stipulation, the record before us contains not only the proceedings in the instant case but also those in Globe, as well as portions of the testimony in some of the other cases heard by the Examiner.

[*Expert Testimony*]

The evidence in this and the related proceedings consisted principally of testimony concerning the methods of operation of the feather and down industry, and the testimony of J. Davis Donovan of the Maryland State Health Department, the expert witness retained by the Commission, and of Ernest Anderson, of United States Testing Company, the expert retained by members of the industry, both of whom analyzed samples taken from the pillows selected by the Commission as a basis for its complaint.

With respect to the "Countess" (down) pillows manufactured by Burton-Dixie, the analyses submitted by Donovan and Anderson respectively were made from the contents of the same two pillows and were as follows:

"Donovan	Pillow 1	Pillow 2
"Down	82.2%	80.3%
Fibers	1.3%	2.5%
Feathers (small downy type)	15.7%	15.7%
Pith and scale	0.8%	1.5%
"Anderson		
"Down and down fiber	86.2%	90.7%
Waterfowl feathers (predominantly duck)	13.8%	9.3%"

[*Examiner's Findings*]

The Examiner found, first, that down fiber, which had been stated separately in Donovan's analysis, should properly be counted as part of the down content, and second, that both experts had conducted their analyses in the manner provided by the Rules and were entitled to equal credibility. He, therefore, averaged the four analyses, arriving at an average down content of 85.8%. Since this was within the 15% tolerance prescribed by the Rules, he found and concluded that the charges of misrepresentation against Burton-Dixie as to its "Countess" pillows were not supported by the evidence. It may be noted that these down pillows of Burton-Dixie were the only ones involved in any of the proceedings in which the Examiner found that average down content exceeded 85%.

At the request of the Commission, Donovan also submitted analyses of the contents of four crushed feather pillows, but testified that it is impossible to analyze crushed feathers accurately, and that crushed material is "not worth testing." He also testified that he thought that in the minds of the public there is no distinction between different types of crushed feathers. The Examiner accordingly concluded that the charges were not supported by the evidence and that there is no reliable evidence of any public interest in distinguishing between the various kinds of crushed feathers.

[*Commission's Ruling*]

On appeal, the Commission reversed the Examiner's decision with respect to the down pillows by rejecting the analyses made by Burton-Dixie's expert witness, by accepting those made by the Commission's expert, and by excluding "down fiber" in calculating the percentage of down in the pillows. With respect to the crushed feather pillows, the Commission reversed the Examiner's finding that there was no reliable evidence of any public interest in the labeling of crushed feather products and concluded that the contents of the pillow had been misrepresented on the basis of Donovan's analysis.

As already noted, the Examiner as to the down pillows found that the analyses submitted by petitioners' expert, Anderson, and the Commission's expert, Donovan, were entitled to equal weight and should, therefore, be averaged. The Commission overruled that finding, rejected Anderson's analyses entirely and gave controlling weight to those of Donovan. The Commission in its decision stated:

"On the basis of professional qualifications and experience and by comparing testing techniques, the Commission has weighed the expert testimony and evidence and is constrained to adopt as determinative of the questions herein the results of the tests performed under the witness in support of the complaint."

The Commission, in an attempt to justify its reliance upon its own professional expert in preference to that of petitioners, recites in considerable detail the experience of the two witnesses. It is pointed out that Donovan has had some forty years' experience in connection with the feather and down industry, while Anderson has had only five or six years. Donovan's office has made more than a thousand feather analyses while Anderson has made about one hundred. Donovan has two employees who are chemists while Anderson has none, although he is himself a graduate chemist. We need not go further in comparing their qualifications because after a thorough study of their testimony we are firmly convinced of the soundness of the Examiner's conclusion that their testimony was entitled to equal weight. They both qualified as experts and testified as such. The cross-examination of Anderson by counsel for the complainant, which was only perfunctory in nature, indicates that his qualifications were recognized.

[*Importance of Expert Testimony*]

The fact is, so we think, that the importance of expert testimony in this case, due to the nature of the product involved, has been greatly exaggerated. A good part of the process by which feathers are made available for the filling of pillows in their various forms and about which there was so much testimony and discussion is within the knowledge and competency of any person with a reasonable amount of experience in the business. We have heretofore shown the manner in which feathers are treated, from the time of their receipt by the manufacturer until they are used for the filling of pillows. Briefly, the feathers are washed, sterilized and dried, then separated by mechanical means into various compartments. For down pillows, the down is then removed, again by mechanical means,

to the filling bin from which the pillows are filled. Certainly up to this point no expertness is required. The Commission in its brief appears to recognize as much because in its agrument in favor of the reasonableness of the 15% tolerance rule it states, "The process of separating feathers and down is not difficult."

Thus, expert testimony becomes important only in making an analysis of the samples which have been removed from the accused pillows, which involves the ability to separate and properly characterize the elements contained in such samples. Donovan, after testifying that the separation of feathers is made by picking out each individual feather, was asked, "In making a separation, just what particular scientific knowledge is required, if any?" to which he responded, "Knowledge of the characteristics of the goose feathers, down feathers, chicken feathers, goose down, duck down, and if the article contains an appreciable proportion of fibers, the characteristics of those fibers." We are unable to comprehend that the scientific knowledge thus required can be made to depend upon the number of years a witness has been familiar with the involved problem. In evaluating the testimony of the expert witnesses, we think it should also be kept in mind that due to the special nature of the product involved, all analyses are subject to variation and uncertainty. As the Examiner stated, "* * * the conclusion is inescapable that as a practical matter, the contents of feather pillows cannot be accurately labeled." In this connection, counsel supporting the complaint in his appeal brief before the Commission made the following significant statement, "In reality, the matter of analysis is a chance. No one knows the distribution of a pillow's content in one position or another or after agitation or before."

[*Down Fiber*]

Petitioners in their brief state, "* * * Donovan testified that, on the basis of tests he had conducted, individual pillows showed as much as 30% variation from the known proportions of feathers and down in the filling bin." The Examiner in his report stated, "The expert whose testimony was presented in support of his complaint stated that the contents of pillows filled from the same bin will vary as much as 30%." The Commission in its brief categorically denies that Donovan so testified. The Commission is in error. The record supports the statement of petitioners and the finding of the Examiner in this respect. As previously shown, Donovan in his analysis did not include "down fiber" as down, while Anderson did. The Commission in its decision states, "In arriving at these results he [Anderson] failed to differentiate between down fiber content and down." There is no justification for this criticism of Anderson. The fact is, as the record overwhelmingly discloses, down fiber has always been treated and considered by the industry as down. It is not a separate constituent but an inevitable incident of the processing of pure down. It cannot be purchased on the market and it cannot be separated from down by mechanical means. That such is a fact has often been recognized by the Commission's expert witness. In the hearing on the Trade Practice Rules Donovan testified, "They classify it as down on the assumption that it originally was a part of the down. It has just broken away from the down cluster by machine processes." In the instant proceeding he admitted to the Examiner that he did not classify down fiber as down "because for the Federal Trade Commission we followed the Fair Trade Practice Rules, and the instructions that they have adopted as to taking and analyzing samples." More than that, this same expert witness in the *Globe* case (now also under review) included down fiber as down. Why it was excluded in the instant analysis and included in the Globe analysis is not explained.

Pursuing further the same subject matter, the Commission in its decision states,

> "The evidence is conflicting on whether down fiber should, as a practical matter, be included with down. We resolve that conflict by concluding that the trade practice rule providing that down fiber should not be included as down takes precedence; that the respondents' expert did not comply with those rules in making his analysis and that the hearing examiner was in error when he included downy fiber to arrive at the computed average of down content he did."

This reasoning, in our judgment, is fallacious. There is no conflict in the evidence as to the proper classification of down fiber other than that artificially created by the Commission's expert who refused to classify

it as down solely on the basis of his interpretation of the Rules. At this point it appears pertinent to quote a voluntary statement injected into the hearing by the witness Donovan, as follows:

> "There is another thing I would like to put in the record and that is that there is a perpetual difference between down and feathers. Down never grows into a feather and feathers never grow into downs. They start from the fowl's body either as down or as feathers and for all the rest of their natural life they continue in that category."

Thus we have a situation where a Rule was utilized by the witness to create a conflict and the same Rule relied upon by the Commission to resolve the conflict. Obviously, there was no occasion to rely upon a Rule to resolve a conflict which did not exist. Assuming *arguendo,* however, that a conflict exists, we think the Commission's reliance upon the Rule is of doubtful propriety. Such reliance is based upon the premise as stated by the Commission, that the Rule provides "that down fiber should not be included as down." We do not so read the Rule. It states that the tolerance percentage (that is, the 15%) "shall consist principally of down fiber and/or small, light, and fluffy waterfowl feathers." The permissive use of down fiber in tolerance is quite different from prohibiting its classification as down. We think petitioners' expert correctly included down fiber as down, which as a matter of fact it was, and that the Examiner was not in error when he included it as such in computing the average of down content.

[*Averaging of Analyses*]

As already noted, the Examiner averaged the four analyses (two by Donovan and two by Anderson) and found an average down content of 85.8%. This average being within the 15% tolerance, he further found that the charges of misrepresentation against Burton-Dixie were not supported. As we understand from the Commission's decision as well as from its brief in this court, the objection to the averaging process employed by the Examiner is based upon the contention that petitioners' expert improperly included down fiber as down. We have shown our disagreement with this contention which renders the objection without force. However, it is pertinent to again point out that the Rule provides that a determination of misrepresentation "should be based on an average of the results of tests of at least two products of the same type when same are readily available for testing * * *." It would seem that the Examiner's action was not only in accordance with this Rule but that it was a fair and reasonable means of determining the issue with which he was confronted. Certainly is this so in view of the uncertain and inconclusive results which may be expected from an analysis, even though made by an expert. Moreover, we find nothing in the record in opposition to the averaging method employed by the Examiner unless it be the statement by Donovan that he would not be willing to average his test with those made by another person. This statement was made by Donovan in the face of his admission that it was quite possible that an analysis of the same pillows by another person would show a substantially higher percentage of down, even up to as high as 90%. Fortunately, the Examiner was not obligated to embrace this egotistical attitude of the Commission's professional and expert witness.

[*Cases Distinguished*]

The Commission places considerable reliance upon the decision of the Third Circuit in *Northern Feather Works, Inc., supra,* and that of the Second Circuit in *Buchwalter, supra,* wherein cease and desist orders of the Commission were approved in proceedings similar to that involved here. Those cases, of course, were reviewed on a record with which we are not familiar. It is evident from reading the opinions, however, that in the main the questions involved were different from those here. Moreover, they are readily distinguishable on the basis that in each of those cases the Commission accepted and affirmed the findings and conclusions of the same Examiner whose findings and conclusions it rejected and reversed in the instant case.

[*Insufficient Evidence*]

We are of the firm conviction that the order of the Commission as it relates to petitioners' "Countess" pillows is not supported by substantial evidence when the record is considered as a whole, including the decision of the Examiner directing a dismissal of the complaint. While we recognize the broad powers of the Commission,

we as a reviewing court are also charged with the responsibility of making a determination and deciding if the Commission's order is substantially supported. We cite without discussion cases which so hold. *Universal Camera Corp. v. National Labor Relations Board,* 340 U. S. 474; *United States Steel Co. v. National Labor Relations Board,* 196 F. 2d 459; *Folds v. Federal Trade Commission* [1950-1951 TRADE CASES ¶ 62,798], 187 F. 2d 658.

[*Crushed Feather Pillows*]

We now come to the phase of the case which involves petitioners' pillows designated "Chatham," represented to contain "All new material consisting of 50% Crushed Chicken Feathers, 50% Crushed Duck Quill Feathers," and pillows designated "Spring" and "Keystone," represented to contain "All new material consisting of 50% Crushed Goose Quill Feathers, 50% Crushed Turkey Feathers." Concerning these crushed feather pillows, the Commission referring to the Examiner's decision stated:

> "As to pillows represented as containing crushed feathers the hearing examiner found no reliable, probative, and substantial evidence to show any public interest either in the matter of labeling or price-listing, or in distinguishing between the various kinds of crushed feather content; that, therefore, there had not been shown any violation of the act through misrepresentation insofar as respondents' 'Chatham', 'Spring' or 'Keystone' pillows are concerned. The charges, in his opinion, not being supported by the evidence and there being no public interest, the hearing examiner dismissed the complaint herein."

[*Analysis of Crushed Feathers*]

Again the Commission reversed the decision of the Examiner, which we think it did without justification. Its finding of substantial proof of mislabeling is based solely on the testimony of Donovan. On this issue, a marked contrast is shown between the attitude of the two expert witnesses—Anderson, whose testimony the Commission brushes aside on his lack of experience, and Donovan, whose testimony is accorded lavish commendation. Anderson, although employed by petitioners and requested by them to make an analysis of the crushed feather pillows, refused to do so for the stated reason that he had learned from experience that such an analysis because of its inaccuracy would be of no value. On the other hand, Donovan, employed by the Commission, made an analysis upon which the Commission relied, which Donovan's own testimony demonstrates was of no probative value. Donovan's procedure for testing the contents of the crushed feather pillows was the same as that employed in testing the down pillows, that is, by removing a quantity of feathers from three positions in the pillow and analyzing not less than three grams. He testified that crushed feathers are even less homogenous than uncrushed feathers and that, when pillows are filled, crushed feathers of one kind come through in lumps and do not mix with crushed feathers of another kind.

Donovan stated that a three gram sample is not likely to be representative of the contents of the pillow as a whole; that it is just chance whether the analyst grabs a lump of turkey or duck quills, and that he had instructed his inspectors not to bring in samples of crushed stock. He was asked, "As a matter of fact, Mr. Donovan, you wrote a letter to Mr. Hafferman of the Burton-Dixie Company a few years ago in which you stated in substance that you did not think it was possible to analyze crushed materials accurately, or words to that effect, did you not?" To this question he responded, "I have held that opinion. I think it is not only a very difficult thing to do, but it is absolutely unnecessary." He was further asked, "In other words, the label describes what the product is and it means really that the product was made from a batch of material that was prepared in that manner, is that it?" to which he responded, "That is what I would take it to mean."

The Examiner in his decision stated:

> "In his [Donovan's] opinion, it is impractical to attempt to distinguish between the various types of crushed feathers in any batch of such pillows, and he suggested during the course of his tests for the Commission that no further pillows filled with crushed feathers be sent to him for analysis."

The Examiner concluded, "It is impossible to separate and analyze crushing feathers accurately." This conclusion was based upon the testimony of Donovan and was the identical reason assigned by Anderson in his refusal to make an anlysis. Under such circumstances, and particularly in view of the admissions by Donovan, we are of

the view and so hold that the analysis made by him of the crushed feather pillows does not furnish substantial support for the Commission's decision.

[*Public Interest*]

The Examiner, as shown, dismissed the complaint also for the reason that "there is no reliable, probative and substantial evidence to show that there is any public interest either in the matter of the labeling * * *, or in distinguishing between the various kinds of crushed feather content thereof." Relative to this finding the Commission stated in part, "We conclude that the evidence herein is reliable, probative, and substantial as to consumer preference for waterfowl feathers; that the preference can be assumed to carry over to crushed feathers * * *." Thus, the Commission argues that because there was proof as to consumer preference for waterfowl feathers, it may be inferred that the same preference would carry over to crushed feathers. Assuming that such an inference might be permissible under other circumstances, we are not able to discern how it can here be utilized by the Commission, in view of Donovan's testimony. The witness, after testifying that the public had a preference for goose feathers and goose down over duck feathers and duck down, as well as over chicken and turkey feathers, was asked, "Would that preference possibly carry over to crushed goose feathers?" to which he answered, "I don't think that in the minds of the general public there is much of a distinction between any type of crushed feather." Again, Donovan testified to a conversation with a Mrs. Nicholls, an Examiner of the Commission, relative to the testing of the contents of crushed feather pillows. As to that conversation he testified, "I explained to her the extreme tediousness and difficulty of separating the portions of feathers and the fibers and the fact that it was, in my opinion, a waste of time, because there was no material difference either to the processor, the manufacturer or the consumer, the purchaser, in the various types of materials." He further testified, "I tried to dissuade her from having any more pillows of that type collected for examination and report to the Federal Trade Commission."

[*Order Set Aside*]

For the reasons stated, the petition of Burton-Dixie to review and set aside the order of the Federal Trade Commission, issued June 30, 1955, is allowed, and an appropriate order will be entered. As a corollary, the Commission's request that a decree be entered affirming the said order is denied.

[¶ 68,592] United States v. Robertshaw-Fulton Controls Company and Wilcolator Co.

In the United States District Court for the Western District of Pennsylvania. Civil Action No. 14745. Dated January 8, 1957.

Case No. 1286 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Price Fixing.—Manufacturers of temperature controls for gas cooking ranges were prohibited by a consent decree from entering into any understanding with any other manufacturer of temperature controls (1) to fix or maintain prices or other terms or conditions for the sale of temperature controls to third persons, (2) to advise or suggest prices or other terms or conditions for the sale of temperature controls to third persons, or (3) to sell or offer to sell temperature controls only at prices quoted in published price lists or announcements.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.181; Monopolies, Vol. 1, ¶ 2610.600.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Exchange of Information or Price Lists.—Manufacturers of temperature controls for gas cooking ranges were prohibited by a consent decree from entering into any understanding with any other manufacturer of temperature controls to exchange or communicate any information concerning (1) costs relating to the manufacture of temperature controls, or

(2) prices or other terms or conditions relating to the sale or distribution of temperature controls, except in connection with a bona fide negotiation or quotation concerning the purchase or sale of temperature controls.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.218; Monopolies, Vol. 1, ¶ 2610.600.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Allocation of Customers.—Manufacturers of temperature controls for gas cooking ranges were prohibited by a consent decree from entering into any understanding with any other manufacturer of temperature controls to allocate customers for the sale of temperature controls.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.468; Monopolies, Vol. 1, ¶ 2610.240.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Acquisitions.—A manufacturer of temperature controls for gas cooking ranges was prohibited by a consent decree (1) for a period of five years, from acquiring ownership or control of the business, physical assets, or good will, or any capital stock or securities, of any person engaged in the manufacture of temperature controls, and (2) thereafter, for an additional ten years, from acquiring such ownership or control except after an affirmative showing to the satisfaction of the court that such ownership or control would not substantially lessen competition or tend to create a monopoly in the manufacture, distribution, or sale of temperature controls. However, the manufacturer was not prohibited from acquiring all or part of the securities or assets of any of its subsidiaries, or from forming subsidiaries and transferring to such subsidiaries its assets or assets of its subsidiaries.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.833; Monopolies, Vol. 1, ¶ 2610.120.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Patent Licensing Agreements—Agreement Not To License Patents.—Manufacturers of temperature controls for gas cooking ranges, which were ordered by a consent decree to license their patents, were each prohibited from entering into any agreement with any person from whom it acquires, on a nonexclusive basis, any license, grant of immunity, or similar right under any existing patent, or under any patent issued or applied for within the five years after the entry of the decree, that such person will not grant similar rights to other applicants.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.360; Monopolies, Vol. 1, ¶ 2610.550.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Patents—Institution of Patent Infringement Suits.—Manufacturers of temperature controls for gas cooking ranges, which were ordered by a consent decree to license their patents, were each prohibited from instituting or threatening to institute any suit or proceeding against any person for acts of infringement of patents alleged to have occurred prior to the entry of the decree.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.225; Monopolies, Vol. 1, ¶ 2610.525.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Licensing of Patents.—Two manufacturers of temperature controls for gas cooking ranges were each ordered to grant a nonexclusive license to manufacture, use, and sell temperature controls under any or all of the patents owned or controlled by the manufacturer at the time of the entry of the decree, or which are owned by the manufacturer within five years from the date of entry. The defendants could charge a reasonable nondiscriminatory royalty.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.30, 8421.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; William D. Kilgore, Jr., Baddia J. Rashid, William L. Maher, Donald G. Balthis, John E. Sarbaugh, and Walter L. Devany, III, Attorneys, Department of Justice.

For the defendants: Reed, Smith, Shaw & McClay by H. E. Hackney, Paul J. Winschel, and J. Tomlinson Fort, Jr., for Robertshaw-Fulton Controls Company. Breed, Abbott & Morgan, by William C. Breed, for Wilcolator Co.

Final Judgment

JOHN L. MILLER, District Judge [*In full text except for Appendix A*]: Plaintiff, United States of America, having filed its Complaint herein on June 21, 1956, and defendants Robertshaw-Fulton Controls Company (hereinafter sometimes referred to as "RFCCo."), and Wilcolator Co. (hereinafter sometimes referred to as "Wilcolator"), having appeared and filed their answer to the Complaint denying violations of law and the substantive allegations thereof, and plaintiff and defendants by their attorneys having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without the Final Judgment constituting any evidence or admission by any party in respect of any such issues;

Now, therefore, before the taking of testimony and without trial or adjudication of any issue of fact or law herein, and upon consent of all the parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I

[*Sherman Act*]

The Court has jurisdiction of the subject matter hereof and of each party hereto. The complaint states a claim upon which relief may be granted against RFCCo. and Wilcolator under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Temperature Controls" means oven thermostatic regulator units for regulating the temperature in the oven of a gas range, and parts of such units when manufactured for and used therein;

(B) "Person" means any individual, partnership, corporation (including any defendant), association, firm, trustee or other business or legal entity;

(C) "Patents" means United States Letters Patent and all reissues and extensions thereof, relating to the manufacture, use or sale of temperature controls.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment shall apply to the defendants RFCCo. and Wilcolator, their officers, directors, agents, employees, successors and assigns, and to all other persons in active concert or participation with a defendant who receives actual notice of this Final Judgment by personal service or otherwise; provided that the said provisions shall not apply to the foreign activities and operations of the defendants unless such activities and operations unreasonably restrain domestic trade and commerce of the United States.

IV

[*Termination of Agreements*]

(A) Defendants RFCCo. and Wilcolator are each ordered and directed to terminate and cancel, within sixty (60) days from the date of entry of this Final Judgment, each of the following agreements which shall not theretofore have been terminated or cancelled:

(1) Agreement dated February 28, 1949, between RFCCo. and Wilcolator;

(2) Agreement dated April 1, 1949, between Wilcolator and Penn Controls, Inc.;

(3) Agreement dated February 13, 1936 between Wilcolator and Magic Chef, Inc.

(B) Defendants RFCCo. and Wilcolator are each enjoined and restrained from entering into, adopting, performing, adhering to, maintaining, or furthering, directly or indirectly, or claiming any rights under any contract, agreement, understanding, plan or program in relation to temperature controls which (1) is inconsistent with any provision of this Final Judgment, or (2) has as its purpose or effect the continuing or renewing of any provision of any of the agreements listed in subsection (A) of this Section IV which is inconsistent with any provision of this Final Judgment;

(C) Defendants RFCCo. and Wilcolator are each ordered and directed to file with the Court within three (3) months following the date of entry of this Final Judgment, an affidavit that the aforesaid written agreements have been terminated and that they are not parties to any agreement or arrangement, plan or program, which is inconsistent with any provision of this Final Judgment.

V

[*Licensing of Patents*]

(A) Defendant RFCCo. is ordered and directed, and, except as to RFCCo., defendant Wilcolator is ordered and directed, in so far as each has or may acquire the power to do so, to grant to any applicant making written application therefor a nonexclusive license to manufacture, use, and sell temperature controls under any, some, or all of the patents owned or controlled by such defendant at the time of entry of this Final Judgment (including those listed on Appendix A [not reproduced] hereto) or which are applied for or issued to or owned by such defendant within five (5) years from such date of entry. Defendants are each enjoined and restrained from making any sale or other disposition of any of the aforesaid patents which deprives such defendant of the power or authority to grant such licenses, unless such defendant sells, transfers, or assigns such patents and requires as a condition of such sale, transfer, or assignment that the purchaser, transferee, or assignee shall observe the requirements of Section V of this Final Judgment with respect to the patents so acquired and the purchaser, transferee, or assignee shall file with this Court, prior to the consummation of said transaction, an undertaking to be bound by the provisions of said section with respect to the patents acquired;

(B) Each defendant is enjoined and restrained from acquiring, on an exclusive basis, any license, sublicense, grant of immunity, or similar right under any existing patent or any patent issued or applied for within the five years after the entry of this Final Judgment, unless such license, sublicense, grant of immunity, or similar right grants to the defendant a full and unrestricted power to sublicense, pursuant to the provisions of this Section V. Each defendant is enjoined and restrained from entering into any agreement or understanding, either direct or implied, with any person from whom it acquires, on a nonexclusive basis, any license, sublicense, grant of immunity, or similar right under any existing patent or under any patent issued or applied for within the five years after the entry of this Final Judgment, that such person will not grant similar or at least as favorable rights to other applicants therefor;

(C) Each defendant is enjoined and restrained from including any restriction or condition whatsoever in any license or sublicense, as the case may be, granted by it pursuant to the provisions of subsection (A) of this Section V, except that:

(1) The license may be nontransferable;

(2) A reasonable nondiscriminatory royalty may be charged;

(3) Reasonable provision may be made for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee who shall report to the licensor only the amount of the royalty due and payable;

(4) Reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalties or to permit the inspection of its books and records as hereinabove provided;

(5) The license shall provide that the licensee may cancel the license by giving thirty (30) days' notice in writing to the licensor; and

(6) The license must refer to and identify this Final Judgment;

(D) Upon receipt of a written request for a license or a sublicense, as the case may be, under the provisions of this Section V, each such defendant shall advise the applicant in writing of the royalty which it deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within sixty (60) days from the date such request for the license was received by such defendant, the applicant or such defendant may forthwith apply to this Court for the determination of reasonable royalties, and the defendant shall, upon receipt of notice of the filing, or upon the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding, the burden of proof shall be on the defendant to establish the reasonableness of the royalty requested, and the reasonable royalty rates, if any, determined by this Court shall apply to the applicant and all other licensees under the same patent or patents. Pending the completion of negotiations or any such proceedings, the applicant shall have the right to make, use, and vend temperature controls under the patent or patents to which its application pertains without payment of royalty or other compensation as above provided, but

subject to the provisions of subsection (E) of this Section V;

(E) Where the applicant has the right to make, use, and vend temperature controls under any patents pursuant to subsection (D) of this Section V, said applicant or the defendant may apply to this Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If this Court fixes such interim royalty rate, the defendant shall then issue, and the applicant shall accept, a license or, as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such a license or fails to pay the interim royalty in accordance therewith, such action shall be ground for the dismissal of his application and his rights under subsection (D) shall terminate. Where an interim license or sublicense has been issued pursuant to this subsection, reasonable royalty rates, if any, as finally determined by this Court shall be retroactive for the applicant and other licensees under the same patents to the date the applicant files his application with this Court;

(F) Each defendant is enjoined and restrained from instituting or threatening to institute, or maintaining or continuing any action, suit, or proceedings against any person for acts of infringement of patents alleged to have occurred prior to the entry of this Final Judgment; and

(G) Nothing herein shall prevent any applicant for a license or sublicense from attacking in the aforesaid proceedings or in any other proceeding or controversy, the validity or scope of any of the patents nor shall this Final Judgment be construed as importing any validity or value to any of the said patents.

VI

[*Price Fixing and Allocation of Customers*]

Defendants RFCCo. and Wilcolator are jointly and severally enjoined and restrained from combining or conspiring or from entering into, adhering to, performing, maintaining, furthering, directly or indirectly, or claiming any rights under any contract, agreement, understanding, plan or program, with any other manufacturer of temperature controls to:

(A) Fix, maintain, determine, control, stabilize or adhere to prices, discounts, allowances or other terms or conditions for the sale of temperature controls to third persons;

(B) Urge, advise or suggest prices, discounts, allowances or other terms or conditions for the sale of temperature controls to third persons;

(C) Circulate, exchange, disclose or communicate any information concerning costs relating to the manufacture of temperature controls, or, prices, discounts, allowances or other terms or conditions relating to the sale or distribution of temperature controls, except in connection with a bona fide negotiation, inquiry, or quotation concerning the purchase or sale of temperature controls;

(D) Sell or offer to sell temperature controls only at prices quoted in published price lists or announcements; and

(E) Allocate customers for the sale of temperature controls.

VII

[*Acquisitions*]

(A) Defendant RFCCo. is enjoined and restrained:

(1) For a period of five years from the date of entry of this Final Judgment, from acquiring, directly or indirectly, by purchase, merger, consolidation or otherwise, ownership or control of the business, physical assets or good will, or any part thereof, or any capital stock or securities of any person engaged in the manufacture of temperature controls in the United States, its territories or possessions; and

(2) Thereafter, for an additional ten years, from directly or indirectly acquiring such ownership or control except after an affirmative showing to the satisfaction of this Court, upon 30 days' notice to plaintiff, that such ownership or control would not substantially lessen competition or tend to create a monopoly in the manufacture, distribution or sale of temperature controls.

(B) Nothing in this Section VII, however, shall be construed to prohibit

(1) Acquisition by RFCCo. of all or part of the securities or assets of any of its subsidiaries;

(2) Formation of subsidiaries by RFCCo. and the transfer thereto of assets of RFCCo. or of its subsidiaries.

VIII

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted (1) access during the office hours of such defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant relating to any matter contained in this Final Judgment, and (2) subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matter. Upon such request the defendants shall submit such reports in writing to the Department of Justice with respect to any of the matters contained in this Final Judgment as from time to time may be necessary to the enforcement of this Final Judgment. No information obtained by the means provided in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

IX

[*Jurisdiction Retained*]

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

[¶ 68,593] Dean Oil Company v. American Oil Company.

In the United States District Court for the District of New Jersey. Civil Action, File No. 7-56. Dated December 26, 1956.

Clayton Act and Robinson-Patman Price Discrimination Act

Private Enforcement and Procedure—Suit for Civil Damages—Right To Maintain Suit for Violation of Section 3, Robinson-Patman Act.—Section 3 of the Robinson-Patman Act is one of the antitrust laws as defined by Section 1 of the Clayton Act; therefore, a private treble damage action based on a violation of Section 3 of the Robinson-Patman Act may be maintained under Section 4 of the Clayton Act.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.710.

Private Enforcement and Procedure—Suit for Civil Damages—Defenses—Statute of Limitations—Applicable Statute.—In a treble damage action brought in the United States District Court for the District of New Jersey, the Court held that a private antitrust suit under the Clayton Act is an action on the case for a tortious injury to the rights of another, and, therefore, it is governed by a New Jersey six-year statute of limitations. The Federal four-year statute of limitations was not applicable since the statute did not become effective until two days after the action was instituted.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010, 9010.100.

Price Discrimination—Robinson-Patman Act, Section 3—Constitutionality.—In a treble damage action based upon an alleged violation of Section 3 of the Robinson-Patman Act, the court refused to rule on the defendant's contention that Section 3 of the Act is

unconstitutional under the Fifth Amendment to the United States Constitution since the section is vague and indefinite. The constitutionality of an act may not be questioned by a party whose rights are not affected by the act.

See Price Discrimination, Vol. 1, ¶ 3551.15.

For the plaintiff: Koestler & Koestler, by Melvin J. Koestler.

For the defendant: Stickel & Stickel, by Fred G. Stickel.

Opinion

[*Robinson-Patman Act, Section 3*]

REYNIER, J. WORTENDYKE, JR., District Judge [*In full text*]: Defendant's motion in this private treble-damage action under Section 4 of the Clayton Act, for dismissal of the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, poses the critical question of whether Section 3 of the Robinson-Patman Act is one of the anti-trust laws as defined by Section 1 of the Clayton Act, for violation of which Section 4 of the same Act provides a private civil action for treble damages. The motion also impugns the constitutionality of Section 3 of the Robinson-Patman Act as violative of the Fifth Amendment. Movant also charges that Section 3 is, in any event, inapplicable to the transactions complained of and asserts that the complaint fails to allege that sales of goods of like grade, quality and quantity were involved or that the charged offending acts of the defendant were for the purpose of destroying competition or eliminating a competitor.

[*Defenses*]

Plaintiff, on its part, moves to strike from defendant's answer the fourth and fifth affirmative defenses therein set forth, which respectively allege that the plaintiff itself discriminated in price among its customers, thereby lessening competition and precluding its recovery in this action, and that the cause or causes of action alleged in the complaint accrued more than two years prior to the commencement of this action and are, therefore, barred by the Statute of Limitations. Plaintiff's motion addressed to the fourth affirmative defense was denied. With respect to the fifth affirmative defense, decision was reserved.

THE COMPLAINT

Plaintiff, a New Jersey corporation, engaged in the sale and distribution of petroleum products throughout certain Counties of the State of New Jersey, charges that from 1940 through June 30, 1953 it was a customer of the defendant, a Delaware corporation authorized to transact business in New Jersey and engaged in interstate commerce. It is alleged that defendant's oil fields and refining plants are located without the State of New Jersey, and that it shipped the products of its refineries to its marine bulk storage station at Carteret, New Jersey, from which defendant made sales in interstate commerce to retail gasoline service stations, both operated by itself and by dealers within the State. It is further alleged that plaintiff purchased defendant's products at the latter's terminal aforesaid, taking delivery thereat in plaintiff's own tank trucks, and thereby transporting same to plaintiff's own storage tanks within the State and to the service stations of customers of the plaintiff. Plaintiff charges that from January 6, 1950 to June 30, 1953, in violation of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, and of Section 3 of the Robinson-Patman Act, defendant continuously discriminated against the plaintiff in certain respects and particulars, all as set forth in the subdivisions of paragraph 9 of the complaint. Plaintiff claims that in consequence of such discriminations and differences in price it suffered damage in the amount of $150,000, was unable successfully to compete with other distributor-customers of defendant, and was unable to sell the gasoline which the plaintiff purchased from defendant at prices which would enable the gasoline service station customers of the plaintiff to successfully compete with other gasoline service station operators. Plaintiff claims to have suffered loss of customers because some were taken over as customers by the defendant and others were forced out of business; thereby causing a decline in plaintiff's business to the extent of $100,000, and a loss of equipment and facilities which plaintiff had furnished to its customers amounting to $20,000. Treble the aggregate of all of these damages is sought, together with attorney's fees.

Answer

Defendant denies the offenses charged against it in the complaint and affirmatively pleads, in addition to those defenses hereinabove referred to, that it falls within the exonerative provisos of subsections (a) and (b) of Section 13 of Title 15 of the United States Code. Section 3 of the Clayton Act (15 U. S. C. A. § 13a) reads as follows:

> "§ 13a. Discrimination in Rebates, Discounts, or Advertising Service Charges; Underselling in Particular Localities; Penalties
>
> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.
>
> "Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."

Defendant's present motion to dismiss rests upon its contention that a violation of the foregoing section does not justify the invocation of Chapter 4 of the Clayton Act (15 U. S. C. A. § 15) in the form of a civil action for treble the damages suffered by the plaintiff in consequence of such violation. The latter section authorizes suit for threefold damages by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." The presently moving defendant insists that section 3 of the Act (15 U. S. C. A. § 13a) is not a part of the "antitrust laws" as that phrase is used in section 4 and that therefore the remedy sought in the instant action is not available insofar as it may be based upon a violation of section 3.

The issue presented by plaintiff's denial of movant's contention in this regard has apparently not yet been directly adjudicated by the Supreme Court of the United States and the decisions of the Courts of Appeal are in conflict thereon.

[*Motion*]

The motion under consideration, according to the Notice thereof, is brought under Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the complaint "insofar as it is sought to be based on Section 3 of the Robinson-Patman Act" (15 U. S. C. A. § 13a) (1) for lack of jurisdiction of the subject matter and (2) for failure to state a claim upon which relief can be granted. The Rule invoked provides (in part) that "every defense, in law or fact, to a claim for relief in any pleading * * * shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, * * * (6) failure to state a claim upon which relief can be granted, * * *. A motion making any of these defenses shall be made before pleading if a further pleading is permitted." Defendant has seen fit to postpone this motion to the filing of its answer. With respect to Section 3 of the Robinson-Patman Act which the complaint charges was violated by defendant, the answer denies the violation but admits that the action is brought "to recover treble damages pursuant to the named statute for alleged violations by defendant of other listed statutes." Nowhere in the answer, however, appears any charge or averment embodying an attack upon the complaint "insofar as it is sought to be based on Section 3 of the Robinson-Patman Act" as presented by this motion. The defenses which defendant now raises, however, are excepted from waiver. See Rule 12(b) and *Gavin v. Hudson & Manhattan R. Co.* (3 Cir. 1950), 185 F. 2d 104.

[*Constitutionality*]

The pending motion, insofar as it seeks a dismissal of the complaint must be denied, irrespective of this Court's views respecting the validity or efficacy of the provisions of Section 3 of the Robinson-Patman Act, to

support the present action, which the defendant here attacks. The complaint rests only partly upon alleged violation of Section 3 as a basis for jurisdiction. Plaintiff also charges violations of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, and defendant makes no attack upon Section 2 as an appropriate basis for some of the claims asserted in the complaint. Whether the evidence will show the existence of violations of Section 2 will depend upon the trial of the case upon the merits. For the purpose of the present motion we must, therefore, assume as true the plaintiff's allegations that the defendant was guilty of violations of that Section. *Frederick Hart & Co. Inc. v. Recordgraph Corporation,* (3 Cir. 1948) 169 F. 2d 580. Accordingly, the attacked pleading withstands the motion to dismiss. Defendant however suggests that if violations of Section 3 of the Robinson-Patman Act are found to be insufficient to afford a basis for the present civil action for treble damages the issues may be simplified by a determination accordingly in advance of trial. While the Court deems it unnecessary to make this determination in order to justify its denial of the motion to dismiss the complaint, counsel for each of the parties apparently desires an expression of the Court's view of a question which has evoked much discussion but which has not been finally determined by the Supreme Court of the United States; although it has been recently conflictingly responded to by the Courts of Appeal of two Circuits. See *Nashville Milk Co. v. Carnation Co.* (7 Cir. Nov. 1, 1956) [1956 Trade Cases ¶ 68,520] — F. 2d — (25 L. W. 2208); and *Vance v. Safeway Stores* (10 Cir. Nov. 6, 1956) [1956 Trade Cases ¶ 68,538] — F. 2d — (25 L. W. 2207). Neither of these cases involved an adjudication upon a question of the constitutionality of Section 3. Movant here charges such unconstitutionality upon the assertion that Section 3 violates the Fifth Amendment in that it is vague and indefinite. It is elementary that the constitutionality of an Act may not be questioned by a party whose rights are not affected thereby. *Moore Ice Cream Co. v. Rose* (1932) 289 U. S. 373, 383. I refrain from passing upon the constitutionality of Section 3 of the Robinson-Patman Act because the defendant has not shown itself to be entitled to raise the question here in view of the language of the Supreme Court of the United States in *Massachusetts v. Mellon,* 262 U. S. 447; as Mr. Justice Sutherland, speaking for the Court, said, at page 488:

> "We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

It is, of course, obvious that if, as defendant contends, Section 3 of the Robinson-Patman Act is not one of the antitrust laws for the violation of which Section 4 of the Clayton Act invests a private party with a cause of action for treble damages, then the question of the constitutionality of Section 3 is irrelevant. *Fairmont Creamery Co. v. Minnesota* (1927), 274 U. S. 1, relied on by defendant to justify its charge of unconstitutionality against Section 3 is not authority for the asserted contention nor does it justify defendant's standing to make the charge. In *Fairmont Creamery,* appellant was convicted under a law of the State of Minnesota which imposed a penalty upon anyone engaged in the business of buying milk, etc., who paid a higher price for the commodity in one locality than for the same commodity in another within the State. The Supreme Court of the United States reversed the conviction because it found that the statute infringed the liberty of contract guaranteed by the Fourteenth Amendment. The appellant there was obviously in a position to contest the constitutionality because the conviction appealed from depended entirely upon the determination of that issue. Although Section 3 of the Robinson-Patman Act imposes penalties for commissions of the forms of discrimination therein stated to be unlawful, the present defendant is not exposed to any of those penalties in the present action or under Section 3. In the

case at bar the plaintiff is seeking treble damages for acts on the part of the defendant which the plaintiff charges amounted to the forms of discrimination enumerated in Section 3. The reasons which induced the Supreme Court to affirm the constitutionality of the Sherman Antitrust Act in *United States v. Frankfort Distilleries, Inc.* (1945) [1944-1945 TRADE CASES ¶ 57,338] 324 U. S. 293 and in *Northern Securities Co. v. United States* (1904) 193 U. S. 197, afford equal support for the constitutionality of Section 3 of the Robinson-Patman Act.

[*Right To Maintain Suit*]

We come now to a consideration of the authorities which have considered the question whether Section 3 of the Robinson-Patman Act is one of the anti-trust laws for the violation of which a private person may recover treble damages from the violator under Section 4 of the Clayton Act. It is the opinion of this Court that Section 3 is clearly an anti-trust law for the reasons expressed by the Tenth Circuit Court of Appeals in *Vance v. Safeway Stores* (*supra*) and by Judge Yankwich in *Balian Ice Cream Co. Inc. v. Arden Farms Co.* (D. C. S. D. Cal. 1950) [1950-1951 TRADE CASES ¶ 62,742] 94 F. Supp. 796, which embodied the view adopted in *Vance.* Moreover, although the point was apparently not raised before it, the Supreme Court of the United States treated Section 3 of the Robinson-Patman Act as one of the anti-trust laws for the purpose of supporting the recovery of treble damages under Section 4 of the Clayton Act in *Moore v. Mead's Fine Bread Co.* (1954) [1954 TRADE CASES ¶ 67,906] 348 U. S. 115, reh. den. 348 U. S. 932. The same high Court in *Bruce's Juices Inc. v. American Can Co.* (1947) [1946-1947 TRADE CASES ¶ 57,533] 330 U. S. 743, dealt with the question whether renewal notes for the purchase price of goods sold would be uncollectible if the vendor violated Section 3 of the Robinson-Patman Act. While the Court concluded that the maker of the notes could not be relieved by proof of such violations, Mr. Justice Jackson, speaking for the Court, at page 750, said:

> "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction a violator may be fined or imprisoned. * * * Any person who is injured in his business or property by reason of anything forbidden therein (Section 3) may sue and recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. (Citing 15 U. S. C. § 15). This treble damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress."

Because I am persuaded by the reasoning and conclusions in *Balian,* which were adopted in *Vance,* I hold that Section 3 of the Robinson-Patman Act is one of the anti-trust laws contemplated by Section 4 of the Clayton Act. It would serve no useful purpose to review the legislative history or to analyze the authorities so ably presented and discussed in *Balian,* and I therefore refrain from doing so.

I conclude that this Court has jurisdiction of the subject matter in this action and that the complaint therein sets forth claims upon which relief can be granted. Defendant's motion to dismiss is accordingly denied.

[*Statute of Limitations*]

Plaintiff's motion to strike the fifth affirmative defense, set forth in defendant's answer, is granted. That defense pleaded a two-year Statute of Limitations in bar of the causes of action alleged in the complaint. The cause or causes of action alleged arose in New Jersey. This Court sits in the District of New Jersey and therefore the Statute of Limitations of the forum applicable to the causes of action alleged controls in this Court. As I pointed out in *Frank L. Gordon et al. v. Loew's Inc., et al.,* C. 202-55 [1956 TRADE CASES ¶ 68,573], the private anti-trust suit under the Clayton Act is an action on the case for a tortious injury to the rights of another. It is, therefore, governed by Section 2A:14-1 of the Revised Statutes of New Jersey, which requires that it be commenced within six years next after the cause of action shall have accrued. The Act of July 7, 1955 (15 U. S. C. A. § 15b) prescribing a Federal four-year Statute of Limitations for actions of this kind did not take effect until two days after the present action was instituted, consequently, this action is governed by the New Jersey Statute of Limitations cited. The period within which the complaint charges that the anti-trust violations complained of took place extended from January 6, 1950 to June 30, 1953; hence the causes of action for which treble damages are here sought accrued

within six years preceding the commencement of this action (complaint filed January 5, 1956) and the defense of Statute of Limitations must fall. The motion to strike the fifth affirmative defense in defendant's answer is granted.

Orders may be presented in conformity with the views hereinabove expressed.

[¶ 68,594] LaCroy Johnson et al. v. Shell Oil Co.

In the Supreme Court of the State of Wisconsin. August Term, 1956. No. 119. Filed January 11, 1957.

Appeal from a judgment of the Circuit Court for Milwaukee County: William F. Shaughnessy, Circuit Judge. Affirmed.

Wisconsin Antitrust Laws

Combinations and Conspiracies Under State Laws—Legality of Practices—Requirements Contracts.—A provision of a gasoline station lease giving the lessor-oil company the right to terminate the lease in the event that the lessee does not purchase at least 144,000 gallons of gasoline from the lessor-oil company annually, and a provision of a dealer sales agreement prohibiting the lessee from disposing of anything but the lessor-oil company's products under the company's trade-marks, were not illegal under the Wisconsin antitrust laws. The contracts do not limit the supply or amounts of the commodities sold at the station, and they do not eliminate other brands from the market or deprive the public of a choice. The contention that the lease and sales agreement constitute illegal requirement contracts was rejected. A minute portion of the market would be affected by the requirement in the lease. Furthermore, it could not be said that the requirement was not for a just and honest purpose or was not for the protection of the legitimate interests of the party in whose favor it was imposed, or that it was not reasonable as between the parties or that it was specially injurious to the public. At the most, the requirement was a partial restraint, limited as to time and extent of purchases, which did not impede the right of the lessee to purchase and sell products of the oil company's competitors upon the premises.

See Combinations and Conspiracies, Vol. 1, ¶ 2325, 2339.

For the appellants: John E. Reilly, Milwaukee, Wis.

For the respondent: Wayne J. Roper, Milwaukee, Wis.

[*Nature of Action*]

Summary Judgment. This action was commenced July 22, 1953 by the plaintiffs, LaCroy Johnson and his wife Dorothy Johnson, against the defendant, Shell Oil Company, a foreign corporation, for relief from a lease of a gasoline and service station, and also from a dealer's sales agreement between the respective parties, upon alleged ground that the contracts were violative of sec. 133.26, 133.01 and 133.85, Stats., and therefore were illegal and void. Issue was joined by the answer of the defendant wherein there was specific denial of any violation of the provisions of the statutes relied upon by the plaintiffs, and also denial that the lease or the dealer's sales agreement are severally or jointly a combination to restrain trade, or to prevent competition.

[*Summary Judgment*]

Both parties moved the court for summary judgment on the pleadings, supporting affidavits, the contracts, and also on portions of an adverse examination of the plaintiff, LaCroy Johnson. By its judgment the trial court denied the plaintiff's motion for summary judgment, and ordered summary judgment in favor of the defendant dismissing the complaint.

This appeal is by the plaintiffs from the judgment.

The facts are stated in the opinion.

[*Lease Arrangement*]

STEINLE, Justice [*In full text*]: The plaintiff, LaCroy Johnson successfully operated a gasoline station owned by the defendant, Shell Oil Company, in the city of Milwaukee from 1945 until the spring of 1951, when he and his wife purchased a tract of land consisting of about one acre at 683 South Hawley Road, West Allis, upon which was located a gasoline and service station, and where Johnson thereafter conducted a filling and service station business. Previous to the purchase of the property by the plaintiffs, the defendant had leased it from the former owner and had operated it. The defendant, through an employee, R. A. Ramaker, negotiated the purchase transaction for the plaintiffs, and procured the necessary financing for them. The price of the property was $22,000 and Ramaker arranged for a loan of $16,000 for the Johnsons from the Bank of Kewaskum to enable them to buy the property. After the purchase of the property, the plaintiffs leased the station to the defendant for a ten year term from May 1, 1951 until April 30, 1961, with an option to extend the lease for an additional five year period. Rent was to be paid by the defendant at the rate of one and one half cents for each gallon of gasoline delivered to the station, with a $50 minimum rental payment per month. It was agreed that the defendant was to pay all rentals under the lease, to the bank. The defendant was given the option to terminate the lease upon 30 days notice, at any time. There was also provision that the defendant was privileged to terminate the lease upon 30 days notice should Johnson fail to maintain the premises in good condition and repair, or fail to rebuild promptly any of the property destroyed in any manner or fail to pay taxes, etc. If without defendant's fault, the licenses and permits of the station were not in existence, or if the business or the property was used for illegal purposes, the defendant was privileged to terminate the lease on five days notice. On the day when the aforementioned lease was executed, the defendant subleased the premises to the plaintiff, LaCroy Johnson, for a term commencing May 1, 1951 and ending April 29, 1961, with right of extension of five years provided that the defendant itself had renewed its own lease of the property for such period. The rent payable by Johnson to the defendant under the sublease was at the rate of one cent for each gallon of gasoline delivered to the premises, and the defendant was given the right to terminate the sublease within 30 days after the expiration of any year during the term in the event that Johnson failed to purchase at least 144,000 gallons of gasoline from the defendant during the year. Neither lease contained provision that Johnson was privileged to terminate the same for any cause.

[*Sales Agreement*]

The "dealer's sales agreement" was a written contract executed on the same day as the leases. It afforded the plaintiff, LaCroy Johnson, the right to purchase products from the defendant at established dealer prices, in any quantities to be ordered by him, and also the right during the continuance of the contract to use the defendant's trademark, trade name and its color scheme of advertising in connection with his sale of its products at the station, but not to use such trademarks, etc., in connection with the sale of products purchased by Johnson from other concerns.

[*Sale of Property*]

Before Johnson started the operation of the station in question, the defendant made certain improvements to the property which included the construction of two new approaches to the station that were sunk to the grade level of the street; the addition of an island for the service of customers; the addition of a light pole; the painting of the building. It appears without dispute that the contracts do not prohibit Johnson from selling products of other concerns, including gasoline, or that they prohibit the use of pumps other than those used for the sale of the defendant's gasoline. The plaintiff did not purchase 144,000 gallons of gasoline annually, but the defendant did not seek termination of the lease because of plaintiffs' failure in such regard, nor for any other cause. Johnson now desires to sell the property free and clear of the defendant's lease.

[*Trial Court Ruling*]

By his application for summary judgment Johnson sought a ruling that the contracts are null and void for reason that they violate the antitrust laws. The Shell Oil Company moved for summary judgment in its favor dismissing the complaint for reason that the contracts are in all respects valid.

In its memorandum decision the trial court stated:

> "it is inconceivable to the court that the agreements between the parties to this action restrain or stifle competition or tend to injury or detriment to the public generally, and it is, therefore, held that the motion of the defendant for summary judgment dismissing the complaint on the merits must be granted."

[*Antitrust Claim*]

On this appeal it is the position of the plaintiffs that the agreements must be considered together and that they violate the provisions of sec. 133.01, Stats., principally for reason that the defendant has retained a right to terminate the lease in the event that Johnson does not purchase 144,000 gallons of gasoline from the defendant annually.

In so far as material sec. 133.01, Stats., provides:

> "(1) Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. Every combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, to be produced or sold therein or constituting a subject of trade or commerce therein, or which combination, conspiracy, trust, pool, agreement or contract shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure in which its price to the public shall be in any manner controlled or established, is hereby declared an illegal restraint of trade. . . ."

The particular provision of sec. 133.01(1), Stats., in question was interpreted by this court in *State v. Lewis and Leidersdorf Co.* (1930), 201 Wis. 543, 553, 554, 230 N. W. 692. There, Mr. Justice Fowler, speaking for the court, said:

> "The word 'supply' covers not only the idea of the quantity of cigars but also that of the brands and sizes of cigars that may be sold in Milwaukee county. Combination and conspiracy to restrain competition in supplying cigars to retailers so as to eliminate from the retail market all kinds of cigars except those exclusively handled by defendants are alleged. The necessary effect of this is to deprive the public of choice in the cigars they will buy, and to cut off supply from the portion of the public who prefer brands of cigars other than those supplied by the defendants. This idea is plainly within the language of the statute banning every combination 'intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state.' Control of price and quantity are especially mentioned, but control of supply in other ways than quantity is also covered. Under many decisions anything that 'prejudices the public interests by unduly restricting competition or unduly obstructing the course of trade' falls within the prohibition of the statute. *Nash v. U. S.*, 229 U. S. 373, 376, 33 Sup. Ct. 780."

[*Limitation on Supply*]

The contracts in the case at bar do not limit the supply or amounts of the commodities sold at the station. They do not eliminate other brands from the market or deprive the public of choice. It appears without dispute that the plaintiff is not prohibited or prevented from installing pumps of other gasoline concerns at the station and disposing of gasoline other than that of the defendant from such pumps. A restriction such as appears in paragraph 7 of the dealer's sales agreement prohibiting the disposing of anything but Shell products under Shell's trademarks and trade names, and through Shell gasoline tanks, is nonviolative of a statutory provision such as that in question. *Federal Trade Commission v. Sinclair Refining Company*, 261 U. S. 463. The lease to Johnson does not contain any restriction as to the use to which he can put the property. It appears without dispute that Johnson had a substantial income from the property by virtue of his activities in the repair of automobiles, tune-ups, wash jobs, the sale of accessories, tires, and additives, none of which are Shell products.

[*Requirement Contract*]

Plaintiffs contend that the lease to Johnson and the dealer's sales agreement are requirement contracts such as have been held to be in restraint of trade in cases as *Standard Oil Company of California and Standard Stations, Inc. v. United States* (1949) [1948-1949 TRADE CASES ¶ 62,432], 78 Fed. Supp. 850, 337 U. S. 293, and *United States v. Richfield Oil Corp.* [1950-1951 TRADE CASES ¶ 62,878] 99 Fed. Supp. 280, (S. D. Cal.). In each of those cases it was established that there was a substantial restraint upon a sizeable segment of the market. In the instant situation it appears that but a minute portion of the market in Wisconsin would be affected by the limitation in the lease. It has long been the rule in this state that agreements although in partial restraint of trade, where effected for a proper purpose and limited in time and scope and otherwise reasonable are not invalid. In *Wisconsin Creameries, Inc. v. Johnson* (1932), 208 Wis. 444, 449, 243 N. W. 498, it was said:

"Coming now to the merits of the case, it is argued that the contracts between Ebbe, Panter, and Otto are void because they are in restraint of trade. The contracts each contained a clause to the effect that the buyer or lessee of certain equipment described therein, for a period fixed in the contract, agrees to buy and use exclusively and to the extent of his requirements, ice cream, ices, and other dairy products sold by the plaintiff, at certain specified prices.

"These contracts are attacked on the ground that being exclusive sales contracts they are void as against public policy. Contracts of this character have been so frequently upheld that it is considered sufficient to cite the cases which sustain them. *E. L. Husting Co. v. Coca-Cola Co.* 205 Wis. 356, 237 N. W. 85, 238 N. W. 626; *Rose v. Gordon,* 158 Wis. 414, 149 N. W. 158; *Butterick Pub. Co. v. Rose,* 141 Wis. 533, 124 N. W. 647."

See also *Rose v. Gordon* (1914), 158 Wis. 414, 149 N. W. 158, *National Refining Company v. Cox* (Mo. 1933), 57 S. W. (2d) 778, and *Cunningham v. Esso Standard Oil Company* (Del. 1955), 118 Atl. (2d) 611.

In *Cottington v. Swan* (1906), 128 Wis. 321, 323, 107 N. W. 336, it was said:

"The vital question in the consideration of every such contract is whether the restraint imposed is reasonable under the circumstances with reference to 'the situation, business, and objects of the parties,' and if 'the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specially injurious to the public, the restraint will be held valid.' "

It cannot be held that the requirement under attack was not for a just and honest purpose, or was not for the protection of the legitimate interests of the party in whose favor it was imposed, or that it was not reasonable as between the parties, or that it was specially injurious to the public. It does not appear from the record that it unduly restricts or unduly obstructs the cause of trade. In his adverse examination incorporated in an affidavit filed in support of defendant's motion for summary judgment, Johnson stated that he had no knowledge of any competitor being prejudiced by virtue of the arrangement in the lease. There is no indication of record that the challenged arrangement prejudiced the interests of the public. The claim that it may reasonably be anticipated that the defendant will negotiate similar arrangements with others for the purpose of gaining monopoly of the market, is not substantiated by the record.

[*Reasonableness*]

By making the improvements to the station, the defendant had an investment for which it was entitled to be remunerated. The protection which it afforded to itself in such respect by its requirement of the minimum amount of gasoline to be purchased by Johnson for the limited period of the contracts, appears reasonable. At most it was a partial restraint, limited as to time and extent of purchases, and did not impede the right of Johnson to purchase and sell products of defendant's competitors upon the premises in quantities as he chose. In *F. T. C. v. Sinclair Refining Co.* 261 U. S. 473, the court noted that the petroleum industry has been and remains highly competitive. Actually the defendant set Johnson up in business for himself by establishing the outlet not only for its own benefit, but for that of others as well. It seems that by such action the opportunity for competition was enhanced, rather than diminished. The provision in the lease relating to pay-

ment of the rentals by the defendant to the bank manifestly was for the bank's protection in the matter of its collection of payment of the loan from the bank of Johnson.

By the Court.—Judgment affirmed.

[¶ 68,595] Myrtle Schreiber, Fannie London, Rose G. Smilay, and Alex Schreiber v. Loew's Incorporated, Paramount Pictures, Inc., et al.

Don Harlo v. Loew's Incorporated, Paramount Pictures, Inc., et al.

In the United States District Court for the Western District of Michigan, Southern Division. Civil Action Nos. 2164 and 2191, respectively. Dated January 4, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Defenses—Statute of Limitations—Applicable State Statute.—In treble damage actions brought in a Federal District Court in Michigan, a general six-year Michigan statute of limitations, covering all personal actions, was held to apply to the actions, rather than a Michigan three-year statute of limitations, covering actions to recover damages for injuries to a person or property. In determining the applicable Michigan statute of limitations, the court ruled that state law governs as to the limitations, that the decisions of state courts must be followed to determine to what actions certain statutes of limitations apply, and that the nature of an action under the Federal antitrust laws is determined solely by Federal law.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.100.

Private Enforcement and Procedure—Suit for Civil Damages—Defenses—Statute of Limitations—Tolling of Statute.—The pendency of a Government antitrust action did not suspend the running of a Michigan six-year statute of limitations as to defendants in a private antitrust action which were not named as defendants in the Government antitrust action.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.275.

Private Enforcement and Procedure—Suit for Civil Damages—Jurisdiction Over Parties—Service of Process—Dissolved Corporation.—Treble damage actions brought in a Federal District Court in Michigan were dismissed as to a corporation which was dissolved under the laws of New York prior to the institution of the actions. The corporation had not done any business within Michigan since its dissolution, and, having been dissolved, it could not be present in Michigan. The contention that Section 12 of the Clayton Act and the general venue statute (Title 28, U. S. Code, Section 1391(c)) should be interpreted to read "a corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business *or has done business in such a manner as to create a claimed cause of action*" was rejected. The provisions of the Clayton Act and the general venue statute are phrased in the present tense, and they do not give any right except as a corporation may be found actually present or doing business in a state. At the time of the commencement of the actions, the corporation was not doing business in any state, although it was subject to service of process in New York.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.350.

For the plaintiffs: Elden W. Butzbaugh, Benton Harbor, Mich., and Seymour F. Simon, Chicago, Ill.

For the defendants: Clayton F. Jennings and Everett R. Trebilcock (Ballard, Jennings, Fraser & Parsons), Lansing, Mich., for Butterfield Michigan Theatres Company and W. S. Butterfield Theatres, Inc. Rockwell T. Gust and David A. Howell (Butzel, Eaman, Long, Gust & Kennedy), Detroit, Mich., for Paramount Pictures, Inc., and all remaining defendants.

Opinion

[*Plaintiffs*]

W. WALLACE KENT, District Judge [*In full text*]: These actions arise under the anti-trust laws of the United States [1] for damages alleged to have been sustained by the plaintiffs in the operation of certain theatres. Plaintiffs Schreiber, *et al.* are the successor owners of the Three Rivers Rialto Theatre in Three Rivers, Michigan, from December 25, 1935, until August 16, 1938. Plaintiff Harlo was the owner and operator of the Harlo Theatre in St. Joseph, Michigan, "from July 1, 1944 up to and including the present time" (paragraph 2 of the complaint which was filed February 5, 1953).

[*Defendants*]

The defendants are distributors of motion pictures and owners of chains of motion picture theatres with the exception of Butterfield Michigan Theatre Company and W. S. Butterfield Theatres, Inc. All of the defendants were alleged to be parties defendant in the case entitled *United States v. Paramount Pictures, Inc.* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131, 72 L. Ed. 1260, which was an anti-trust action commenced on July 20, 1938, and terminated completely on February 8, 1950, when the last final decree was alleged to have been entered. Final decrees had previously been entered against R. K. O. Pictures on November 8, 1948, and against Paramount Film Distributing Corporation on March 3, 1949.

Paramount Pictures Inc., a New York corporation, one of the parties defendant in each of the actions was admittedly dissolved as a corporation under the provisions of the laws of the State of New York a substantial period of time prior to the commencement of these actions.

[*Motion to Dismiss*]

All of the defendants have joined in motions to dismiss on the ground that both actions are barred by the provisions of the Michigan Statutes relative to limitations of actions. Michigan Statute Annotated § 27.605 provides in part as follows:

> "Sec. 27.605. Limitations of personal actions; .... Sec. 13. All actions in any of the courts of this state shall be commenced within six years next after the causes of action shall occur, and not afterward, except as hereinafter specified; Provided, however, ... (2) Actions to recover damages for injuries to person or property shall be brought within three years from the time said actions accrue, and not afterwards;"

[*Applicable Statute of Limitations*]

The first question before the court in each case is whether plaintiffs are bound by the general six year provision of the above quoted statute or by the specific three year provision, which turns on a determination of whether the Clayton Act, 15 U. S. C. A. § 12 *et seq.* which gives a right of action to one who "has been injured in his business or property," has the same connotation as the limitation of action provision of the cited Michigan statute which requires plaintiffs to bring "actions to recover damages for injuries to person or property .... within three years."

Counsel have cited us to and the court has examined numerous state statutes relating to limitation of actions and the interpretation by various and sundry state and federal courts of these statutes of limitations as they relate to the meaning of "business" and "property" and whether these terms are synonymous.

It is clear that state law will govern as to limitations and the decisions of state courts must be followed to determine to what actions certain limitations apply. However, the nature of an action under the anti-trust law has been held to be a matter to be determined solely by federal law. *Barnes Coal Corp. v. Retail Coal Merchants Assn., et al.* (4, 1942) [1940-1943 TRADE CASES ¶ 56,217] 128 F. 2d 645, *Glenn Coal Co. v. Dickenson Fuel Co.* (4, 1934) [1932-1939 TRADE CASES ¶ 55,062] 72 F. 2d 885, and *Williamson v. Columbia Gas & Electric Corp.* (D. C. Del. 1939) 27 F. S. 198. However, certain of the courts have not been consistent in following the above announced rule as appears in *Hoskins Coal & Dock Corp. v. Truax Traer Coal Co.,* (7, 1951) [1950-1951 TRADE CASES ¶ 62,925] 191 F. 2d 912; *Christensen v. Paramount Pictures, Inc.* (D. C. Utah, 1951) [1950-1951 TRADE CASES ¶ 62,751] 95 F. S. 446; *Jaeger Research Lab. v. R. C. A.* (3, 1937) [1932-1939 TRADE CASES ¶ 55,162] 90 F. 2d 826; *Northern Kentucky Telephone Company v. Southern Bell Tele-*

[1] 15 U. S. C. A. 1-7; 15 U. S. C. A. § 12 *et seq.*

phone and Telegraph, et al. (6, 1934) [1932-1939 TRADE CASES ¶ 55,063] 73 F. 2d 333, cert. den. 294 U. S. 719. Two Michigan cases have been cited which would appear to be applicable to the present situation. *Sweet v. Shreve* (1933) 262 Mich. 433 and *American Surety Co. v. McKievnan* (1943) 304 Mich. 322.

The *Sweet* case, *supra,* was a suit for damages for fraud perpetrated upon the plaintiff when the plaintiff purchased a boarding house. It was the defendant's contention that the injury was within the "injury to person or property" section of the Michigan statute relating to the limitation of actions, above cited, and that plaintiff's case was thereby barred because more than three years had elapsed since the cause of action accrued. The court commented that some testimony indicated that the action was commenced within one and one-half years after discovery of the fraud but the court stated at page 435:

> "Furthermore, we do not believe that the present action constitutes one for injuries to person or property. It is a suit brought for the recovery of damages caused plaintiffs as a result of fraudulent representations made by defendants. Previous Michigan decisions have assumed that actions for fraud are covered by the general six-year limitation in section 13976. See *Holman v. Moore,* 259 Mich. 63, 68; *Ramsey v. Child, Hulsmit & Co.,* 198 Mich. 658, 667; *Armstrong v. Rachow,* 205 Mich. 168, 179. While there are some authorities in other jurisdictions to the contrary, and it may be claimed that the precise point here involved was not carefully considered in the cases cited, we believe the correct rule to be that, where the damage claimed are not for injuries to *specific* property, subsection 2 of of 3 Comp. Laws 1929, Sec. 13976, does not apply, but the action may be brought within the general six-year provisions in 3 Comp. Laws 1929, Sec. 13976."

In the *American Surety* case *supra* plaintiff surety company had paid its liability under the terms of a certain bond on the defendant who had embezzled funds. Plaintiff then took a note from the defendant on which the suit in question was based. It was defendant's claim that the debt evidenced by the note was discharged by his bankruptcy. The court held that the suit was a suit on a note, but that plaintiff was nevertheless entitled to rely upon defendant's tort, i.e. willful conversion as defeating the claimed discharge in bankruptcy. The court thus held that the willful conversion of money was an injury to property within the meaning of the Bankruptcy Act (Title 11 U. S. C. A. § 35).

From the Michigan cases it appears that the present action cannot be neatly labelled or clearly defined in any way that is helpful toward determining the applicability of the Michigan Statute relative to limitations of actions. It would appear that a proper construction of the statute in question would be; any case not clearly otherwise provided for must come within the six-year limitation. Thus the question before the court is whether the present action under the anti-trust laws is clearly provided for by subsection 2 of Section 27.605 M. S. A.

This court is of the opinion that the distinction drawn by a distinguished jurist is conclusive in the proper definition of this action. In *Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U. S. 390, 51 L. Ed. 241, 27 S. C. 65, at page 398, Mr. Justice Holmes, delivering the opinion of the court, stated as follows:

> "It was pressed upon us that formerly the limitations addressed themselves to forms of action, that actions upon the case, such as this would have been, were barred in three years, following St. 21 Jac. 1, c. 21, § 3, and that when a change was necessitated by the doing away with the old forms of action, it is not to be supposed that the change was intended to affect the substance, or more than the mode of stating the time allowed. Of course, it was argued also that this was an injury to property, within the plain meaning of the words. But we are satisfied, on the whole, and in view of its juxtaposition with detention and conversion, that the phrase has a narrower intent. It may be that it has a somewhat broader scope than was intimated below, and that some wrongs are within it besides physical damage to tangible property. But there is a sufficiently clear distinction between injuries to property and 'injured in his business or property,' the latter being the language of the act of Congress. A man is injured in his property when his property is diminished. He would not be said to have suffered an injury to his property unless the harm fell upon some object more definite and less ideal than his total wealth. A trademark, or a tradename, or a title, is property, and is regarded as an object capable of injury in various ways. But when a man is made

poorer by an extravagant bill we do not regard his wealth as a unity, or the tort, if there is one, as directed against that unity as an object. We do not go behind the person of the sufferer. We say that he has been defrauded or subjected to duress, or whatever it may be, and stop there. It was urged that the opening article to which we have referred expressed an intention to bar all civil actions, but that hardly helps the construction of any particular article following, since the dragnet at the end, 2776, catches all cases not 'expressly provided for.' On the whole case we agree with the court below."

For this reason this court is satisfied that the plaintiffs are not bound by the three-year provision of the Statute of Limitations and that the action may be commenced at any time within six years after the cause of action has accrued.

[*Tolling of Statute*]

In view of the conclusion that the court has reached relative to the application of the Michigan Statute of Limitations it is unnecessary to determine the effect of the decrees entered against certain of the defendants in the *Paramount Pictures* case since less than six years passed prior to the filing of these actions, and clearly the statute of limitations had been tolled by Section 5 of the Clayton Act, Title 15 U. S. C. § 16, which provides in part:

"Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the anti-trust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

The courts seem to have uniformly held that the tolling effect of the above quoted statutory proviso does not extend to defendants not parties to the government action. *Levy v. Paramount Pictures* (Calif. 1952) [1952 TRADE CASES ¶ 67,327] 104 F. S. 787; *Momand v. Universal Film Exchanges* (1, 1948) [1948-1949 TRADE CASES ¶ 62,360] 172 F. 2d 37, cert. den. 93 L. Ed. 1118; *Christensen v. Paramount Pictures Inc.* (Utah, 1951) [1950-1951 TRADE CASES ¶ 62,751] 95 F. S. 446.

It is agreed by all counsel that Butterfield Michigan Theatre Company and W. S. Butterfield Theatres Inc. were not named as parties defendant nor as co-conspirators in *United States v. Paramount Pictures Inc. supra.*

In Civil Action 2164 the plaintiffs allege that they, as successors in interest to the Three Rivers Rialto Theatre, a Michigan corporation, claim damages alleged to have been sustained by said corporation from December 25, 1935 to August 16, 1938. Since no cause of action could have arisen and no damages could have been suffered subsequent to September 1, 1938, the date on which the corporation was dissolved, the action must be dismissed as to the defendant Butterfield Michigan Theatre Company and defendant W. S. Butterfield Theatres, Inc., the statute of limitations not having been tolled as to those defendants.

In Civil Action No. 2191 the plaintiff operated the theatre in question from July 1, 1949 until the commencement of the action in question. The allegation of damage relates to the period until at least January 1, 1950.

The Court having previously ruled that the six-year statute of limitations is applicable to this action it is not important whether the statute of limitations was tolled as to the Butterfield defendants. For this reason the motion to dismiss as to plaintiff Don Harlo by defendants Butterfield Michigan Theatre Company and W. S. Butterfield Theatres Inc. must be denied.

[*Service of Process*]

There is left one question relating to the service of process upon Paramount Pictures Inc. Paramount Pictures Inc. was dissolved as a corporation under the laws of the State of New York on December 30, 1949, and a notice of withdrawal from the State of Michigan was filed and became effective on January 11, 1950. Admittedly, this defendant has not done any business within the State of Michigan since that time and having been dissolved it could not be present in the State of Michigan.

Plaintiffs, however, rely on *Mehl v. Barr Transfer Co.,* 305 Mich. 276 (1943) wherein the defendant, a corporation existing under the laws of a foreign state not licensed to do business in Michigan, operated a motor

vehicle within the territorial limits of the State of Michigan. The motor vehicle was involved in a traffic accident which gave right to a suit for damages by the injured party. During the period between the occurrence of the accident and the institution of the suit the defendant corporation had been dissolved under the laws of the state in which it was organized. The Supreme Court of Michigan held in substance that a defendant operating a motor vehicle within the State of Michigan was subject to service of process in accordance with the provisions of the Michigan statute relating to nonresident motorists so long as it was subject to service of process under the laws of the state which gave it a right to exist, regardless of the fact that by law it had been dissolved though it was still subject to service of process in the state of domicile.

Defendant Paramount Pictures Inc. claims that the matter is controlled by the provisions of Title 15 U. S. C. A. § 22—

> "Sec. 22. District in which to sue corporation. Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

In effect the plaintiffs claim that the statutes applicable to this situation should be interpreted to read "a corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business *or has done business in such a manner as to create a claimed cause of action.*" However, the provisions of the venue section of the Clayton Act, Title 15 U. S. C. A. § 22, and the provisions of the general venue statute Title 28 U. S. C. A. § 1391(c) are phrased in the present tense, and do not give any right except as a corporation may be found actually present in or doing business in a state.

At the time of the commencement of this action Paramount Pictures Inc. was not doing business within the meaning of the venue statutes in *any* state although it was subject to the service of process in the State of New York. For the above reasons the motion to dismiss by the defendant Paramount Pictures Inc. is granted.

[*Motions To Strike*]

There remain only certain non-briefed motions to strike certain allegations in the complaints. The court is satisfied that the allegations relating to the actions of the defendants over periods of time prior to the time when the causes of action arose may well become material to the disposition of the present actions. Under the provision of Rule 12 Federal Rules of Civil Procedure such matters should not be stricken unless it would be unduly prejudicial to the defendants to permit them to remain. We do not find such a situation in this case. The motions to strike are denied.

[*Rulings*]

In conclusion the court finds (1) that the six-year statute of limitations of the State of Michigan applies to these actions and the motions to dismiss based upon the three-year statute of limitations are denied; (2) that the Butterfield Michigan Theatre Company and W. S. Butterfield Theatres Inc., named as defendants in Civil Action No. 2164 were not named as parties defendant in *United States v. Paramount Theatres Inc.* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131, 72 L. Ed. 1260, and that the action may be dismissed as to those defendants; (3) that the motion by Butterfield Michigan Theatre Company and W. S. Butterfield Theatres Inc. named as defendants in Civil Action No. 2191, to dismiss the action is denied; (4) that Paramount Pitcures Inc. was not subject to the service of process in the State of Michigan, and cannot be brought into the State of Michigan under the terms of any statute in an action of this type and the action is dismissed as to that defendant, and (5) the motions to strike the allegations in plaintiffs' complaint are denied.

[¶ 68,596] Enterprise Industries, Inc. v. The Texas Company.

In the United States Court of Appeals for the Second Circuit. No. 21—October Term, 1956. Docket No. 24045. Argued November 9, 1956. Decided January 7, 1957.

Appeal by the defendant from a judgment of the District Court for the District of Connecticut (SMITH, J., presiding), awarding damages to the plaintiff under the Robinson-Patman Act (§ 13(a), Title 15, U. S. C.).

Robinson-Patman Price Discrimination Act

Private Enforcement and Procedure—Suit for Civil Damages—Measure of Damages—Price Discrimination.—An award of damages based on the amount of unlawful price discriminations was held to be improper in an action in which a refiner was found to have granted price allowances to its competing gasoline dealers on the condition that they drop their prices to a level competitive (equal price) with neighboring dealers in rival brands of gasoline and to have consequently discriminated in price against one of its dealers which either had not availed itself of the price allowances or had not received an allowance as large as its competitors. The proper measure of damages was held to be the dealer's gross loss of profits resulting from the discriminations. The measure of the dealer's loss, if any, was not the difference between the sale price charged the dealer and the lowest price charged any of the dealer's competitors. The Robinson-Patman Act should not be read as creating any presumption that where the fact of damage is shown, the pecuniary amount or equivalent of the prohibited discrimination is the proper measure of damages.

See Price Discrimination, Vol. 1, ¶ 3505.390, 3508, 3515; Private Enforcement and Procedure, Vol. 2, ¶ 9009.750, 9010.475, 9011.640.

For the appellant: Milton Handler.

For the appellee: Wallace R. Burke.

Reversing a judgment of the U. S. District Court, District of Connecticut, 1955 Trade Cases ¶ 68,163.

Before: HAND, MEDINA and LUMBARD, Circuit Judges.

[*Nature of Action*]

HAND, Circuit Judge [*In full text*]: The defendant appeals from a judgment for the plaintiff in an action tried to a judge, awarding treble damages suffered by the defendant's violation of the Robinson-Patman Act (§ 13(a), Title 15, U. S. C.). The plaintiff was a corporation, operating a gasoline "filling station" in the town of Wethersfield, Connecticut, on the right hand side, going south, of the main highway from Boston to New York, a short distance south of the boundary of Hartford. During the period in suit it was a lessee of this station from the defendant at a rent that for the purposes of this action may be taken as two cents for every gallon of gasoline sold. It is not uncommon in the industry for a filling station to start what has come to be known as a "gas war"; that is, to cut the prevailing price of gasoline, which other competing stations must meet by a corresponding cut in order to keep up their sales; and that makes it important, if indeed not necessary, for the producing companies to reduce their price to their own competing stations. In the neighborhood of the city of Hartford between November 1950 and February 1952, two such "wars" occurred: the first lasted from November 1950 to July 1951; the second from November 1951 to February 1952. In each period the defendant by a rebate or allowance reduced its selling price to its tributary stations enough to enable them to meet a price cut, and yet to keep a net margin to each of two cents.

[*Pricing Practice*]

During a price war different prices prevail in different areas, dependent apparently upon the relative advantage of position of the stations. Moreover, as it was the defendant's practice not to underbid the prices of other producers, it imposed as a condition upon any allowance or rebate that its stations should not undercut the prevailing price for other brands. Thus it followed that, although the defendant cut its price enough to allow Texaco stations to meet the reduction, its price to a station, which

like the plaintiff's was in an area of higher prices, was higher than its price to Texaco stations in areas of lower prices. This was the discrimination of which the plaintiff complained, for it alleged that a greater allowance was extended to Texaco stations that were in competition with itself.

[*Plaintiff's Business*]

The larger part of the plaintiff's sales were to cars coming from points east of Hartford and bound south; and, as there were no stations of any kind for about forty miles to the east on the main highway, the plaintiff enjoyed as to this through traffic an important advantage. On the other hand Judge Smith found that there were nine Texaco stations so situated that they did compete with the plaintiff for local sales, by which he meant sales to cars of workmen and others that commuted back and forth from Hartford, in some cases for a distance of twenty miles or more. Such buyers were advised of the prices posted by the different stations as they passed, and would select the lowest. This finding the defendant challenges as "clearly erroneous" because the testimony was not definite that these stations did compete with the plaintiff, but at most proved no more than that there might be such competition.

[*Proof of Damages*]

However, even though we were to agree that the finding was right, and that for that reason the plaintiff had proved its claim for relief, we do not think that it proved the amount of its damages, or indeed that it suffered any damages at all. The wrong was in selling gasoline to the nine Texaco competitors at a lower price than to the plaintiff; and a distinction should be made at the outset between the first "gas war"—November 1, 1950 to July 1951—and the second—November 1951 to February 1952. During the second the plaintiff refused to accept any allowance or rebate and in consequence was free to charge what it could get for gasoline. The equation measuring its loss in that period may therefore be stated as follows. The gross loss was the profit on any sales that it would have made to the nine competitors' customers whom it could, and would, have retained, had it been able to buy from the defendant at the same price as the competitors. From this must, however, be deducted what added profit it may have got by being free to charge what it chose, particularly in the through traffic where there was little competition. Moreover, we have no reliable figures from which to appraise either the gross loss or the gain, for the plaintiff has not shown how much of the business of the nine Texaco competitors it would have retained or obtained at the same price as they; and equally we do not know what would have been its profit on the south bound through traffic if it had sold at the prevailing prices.

So much, therefore, for the second "war." During the first the plaintiff had had the advantage of the rebate or allowance, but had been obliged to sell to all customers at the prices prevailing in its area, as well as to pay a higher price than the nine. Of course the profit gained by means of the rebate or allowance may have been less than that lost by the lower prices granted to the nine together with the lower prices required to meet the prevailing prices in the through traffic; but it is impossible to know whether that was so, and even more impossible to appraise what the loss was, if there was any. The plaintiff kept no books from which it could be learned what were its profits from either part of its business, and even if it had, there was uncontradicted evidence that in June of 1951 the plaintiff was not charging the prevailing price. Moreover, the "wire recording" of the interview between Raymond, the plaintiff's president, and two of the defendant's officers, leaves no doubt that in that month they were complaining to him of his failure to conform. For these reasons we hold that there was also no evidence that would have sustained a finding as to the plaintiff's loss during the first "war."

[*Measure of Damages*]

The judge proceeded by an entirely different method; he assessed the damages by accepting as the measure of the plaintiff's loss the difference between the sale price charged the plaintiff and the lowest price charged any of the nine Texaco stations. For this he relied upon the decision of the majority of the Eighth Circuit in *Elizabeth Arden Sales Corp. v. Gus Blass Co.* [1944-1945 TRADE CASES ¶ 57,400] 150 F. 2d 988. In *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.* [1948-1949 TRADE CASES ¶ 62,521], 178 F. 2d 150, we held that the

discrimination was not a proper measure of the loss; and the Eighth Circuit appears to have overruled its earlier view in a second majority decision, *American Can Co. v. Russellville Canning Co.* [1950-1951 TRADE CASES ¶ 62,895], 191 F. 2d 38. There remains, however, a passage in the opinion of the Supreme Court in *Bruce's Juices, Inc. v. American Can Co.* [1946-1947 TRADE CASES ¶ 57,553], 330 U. S. 743, 757, in which Justice Jackson said that, if the buyer showed that the prices charged were "discriminatory, * * * it would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices. If the prices are illegally discriminatory, petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination." The question then before the court was whether discrimination should bar a seller from recovering the contract price from the buyer and should confine him to a recovery on a *quantum meruit;* and the passage quoted was only an answer to to the buyer's argument that, unless he was allowed to disaffirm the sale, he would be without any other relief. In that case the addition of 5% to the cost to the plaintiff of its cans, even if coupled with relief from "delivery charges" (155 Fla. 877) might well not have been passed on to the consumer, and have been absorbed by the canners, who sold fruit juices in cans. If that were true, the amount of the discrimination might well be a proper measure of the buyer's damages. On the other hand, in the case at bar we have as little means of knowing whether or how far the plaintiff passed on to car owners any difference in the price charged it, as we have of knowing how far the addition affected the gallonage that it sold. In *Interstate Commerce Com. v. United States,* 289 U. S. 385, it is true that an award to the shipper of the "discrimination" would presumably have been unlawful, because by hypothesis the rate charged him had been reasonable. Nevertheless, the reasoning of Cardozo, J., in discussing the proper way to measure damages is relevant here. "If by reason of the discrimination, the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered * * * price * * * damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more" (pp. 390, 391). "Overcharge and discrimination have very different consequences, and must be kept distinct in thought" (p. 390).

[*Construction of Statute*]

At all events the statute should not be read as creating any presumption that "where the fact of damage is shown * * * the pecuniary amount or equivalent of the prohibited discrimination" is the proper "measure of damages." Exactly that was a provision in the bill, when it came from the Senate to the House (S. 3154, 74th Cong., 2d Sess.), and it was eliminated in conference. This action becomes particularly persuasive in contrast with the retention of that part of § 13(b) that imposes a burden of proof on the seller as to the effect of a "discrimination." * Congress obviously did not wish the seller to be under a double burden, as soon as the buyer proved that he had been charged a higher price than any of his competitors; especially the burden of proving the negative upon an issue as to which the seller could know nothing and the buyer everything. Indeed, that was a burden that Congress might well hesitate to impose in an action in which the seller must not only make good the buyer's loss, but also pay him a fine in double the amount of his loss. It is fair to suppose that, if Congress had thought the evil of price discrimination so great as to require so drastic a procedural support, it would have made its purpose more clear.

[*Reversed*]

In view of what we have said it is not necessary to consider whether the defendant proved its defense under the proviso to § 13(b). All the evidence was so fully developed that there is no reason for another trial.

Judgment reversed; complaint dismissed.

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* *Samuel H. Moss, Inc. v. Federal Trade Commission* [1944-1945 TRADE CASES ¶ 57,353], 148 F. 2d 378 (2 Cir.), cert. denied 326 U. S. 734; *Federal Trade Commission v. Standard Brands, Inc.* [1950-1951 TRADE CASES ¶ 62,797, 62,846], 189 F. 2d 510, 515 (2 Cir.).

[¶ 68,597] **Buryl J. Lazar, Jorge Lazar and Hattie Lazar, co-partners trading as Globe Feather & Down Company v. Federal Trade Commission.**

In the United States Court of Appeals for the Seventh Circuit. September Term, 1956, January Session, 1957. No. 11569. Dated January 10, 1957.

Petition for Review of Order of the Federal Trade Commission.

Federal Trade Commission Act

Unfair Practices—Misrepresentations—Down Content of Pillows—Average of Analyses—Down Fiber.—A Federal Trade Commission finding that a manufacturer falsely represented that its pillows contain all new material consisting of imported white goose down, or contain all new material consisting of 50 per cent goose down and 50 per cent goose feathers, was affirmed on the ground that the finding was supported by substantial evidence. An average of analyses made by experts on behalf of the Commission and the manufacturer disclosed that the average down content, including down fiber, of one type of pillow was 83.85 per cent. Since the average down content of this type of pillow was not within the 15 per cent tolerance prescribed by the trade practice rules for the feather and down products industry, the down content of the pillows was misrepresented. Thus, a pillow represented to contain 100 per cent down is in compliance if it contains 85 per cent down. It is not enough that a manufacturer merely approach this line, he must as a minimum reach it. As to the manufacturer's other type of pillow, an average of the analyses disclosed that the average down content was 36.5 per cent. Therefore, the down content of these pillows was misrepresented since the allowable tolerance of 15 per cent was exceeded. The manufacturer's contention that the Commission's cease and desist order would require the impossible, that the order is therefore unreasonable and arbitrary, and that, consequently, the order is repugnant to the United States Constitution as a denial of due process was rejected.

See Unfair Practices, Vol. 2, ¶ 5081.482; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.91.

For the petitioners: Marshall M. Holleb, Chicago, Ill.

For the respondent: Robert B. Dawkins, Washington, D. C.

Affirming a Federal Trade Commission cease and desist order in Dkt. 6188.

Before DUFFY, Chief Judge, MAJOR and LINDLEY, Circuit Judges.

[*Review of FTC Order*]

MAJOR, Circuit Judge [*In full text*]: This is a petition under Section 5(c) of the Federal Trade Commission Act, 15 U. S. C. A. Sec. 45(c), to review and set aside an order of the Federal Trade Commission (hereinafter referred to as the Commission), issued June 30, 1955, ordering petitioners Buryl J. Lazar, Jorge Lazar and Hattie Lazar, co-partners trading as Globe Feather & Down Company (hereinafter referred to as Globe), to cease and desist from misrepresenting the identity of the type of filling material contained in its feather and down products or of the proportions of each type when the filling material is a mixture of more than one kind or type.

[*FTC Complaint*]

The proceeding was commenced on June 10, 1954, by the issuance of a complaint by the Commission, naming the above named petitioners as respondents. The complaint alleged that Globe is engaged in the manufacture and sale in interstate commerce of pillows and other products known as feather and down products in competition with other manufacturers and that, in the course of their business, petitioners caused labels to be affixed to Globe pillows containing the following typical statements:

"Trade Name of Pillow	Statement
"Little Boy Blue	All new material consisting of imported White Goose Down
"Manchester	All new material consisting of 50% Goose Down, 50% Goose Feathers"

The complaint alleged that the representations as to the filling material were

false and misleading and had a tendency to deceive dealers and purchasers as to the content of the filling material, thus resulting in injury to competition in commerce and prejudice to the public. It was further alleged that these acts and practices constituted unfair and deceptive acts and practices and unfair methods of competition within the meaning of the Federal Trade Commission Act, 15 U. S. C. A. Sec. 41, *et seq.*

[*Findings of Examiner*]

Globe and the individual petitioners by answer admitted the jurisdictional averments of the complaint and that their pillows were labeled as alleged but denied all other material allegations. Hearings were had before a designated Examiner of the Commission who, on December 17, 1954, issued his initial decision containing findings of fact, together with his conclusions. The Examiner found and so concluded that the charges against petitioners' "Little Boy Blue" pillows had not been sustained but that the charges against the "Manchester" pillows had been, and, accordingly, issued a cease and desist order. Upon appeal, the Commission reversed the decision of the Examiner relating to the "Little Boy Blue" pillows but sustained his decision relating to the "Manchester" pillows, and issued its cease and desist order now under attack.

[*Related Proceedings*]

The action against petitioners was one of eleven proceedings brought by the Commission involving the feather and down products industry, ten of which were contemporaneously heard and considered by the same Examiner. These related proceedings covered practically all pillow production in the industry. One of the related proceedings heard contemporaneously by the Examiner was *Burton-Dixie Corporation v. Federal Trade Commission,* No. 11570, now pending in this court, in which a decision has been rendered and an opinion filed simultaneously with the decision and opinion in the instant matter.

The nature of the product involved and the proceessing method employed by the industry in the manufacturing of various types of pillows, as well as pertinent provisions of the Trade Practice Rules for the feather and down products industry, are set forth in our opinion in *Burton-Dixie* and need not be repeated. Moreover, the findings, reasoning and conclusions of the Examiner and the Commission in the instant case are similar to those in *Burton-Dixie,* with such variation as is occasioned by a difference in the facts.

[*Pillow Production*]

As we pointed out in *Burton-Dixie,* pillow production falls generally into three types: (1) the down pillow, which is always recognized to contain some light feathers, (2) the mixed whole feather or whole feather and down pillow, and (3) the crushed feather pillow. *Burton-Dixie* involved pillows of the first and third types, and the instant case those of the first and second types. The controversy in *Burton-Dixie* revolved largely around the appraisement to be made of the testimony of J. Davis Donovan, an expert witness for the Commission, and of Ernest Anderson, an expert witness retained by members of the industry. The same controversy, to a lesser extent perhaps, exists in the instant case, particularly as it relates to petitioners' pillow labeled "Little Boy Blue."

[*Analyses By Expert Witnesses*]

Both expert witnesses tested and submitted an analysis of the contents of the "Little Boy Blue" pillows, using the same process and method as we have shown in *Burton-Dixie.* The analysis made by Donovan discloses a goose down content (including down fiber) of 80.6% in one pillow and 78.7% in the other pillow. Anderson's analysis discloses down and fiber in one pillow of 89.3% and in the other, 88.8%. We note that Donovan in the instant case included down fiber as down, while in *Burton-Dixie* it was excluded.

Here again, the Examiner averaged the four analyses (two by Donovan and two by Anderson) and found an average down content of 83.85%. The Commission here makes the same argument as it did in *Burton-Dixie,* that down fiber should not be included as down and that the Examiner improperly averaged the four analyses. We rejected that argument in *Burton-Dixie,* and for the same reason reject it here.

[*Tolerance Rule*]

There is this difference, however; in *Burton-Dixie* the average as found by the Examiner was 85.8% while in the instant

case the average was 83.85%. Thus, in the former, the average down content was within the 15% tolerance prescribed by the rules, while in the instant case it was not. Notwithstanding this deficiency in the average down content, the Examiner found compliance. In doing so he stated:

"Taking into consideration the numerous variables involved, and the lack of absolute accuracy in any of these tests, this percentage is found not to be substantially outside the reasonable tolerances applicable to pillows of this type, and the conclusion is reached that the charges of the complaint have not ben adequately established by reliable, probative and substantial evidence as to these pillows."

In our view, the Commission was justified in rejecting the conclusion of the Examiner on this phase of the case, even though his reasoning is not without plausibility. It is true, of course, that the nature of the product is such as to create uncertainty and variations in analyses but, even so, the purpose of the 15% tolerance was to make allowance therefor. By this rule, a pillow represented to contain 100% down is in compliance if it contains 85%. In other words, the line between compliance and noncompliance was fixed at a down content of 85%. It is not enough that a manufacturer merely approach this line, he must as a minimum reach it. Any other view would seriously impair the efficacy of the tolerance rule. If the tolerance per-cent is increased in one case even by 1%, it might in some other case be increased by 3%, or 5%, or even more. The existing confusion and uncertainty would thereby be enhanced rather than diminished.

[*Tolerance Exceeded*]

As to petitioners' "Manchester" pillows, represented to contain 50% goose down and 50% goose feathers, the analysis of the Commission's expert showed an average down content of 36.5%. Anderson submitted no analysis of these pillows. Petitioner Lazar testified mostly concerning the mixture from which these pillows were filled and it is upon this testimony that petitioners rely in support of their contention that the analysis of Donovan should not be accepted. The Examiner, however, gave credence to the testimony of Donovan and, with reference to the average down content as found by him, stated:

"This is substantially greater than the allowable, reasonable tolerance of 15%, and cannot be justified. It is concluded, therefore, that these pillows have been mislabeled and that the representations made by respondents in respect thereto are false and misleading."

[*Validity of Order*]

The Commission sustained this finding or conclusion by the Examiner and we think properly so. Petitioners contend that there is no evidence that the alleged mislabeling in fact deceived or misled anyone or that the proceedings were in the public interest. We approve, without discussion, the findings of the Examiner sustained by the Commission on these issues. Petitioners also contend that the proposed cease and desist order would require the impossible; that it is therefore unreasonable and arbitrary and, consequently, repugnant to the Constitution of the United States as a denial of due process. This contention was advanced and rejected by the Second Circuit in *Buchwalter etc. v. Federal Trade Commission* [1956 TRADE CASES ¶ 68,425], 235 F. 2d 344, 346. We also reject it.

[*Order Affirmed*]

The petition to set aside the cease and desist order is denied, the order is affirmed and an appropriate order will be entered in this court.

[¶ 68,598] Frances Netter and Robert Netter v. Ashland Paper Mills, Inc., White-Washburne Corp., Bridgeport Paper Company, Inc., Isidor Baum, Seymour I. Baum, Morton J. Baum, Sarah Baum, and A. P. W. Products Company, Inc.

In the United States District Court for the Southern District of New York. Civ. 107-271. Filed January 9, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Injunctive Relief—Necessary Averments To State Cause of Action—Antitrust Violation—Motion To Stay Merger.—In a

stockholders' derivative action, the stockholders' motion to stay the proceedings for the merger of their corporation with another corporation on the ground that the merger would violate the antitrust laws was denied. There was nothing alleged in the affidavits which would justify the court in imposing a prior restraint upon the merger in anticipation that it would prove on a trial to have been in violation of the antitrust laws.

See Private Enforcement and Procedure, Vol. 2, ¶ 9022.20.

Private Enforcement and Procedure—Suit for Injunctive Relief—Pretrial Procedures —Supplemental Complaint.—In a stockholders' derivative action charging that the merger of their corporation with another corporation would violate the antitrust laws, the plaintiffs were permitted to file a supplemental complaint against the corporation which was merging with their corporation. The allegations of the supplemental complaint contained the claim that the other corporation had gone into the merger proceedings with full knowledge of the purpose of their corporation to violate the antitrust laws.

See Private Enforcement and Procedure, Vol. 2, ¶ 9026.

For the plaintiffs: Netter & Netter, New York, N. Y.

For the defendants: Jaffin, Schneider, Kimmel & Galpeer, and Irving E. Kanner, all of New York, N. Y.

Memorandum on Motion to Stay Merger

DIMOCK, District Judge [*In full text*]: Plaintiffs move for an order staying proceedings for the merger of A. P. W. Products Company, Inc., with Allied Paper Corporation or any other proceedings which will result in the absorption of A. P. W. by Allied. This is only one branch of an omnibus motion made by plaintiffs but I will dispose of it first and will refer to it for convenience as a motion to stay the merger of the two corporations. The corporations will be referred to as A. P. W. and Allied respectively.

[*Parties*]

The action is one brought by plaintiffs, stockholders of A. P. W., to enforce their derivative rights against the individual defendants, Isidor Baum, Seymour I. Baum, Morton J. Baum and Sarah Baum, and the corporate defendants, Ashland Paper Mills, Inc., White-Washburne Corp. and Bridgeport Paper Company, Inc. Plaintiffs proceed under section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1, section 1 of the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13, and section 16(b) of the Securities Exchange Act of 1934, 48 Stat. 896, 15 U. S. C. § 78p(b). The individual defendants own two-thirds of the stock of A. P. W. so that the consent of two-thirds of the stockholders of A. P. W., necessary for the merger under section 21 of the New York Stock Corporation Law, is a foregone conclusion. Plaintiffs allege that it is proposed that the merger be accomplished by the exchange of one share of Allied common stock for eleven shares of A. P. W. common stock and that any such allocation is grossly unfair to the A. P. W. stockholders. Plaintiffs go on to say that they are placed in the position of either accepting unfair treatment in the merger or else losing their right to bring this action as stockholders by rejecting the unfair treatment and receiving the appraised value of their stock under section 21 of the New York Stock Corporation Law.

[*Issues*]

This plea raises the question whether defendants in a stockholders' derivative action have it in their power to eliminate the action, in a case where they own the control of the corporation and own substantially all of the stock of some other corporation, by simply arranging for a merger of the two on terms unfair to the stockholders in the corporation for whose benefit the derivative action is brought and thus forcing the complaining stockholders to accept the appraisal of their stock and disqualification as stockholders to maintain a stockholders' derivative action. On the other hand, the second question is raised: should stockholders of a corporation be permitted to hold up a proposed merger by bringing a stockholders' derivative action and alleging that the

terms of the proposed merger are unfair and a mere device for freezing them and their lawsuit out at the appraisal price?

The facts presented on this motion do not raise the first question in its most extreme form. There is no allegation that the individual defendants own substantially all the stock of Allied. If the eleven to one ratio is unfair, therefore, the individual defendants must suffer from this unfairness to just the same degree as plaintiffs. To meet this point one of the plaintiffs says in an affidavit, "Surely the Baums would not dispose of their stock on the proposed terms except for the 'additional' benefits which they can derive out of the transaction. Although I am presently in no position to know all of such possible benefits, it is clear that the Baums would welcome the elimination of this law suit, as well as the elimination of A. P. W. as a competitor of their wholly owned corporation." Plaintiffs thus do not make a very strong case.

The question here is therefore the bald one: where plaintiffs have brought a stockholders' derivative action and a proposal is made to merge the corporation in which they are stockholders with another and plaintiffs allege that their share of the stock of the resulting corporation would not adequately recognize the value of their stock in the old corporation in the light of the claim presented in the stockholders' derivative action, must the merger be postponed until the outcome of the derivative action?

[*Appraisal*]

If plaintiffs did not introduce the element of the pending stockholders' derivative action into the problem it would be perfectly clear that they would have no right to a stay of the proposed merger. The sole remedy of one who objects to a proposed merger is to go to appraisal under the terms of the statute. *Beloff v. Consolidated Edison Co. of N. Y.*, 300 N. Y. 11, 19. Such an appraisal is intended to give effect to every potentiality of the objecting stockholders' stock. *Anderson v. International Minerals & Chemical Corp.*, 295 N. Y. 343, 350. The argument to the contrary in the case where a stockholders' derivative action is pending is based on the claim that such appraisals are usually made at a figure very close to the market price of the stock and that in the case of a stockholders' derivative action brought by a very small minority of the stockholders they are entitled to put to the test their belief that the claim asserted in the stockholders' derivative action is of much more value than anything reflected in the current market price. Stated another way, to force a merger on the plaintiff stockholders is to force upon them a settlement of the case at the market place's estimate of its value instead of their estimate.

This argument can be robbed of force by treating the problem in the appraisal proceedings not as the estimation of the value of the derivative claim for settlement purposes but as the actual determination of the validity of that claim. The appraiser can fix the value of the dissenting stock without reference to the claim asserted and then, after determining the validity or invalidity of the claim, may, if the determination is that the claim is valid, add to the appraisal as made an amount equal to the complaining stockholders' share in the recovery which the appraiser holds they would have obtained.

Thus, while the plaintiffs in the stockholders' derivative action would, in form, lose their lawsuit by the merger, they could obtain a very effective substitute by going to appraisal in the merger proceedings and, in substance, trying out their lawsuit on its merits before the appraiser.

Certainly that substitute is adequate in a case such as this where no evidence has been submitted to support a claim that the defendants in the stockholders' derivative action were in a position where they could afford to set up a merger whose terms were deliberately unfair to the stockholders in the corporation in which the plaintiffs held shares.

[*Antitrust Claim*]

As an additional ground for staying the merger, plaintiffs allege that it would result in further restraint of trade and thus would constitute one more act in the course of conduct of which they complain as violating section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1, and section 1 of the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13. It seems to me that to substantiate a stay of a merger on the ground that it would violate the antitrust laws would require an even stronger case than if the stay were desired only to preserve a stockholders' derivative action. Nothing that is

alleged in the affidavits would justify me in imposing a prior restraint upon the merger in anticipation that it would prove on a trial to have been in violation of the anti-trust laws. See *Anderson-Friberg, Inc. v. Justin R. Clary & Son*, D. C. S. D. N. Y. [1950-1951 TRADE CASES ¶ 62,852], 98 F. Supp. 75; *DeKoven v. Lake Share & M. S. Ry. Co.*, D. C. S. D. N. Y., 216 Fed. 955.

The motion to stay the merger is denied.

[*Supplemental Complaint*]

Besides seeking to stay the merger, plaintiffs' motion has other branches. Plaintiffs seek leave to file a supplemental complaint in which Allied is named as an additional defendant and they ask leave to bring in Allied as such a defendant.

These branches of the motion are opposed on the ground that no enforcible claim is made out in the proposed supplemental complaint. I do not propose to pass on that question. I am disposed to permit plaintiffs to assert whatever claims they think that they possess. Whether or not their pleadings state a claim can be later determined.

Since the new allegations contain the claim that Allied has gone into the merger proceedings with full knowledge of the purpose of the other defendants thereby to violate the anti-trust laws I can see no reason for refusing plaintiffs the right to make Allied a party.

The motion for leave to file a supplemental complaint and to make Allied Paper Corporation a party defendant is granted.

[¶ 68,599] United States v. Cigarette Merchandisers Association, Inc.; Confectionery & Tobacco Drivers & Warehousemen's Union, Local 805, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, A. F. of L.; The Rowe Corporation; Cigarette Service, Inc.; United Tobacco Corporation; Herald Vending Corporation; County Enterprises, Inc.; Matthew Forbes; Milton Holt; Arthur Gluck; Gustave Stern; Jackson Bloom; Harold Jacobs; and Louis Price.

In the United States District Court for the Southern District of New York. Civil Action No. 92-388. Filed January 9, 1957.

Case No. 1193 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Allocation of Markets—Restricting Competition—Cigarette Vending Machines.—A trade association of cigarette vending machine operators, members of the association, a labor union, and others were prohibited by a consent decree from entering into any understanding (1) to allocate or divide locations, (2) to leave any person free from competition in the selection of locations, the placement of vending machines in locations, or the solicitation of location owners, (3) to hinder or restrict any person from placing a vending machine in any location, (4) to hinder or restrict any person from competing for a location, or (5) to hinder or restrict any location owner from selecting or doing business with any operator of his choice, placing or operating his own vending machine, or selling cigarettes over the counter.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.468, 2005.605; Monopolies, Vol. 1, ¶ 2610.240.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Agreements Not to Compete.—A trade association of cigarette vending machine operators, members of the association, and others were prohibited by a consent decree from refraining from competing for an open location because (1) another operator has evidenced an interest in placing a vending machine in that location, or (2) another operator once had a vending machine in that location. However, the decree did not prohibit any operator from entering into a legally valid covenant not to compete which is an integral part of a binding contract for the sale or purchase of the business of an operator.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.025; Monopolies, Vol. 1, ¶ 2610.240; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.48.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Coercion and Intimidation.—A trade association of cigarette vending machine operators, members of the association, and others were prohibited by a consent decree from (1) using coercion to prevent any location owner from selecting and doing business with a vending machine operator of his own choice, (2) using coercion to prevent any person from competing for a location, or (3) inducing or attempting to induce any labor union, through any of its officers, members, or agents, to coerce or persuade a location owner not to permit a particular operator to place or operate a vending machine in his location.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.575; Monopolies, Vol. 1, ¶ 2610.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Duration of Contracts.—A trade association of cigarette vending machine operators, members of the association, a labor union, and others were prohibited by a consent decree from entering into any contract with a location owner for the placement of and sale of cigarettes through a vending machine, unless such contract shall be for a period not longer than three years and have no provision for automatic renewal at the end of the period.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.690; Monopolies, Vol. 1, ¶ 2610.300.

Combinations and Conspiracies—Trade Associations—Consent Decree—Practices Enjoined—Use of Trade Association Facilities.—A trade association of cigarette vending machine operators was prohibited by a consent decree from using or permitting the use of its facilities to carry out or enforce any agreement which was prohibited by any provision of the decree.

See Combinations and Conspiracies, Vol. 1, ¶ 2017.121.

Combinations and Conspiracies—Labor Unions—Consent Decree—Practices Enjoined—Withholding Union Labor.—A labor union was prohibited by a consent decree from (1) preventing any cigarette vending machine operator from securing or employing service men who are members of the union, (2) threatening to withhold or withholding union labor from any vending machine operator, or otherwise discriminating against any vending machine operator in the furnishing of union labor, for the purpose of inducing vending machine operator to join, or carry out any rules of a defendant trade association or any other association of vending machine operators, or (3) advising or compelling a location owner to refuse to do business with a particular vending machine operator because such operator is not a member of the defendant trade association or any other association of operators.

See Combinations and Conspiracies, Vol. 1, ¶ 2101.063.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Union Activities.—A consent decree entered against a trade association of cigarette vending machine operators, members of the association, a labor union, and others provided that nothing in the decree should be deemed to prevent the labor union, its officers, agents, and members from (1) entering into and carrying out the terms of a collective bargaining agreement with a defendant trade association or with any other association of vending machine operators, or (2) initiating, participating in, and executing, solely in its separate capacity, policies and activities relating solely to a labor dispute concerning compensation or conditions of employment.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.45.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Amendment of Trade Association's By-Laws—Expulsion of Members—Listings of Placements and Removals of Vending Machines—Membership.—A trade association of cigarette vending machine operators was required by a consent decree (1) to amend its by-laws to incorporate therein certain provisions of the decree, (2) to require, as a condition of membership, that each present and future member (a) abide by the terms of such provi-

sions of the decree, (b) file with the association a listing of each placement and removal of a vending machine, and (c) where any such placement is pursuant to a contract with a location owner, file with the association the facts of the existence and of the expiration date of such contract; and (3) to expel promptly from membership any present or future member who violates any such provision of the decree. The association was required to receive from any operator listings of that operator's placements and removals of vending machines and to report to every operator, members and non-members of the association, who shall make inquiry concerning a particular location, the name of the operator listed with the association as having a vending machine at that location and the expiration date of any contract between that operator and the location owner listed with the association. Also, the association was required to grant non-discriminatory membership to operators of cigarette vending machines.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.60, 8401.21, 8421.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; John D. Swartz, W. D. Kilgore, Jr., and Richard B. O'Donnell, Special Assistants to the Attorney General; and Richard Owen, Louis Perlmutter, Ralph S. Goodman, and George S. Leisure, Jr., Trial Attorneys.

For the defendants: Parker, Chapin & Flattau, by Samuel Chapin, for Arthur Gluck, The Rowe Corporation, and The Rowe Corporation, as successor to defendant, The Rowe Corporation. Goldstein & Goldstein, by Ely Levy, for Cigarette Service, Inc., and Gustave Stern. Mervin C. Pollak for Cigarette Merchandisers Association, Inc., Matthew Forbes, United Tobacco Corporation, Jackson Bloom, Herald Vending Corporation, Harold Jacobs, County Enterprises, Inc., and Louis Price. Katz & Wolchok, by Charles Katz, for Local 805 and Milton Holt.

For a prior decision of the U. S. District Court, Southern District of New York, see 1955 Trade Cases ¶ 68,183.

Final Judgment

SYLVESTER J. RYAN, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on April 28, 1954, and the defendants having respectively appeared and filed their separate answers to such complaint denying the substantive allegations thereof, and the plaintiff and the defendants, by their respective attorneys herein, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without admission by any party hereto in respect of any such issue,

Now therefore, before any testimony has been taken herein, and without trial or adjudication of, or any admission with respect to any issue of fact or law herein, and upon the consent as aforesaid of all the parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I.

[*Sherman Act*]

This Court has jurisdiction of the subject matter herein and of all the parties hereto. The complaint states a cause of action against the defendants, and each of them, under § 1 and § 2 of the Act of Congress of July 2, 1890 entitled "An act to protect trade and commerce against unlawful restraint and monopolies," as amended, commonly known as the Sherman Act.

II.

[*Definitions*]

As used in this Final Judgment:

(a) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(b) "New York metropolitan area" shall mean that part of the State of New York which includes the City of New York and the counties of Nassau, Suffolk, Westchester, Putnam and Rockland.

(c) "Vending machine" shall mean a coin-operated merchandising device through which packages of cigarettes are sold to the public.

(d) "Location" shall mean any place where people congregate within the New York metropolitan area and in which a vending machine is placed or may be placed, such as a bar, restaurant, hotel, apartment, office building or store.

(e) "Location owner" shall mean any person who has possession, ownership or control of a location whose permission or authority must be obtained to place, or who may himself place, a vending machine in the location.

(f) "Operator" shall mean any person engaged in the business of selling cigarettes to the public through vending machines at a location.

III.

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to any defendant shall apply to each such defendant, its subsidiaries, successors, officers, directors, employees, agents and members, and to all persons in active concert or participation with any such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise. Such provisions shall not apply to any transaction solely between a defendant and a subsidiary owned or controlled by such defendant.

IV.

[*Amendment of By-Laws*]

Defendant Cigarette Merchandisers Association, Inc., is ordered and directed:

(A) Within sixty days after the entry of this Final Judgment, to serve by mail, upon each of its present members, a conformed copy of this Final Judgment, and to file with this Court and with the plaintiff herein proof by affidavit of such service upon each such member;

(B) Within three months from the date of entry of this Final Judgment to amend its by-laws to incorporate therein the substance of Section V, VI and VII of this Final Judgment, and to require, as a condition of membership, or retention of membership, that each present and future member abide by the terms of said Sections V, VI and VII; file with the association a listing of each placement and removal of a vending machine by that member; and where any such placement is pursuant to a contract, agreement or understanding with a location owner, to file with the association the facts of the existence and of the expiration date of such contract, agreement or understanding;

(C) To furnish to plaintiff and to each present and future member a copy of its by-laws as amended in accordance with the foregoing subdivision of this Section IV;

(D) To expel promptly from membership any present or future member who shall violate any of the provisions of Sections V, VI and VII of this Final Judgment.

V.

[*Allocation of Locations*]

Defendants and each member of defendant Cigarette Merchandisers Association, Inc. are jointly and severally enjoined and restrained from entering into, adhering to, maintaining or furthering, directly or indirectly, or claiming any rights under, any contract, combination, agreement, understanding, plan, program or common course of action with any defendant or any operator to:

(A) allocate or divide locations;

(B) refrain from or leave any person free from competition in the selection of locations, the placement of vending machines in locations or the solicitation of location owners;

(C) hinder or restrict any person from placing a vending machine in any location;

(D) hinder or restrict any person from competing for a location;

(E) hinder or restrict any location owner from selecting or doing business with any operator of his choice, placing or operating his own vending machine, or selling cigarettes over the counter.

VI.

[*Use of Coercion*]

Each defendant other than defendant Local 805 is enjoined and restrained from:

(A) Refraining from competing for an open location because

(1) Another operator has evidenced an interest in placing a vending machine in that location;

(2) Another operator once had a vending machine in that location;

(B) Using coercion to prevent any location owner from selecting and doing business with a vending machine operator of his own choice;

(C) Using coercion to prevent any person from competing for a location;

(D) Inducing or attempting to induce any labor union, through any of its officers,

members or agents, to coerce, persuade or otherwise prevail upon a location owner not to permit a particular operator to place or operate a vending machine in his location;

(E) Becoming or remaining a member of, participating in the activities of, or contributing anything of value to any association or other organization, the purposes, policies, rules, practices or activities of which are inconsistent with any of the provisions of this Final Judgment.

VII.

[*Duration of Contracts*]

Defendants and each member of defendant Cigarette Merchandisers Association, Inc., are jointly and severally restrained and enjoined from hereafter entering into any contract, agreement or understanding with a location owner for the placement of and sale of cigarettes through a vending machine unless such contract, agreement or understanding

(1) shall be for a period not longer than three years, and

(2) shall have no provision for automatic renewal at the end of the period thereof.

Provided, however, that the foregoing injunction shall not prohibit any operator from entering into such a contract, agreement or understanding of duration longer than three years, if insisted upon by a location owner or if a location owner insists upon payments from the operator which the latter cannot reasonably expect to recoup within a three year period.

VIII.

[*Use of Association Facilities*]

Defendant Cigarette Merchandisers Association, Inc. is enjoined and restrained from using or permitting the use by any person of the facilities of said defendant to promulgate, adopt, carry out or enforce any contract, agreement, understanding, plan, program, policy or conduct which is enjoined by any of the provisions of this Final Judgment.

IX.

[*Trade Association Membership*]

Defendant Cigarette Merchandisers Association, Inc., is ordered and directed to grant non-discriminatory membership to any operator having one or more vending machines placed in the New York metropolitan area who shall apply for such membership and who shall agree to pay dues and assessments and who shall agree to abide by the provisions of the by-laws of defendant Cigarette Merchandisers Association on the same basis as all other members of said defendant. Nothing in the provisions of this Section IX shall prevent defendant Cigarette Merchandisers Association, Inc. from imposing reasonable penalties on, or expelling any member for failure to pay regular dues and assessments or for otherwise failing to abide by the provisions of the by-laws and rules of said defendant.

X.

[*Union Activities*]

Defendant Local 805 is enjoined and restrained from:

(A) Preventing any operator from securing or employing service men who are members of defendant Local 805;

(B) Threatening to withhold or withholding union labor from any operator, or otherwise discriminating against any operator in the furnishing of union labor, for the purpose of inducing such operator to join, or carry out any rules, policies or programs of defendant Cigarette Merchandisers Association, Inc. or of any other association of operators;

(C) Advising, inducing, threatening, coercing or compelling a location owner to refuse to do business with a particular operator because such operator is not a member of defendant Cigarette Merchandisers Association, Inc., or of any other association of operators.

XI.

[*Permissive Provisions*]

Without determining, adjudicating or affecting the legality under the Sherman Act of the activities hereinafter referred to in this Section XI the provisions of this Final Judgment shall not be deemed to prevent defendant Local 805, its officers, agents and members, including members who may be employees of the defendants and other operators bound by the provisions of this Final Judgment, from:

(A) Bargaining collectively, entering into and carrying out the terms of a collective bargaining agreement with defendant Cig-

arette Merchandisers Association, Inc., or with any other association of operators;

(B) Initiating, participating in and executing, solely in its separate capacity, policies and activities relating solely to a labor dispute concerning compensation or terms and conditions of employment.

XII.

Without hereby determining, adjudicating or affecting the legality under the Sherman Act of the contracts herein after referred to in this Section XII, the provisions of this Final Judgment shall not prevent any operator from entering into, continuing, abiding by or enforcing a reasonable and otherwise legally valid covenant not to compete which is an integral part of a binding contract with another operator for the sale or purchase of all or part of the business of one of such operators.

XIII.

[*Listings of Placements and Removals*]

Defendant Cigarette Merchandisers Association, Inc. is ordered and directed:

(A) To receive from any operator listings of that operator's placements and removals of vending machines and, where any such placement is pursuant to a contract agreement or understanding with a location owner, the facts of the existence and of the expiration date of such contract, agreement or understanding, and

(B) To report to every operator, members and non-members of said association, who shall make inquiry concerning a particular location, the name of the operator, if any, listed with said association as having a vending machine at that location, and the expiration date of any contract agreement or understanding between that operator and the location owner listed with said association.

XIV.

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant, made to its principal office, be permitted:

(A) Access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment, and

(B) Subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters.

Upon such written request the defendant shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of said Final Judgment. No information obtained by the means provided in this Section XIV shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XV.

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the termination or modification of any of the provisions thereof, and for the purpose of the enforcement of compliance therewith and the punishment of violations thereof.

[¶ 68,600] United States v. Maryland State Licensed Beverage Association, Inc., et al.

In the United States Court of Appeals for the Fourth Circuit. No. 7189. Argued November 16, 1956. Decided January 3, 1957.

Appeal from the United States District Court for the District of Maryland, at Baltimore. THOMSEN, Chief Judge.

Case No. 1225 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Conspiracy To Restrain Trade and Conspiracy To Monopolize Trade—Separate or Identical Offenses—Same Evidence—Election of Offenses.—A trial court order requiring the Government to elect whether it will proceed under a count of an indictment charging a conspiracy to restrain trade in violation of Section 1 of the Sherman Act, or a count of the indictment charging a conspiracy to monopolize trade in violation of Section 2 of the Act, was reversed. Although the trial court recognized that different offenses were created by Sections 1 and 2 of the Sherman Act, it was of the opinion, in view of the admission of the Government that the proof under the one count would be relied upon as proof of the other count, that only one conspiracy was involved, and that, therefore, one of the counts should be dismissed. The fact that the same evidence is relied upon to establish the conspiracies charged in both counts does not mean necessarily that there is only one conspiracy. The purpose underlying the practice of requiring that the prosecution elect between offenses or counts is to prevent prejudice to the accused which might result from being required to meet a multiplicity of charges in one trial. It has no application to a case where the different counts are merely variations of the same charge. In the instant case, there could be no possible prejudice to the accused in going to trial under an indictment charging in separate counts that the conduct complained of constituted violations of separate sections of the Sherman Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2037.123; Monopolies, Vol. 1, ¶ 2520; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.520.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Appellate Review—Review of Order Requiring Election of Offenses—Jurisdiction of Court of Appeals.—A motion to dismiss an appeal, filed in a United States Court of Appeals, from an order requiring the Government to elect between two offenses charged in an indictment on the ground that the appeal from the order should have been made directly to the United States Supreme Court was denied. The contention that the dismissal of one of the counts of the indictment, which resulted from the Government's election, was based upon a construction of the statute upon which it was founded, and that an appeal, under Title 18, United States Code, Section 3731, lay direct to the Supreme Court and not to the Court of Appeals was rejected. The dismissal of the count was not based upon a construction of the statute but upon an erroneous view of the proper practice to be followed when two counts of a conspiracy indictment were admittedly based upon the same evidence and the same course of conduct.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8029.890.

For the appellant: Gordon B. Spivack, Attorney, Department of Justice (Victor R. Hansen, Assistant Attorney General, and Horace L. Flurry, Attorney, Department of Justice, on brief).

For the appellees: John Henry Lewin (David C. Green, G. C. A. Anderson, Everett L. Buckmaster, Charles Mindel, Robert E. Coughlan, Jr., Eugene M. Feinblatt, John R. Fitzpatrick, F. Joseph Donohue, Hilary W. Gans, Edwin Harlan, Isaac Hecht, Louis Hoffman, Ellis Levin, Zanvyl Krieger, William D. Macmillan, David R. Owen, George D. Hubbard, William L. Marbury, John W. Hardwicke, Read A. McCaffrey, C. Gordon Haines, Morris Rosenberg, Hugh B. Cox, James C. McKay, and Stanley H. Wilen, on brief).

Reversing a decision of the U. S. District Court, District of Maryland, at Baltimore, 1956 Trade Cases ¶ 68,243.

Before PARKER, Chief Judge, SOPER, Circuit Judge, and HOFFMAN, District Judge.

[*Issues*]

PARKER, Chief Judge [*In full text*]: This is an appeal by the United States in a prosecution under the Sherman Act from an order requring the government to elect whether it would proceed under the first or second counts of the indictment, and when it elected to proceed under the first, dismissing the second count. Appellees have moved to dismiss the appeal or transfer it for hearing to the Supreme Court. We think that the motion should be denied and that the order requiring the election and dismissing the second count on the indictment should be reversed.

[*Indictment*]

Count one of the indictment charged conspiracy in violation of section 1 of the Sherman Act to restrain interstate commerce by establishing "fair trade" prices for alcoholic beverages in the State of Maryland and taking steps to have them observed. Count two charged conspiracy to monopolize in violation of section 2 of that act. In answers to interrogatories and at the bar of the court counsel for the government stated that "the proof under count one will be relied upon as proof of the other counts" that there will be "no variation as far as proof is concerned" and that the government's evidence as to each count will be "the same evidence of that course of conduct." The trial judge recognized that different offenses were created by sections 1 and 2 of the Sherman Act as held in *American Tobacco Co. v. United States* [1946-1947 TRADE CASES ¶ 57,468] 328 U. S. 781; but, because of the foregoing admissions by government counsel, thought that only one conspiracy was involved and that, because of the holding in *Braverman v. United States* 317 U. S. 49, 53, he should require one of the counts to be dismissed. In this we think he was in error.

[*Election of Offenses*]

The fact that the same evidence was relied upon to establish the conspiracies charged in both counts of the indictment does not mean necessarily that there was only one conspiracy. It might very well establish separate conspiracies to fix prices and to monopolize, with the direct evidence as to each having probative value with respect to the other. Even if only one conspiracy was involved, however, this would not support the action taken by the District Judge. *Braverman's* case holds merely that there may not be more than one punishment for a single conspiracy, not that a single conspiracy may not be charged as a crime in several counts to meet different interpretations that might be placed upon the evidence by the jury. Upon the government's evidence, which has not yet been produced, the jury might conceivably conclude that the accused were guilty of conspiracy to restrain trade by fixing prices but not of conspiracy to monopolize, or they might conclude that they were guilty of conspiracy to monopolize but not to fix prices or they might conclude that they were guilty of conspiracy to do both. If the evidence showed that there was only one conspiracy, the judge would impose only one punishment; but this is no reason for requiring dismissal of one of the counts in the early stages of the case; and parties should not be allowed thus to try their case in advance and by piecemeal.

> "It has long been the approved practice to charge, by several counts, the same offense as committed in different ways or by different means, to such extent as will be necessary to provide for every possible contingency in the evidence". 27 Am. Jur. p. 688.

In the case of *United States v. Anderson,* 7 Cir. [1932-1939 TRADE CASES ¶ 55,204] 101 F. 2d 325, one of the cases upon which defendants place their chief reliance for the proposition that only one punishment can be imposed for a single conspiracy, it was expressly held that the government was properly allowed to go to trial upon two indictments with a number of counts relating to the single conspiracy, although all were based upon precisely the same facts. The court said:

> "Each of the indictments, and each of the two counts of the antitrust indictment was based upon precisely the same facts, *and we perceive no just reason why both indictments and all the defendants should not be tried at the same time and by the same jury.*
>
> "It is also contended by appellants that the court erred in the imposition of cumulative sentences, and we think this contention must prevail. There was but one conspiracy and its primary object was to stop the transportation of coal * * *. *This does not mean that both indictments were not properly pleaded, as a precautionary*

matter, but we can not believe that Congress intended to permit the accumulation of sentences upon diverse objects of a conspiracy where there was but one conspiracy and the evidence supporting each was precisely the same. * * *

"The judgment is affirmed as to all matters except as to the sentence of imprisonment and fines." (Italics supplied.)

In the old and celebrated case of *Commonwealth v. Webster* 5 Cush. (Mass.) 295, 52 Am. Dec. 711, 731-32, Chief Justice Shaw pointed out the reason for permitting a number of counts charging a single crime, in that case homicide. He said:

"The indictment is but the charge or accusation made by the grand jury, with as much certainty and precision as the evidence before them will warrant. They may be well satisfied that the homicide was committed, and yet the evidence before them may leave it somewhat doubtful as to the mode of death; but in order to meet the evidence as it may finally appear, they are very properly allowed to set out the mode in different counts; and then if any one of them is proved, supposing it to be also legally formal, it is sufficient to support the indictment."

[*Purpose of Election*]

The purpose underlying the practice of requiring in proper cases that the prosecution elect between offenses or counts is to prevent prejudice to the accused which might result from being required to meet a multiplicity of charges in one trial. It has no application to a case where the different counts are merely variations or modifications of the same charge. 27 Am. Jur. pp. 690-691. Here there could be no possible prejudice to the accused in going to trial under an indictment charging in separate counts that conduct complained of constituted violations of separate sections of the Sherman Act; and to require such an election was to prejudice the prosecution in the presentation of its case and cannot be upheld as a sound exercise of discretion. In *State v. Schaefer,* 96 Ohio St. 215, Ann. Cas. 1918E, 1137, 1138-1139, it was held to be error as matter of law to require an election between counts where they related to the same transaction. And in *Herman v. People,* 131 Ill. 594, 9 L. R. A. 182, it was said,

"The right of demanding an election, and the limitation of the prosecution to one offense, is confined to charges which are actually distinct from each other and do not form parts of one and the same transaction."

And see note 9 L. R. A. 182 *et seq.*

[*Appeal—Proper Court*]

There is no merit in the motion to dismiss the appeal or transfer it to the Supreme Court. It is argued in support thereof that the dismissal of the second count of the indictment was based upon a construction of the statute upon which it was founded and that appeal under 18 USC 3731 lay direct to the Supreme Court of the United States and not to the Court of Appeals. The dismissal of that count, however, was not based upon a construction of the statute but upon an erroneous view of the proper practice to be followed when two counts of a conspiracy indictment were admittedly based upon the same evidence and the same course of conduct of the persons charged.

[*Reversed and Remanded*]

The order appealed from will accordingly be reversed and the case will be remanded to be tried on all counts of the indictment.

Reversed.

[¶ 68,601] The Kansas City Star Company v. United States. Emil A. Sees v. United States.

In the United States Court of Appeals for the Eighth Circuit. Nos. 15,456, 15,457. Dated January 23, 1957.

Appeals from the United States District Court for the Western District of Missouri. RICHARD M. DUNCAN, District Judge.

Case No. 1151 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Monopolies—Monopolization—Dissemination of News and Advertising—Tests.—A jury verdict finding that a newspaper company attempted to monopolize and monopolized the dissemination of news and advertising in the Kansas City area was affirmed where there was substantial evidence to sustain the verdict of the jury. The newspaper company's position in the area was of such dominance that it could be found by the jury that the newspaper company possessed monopoly power, that it was an indispensable medium of advertising for some advertisers, that its position gave it the power to exclude competition, and that it exercised such power with the intent to exclude competition.

See Monopolies, Vol. 1, ¶ 2510.250.

Monopolies—Monopolization—Elements of Offense—Power to Exclude Competition—Exclusion of Competition.—A jury verdict finding that a newspaper company attempted to monopolize and monopolized the dissemination of news and advertising in the Kansas City area was affirmed where there was substantial evidence to sustain the verdict of the jury. The newspaper company, which published a morning and an evening newspaper, controlled approximately 95 per cent of the newspaper circulation in the area and received approximately 94 per cent of the total newspaper advertising revenue in the area. The newspaper company's dominant position as to both circulation and advertising was therefore apparent. The newspaper company's position was of such dominance that it could be found by the jury that the company possessed monopoly power, that it was an indispensable medium of advertising for some advertisers, that its position gave it the power to exclude competition, and that it exercised such power with the intent to exclude competition. The jury properly concluded from the evidence that the newspaper company threatened advertisers with refusal to take their ads if they advertised in competitive publications, that advertisers were threatened with the loss of desirable position in the company's newspapers if they placed ads in competitive publications, that the newspaper company threatened to discontinue advertisements unless it was given equal space with competitive publications, that advertisers were threatened with having their credit cut off if they used competitive publications, that the newspaper company used the dissemination of news to control advertising, that the newspaper company used its dominant position to dictate to advertisers how much of their advertising quota would have to be spent with its newspapers, and that the newspaper company used its television and radio facilities to obtain advertising for its newspapers. Also, the newspaper company sold its morning and evening newspapers to its subscribers in combination only, and classified and general advertisers were required to run their advertisements in both the morning and evening newspapers. The record justified the jury's conclusions that the two newspapers were separate and distinct, that the combination sale of the newspapers had the effect of foreclosing the purchase of other newspapers, and that the unit advertising method was used with the intent and effect of excluding competition.

See Monopolies, Vol. 1, ¶ 2510.520, 2530.54, 2610.287, 2610.310, 2610.728, 2610.806.

Monopolies—Monopolization—Relevant Market—Dissemination of News and Advertising.—A newspaper company's contention that it did not monopolize the dissemination of news and advertising in the Kansas City area because it was in direct and vigorous competition with other mass media engaged in the dissemination of news and advertising, and it could not exclude them from the market or control their prices, was rejected. Specifically, the newspaper company claimed that it had competition from radio and television broadcasting stations, magazines, newsreels, and topical books. "When a

product is controlled by one interest, without substitutes available in the market, there is monopoly power." Also, where "there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others." In determining the relevant market, the court concluded that radio and television stations located outside the Kansas City area, magazines, newsreels, topical books, and specialty publications are not "market alternatives" or effective substitutes for newspapers. The other media were not competitors in the real sense of the word.

See Monopolies, Vol. 1, ¶ 2540.10.

Monopolies—Attempt To Monopolize—Sufficiency of Evidence.—A jury was justified in finding that the advertising director of a newspaper company, publishing a morning and an evening newspaper, attempted to monopolize the dissemination of news and advertising in the Kansas City area. The director's contention that the Government failed to prove that he attempted to monopolize the dissemination of news was rejected. The advertising revenues for which the individual was responsible made up a vast percentage of the total income of the newspaper company; therefore, such revenues helped to support news dissemination. Each was dependent upon the other and each without the other would fall. Furthermore, the evidence established that the director threatened to exclude an individual's name from the news columns of the newspapers if the individual did not take his advertising out of a competitor's publication. Monopolistic control of advertising strikes at the very heart of a competitor's dissemination of news. The effect of the director's advertising practices was "to destroy news publications for whom advertising was their life blood."

See Monopolies, Vol. 1, ¶ 2515, 2610.856.

Monopolies—Monopolization—Practices as Evidence of Monopolization—Dissemination of News and Advertising—Unit Advertising Rates—Combination Subscriptions.—A jury finding that a newspaper company, publishing a morning and an evening newspaper, monopolized the dissemination of news and advertising in the Kansas City area was affirmed. The evidence established that the company sold its morning and evening newspapers to its subscribers in combination only, and that the company required classified and general advertisers to run their advertisements in both of the newspapers at a unit advertising rate. The jury was justified in concluding that the morning and evening newspapers were two separate newspapers with distinct and separate uses for advertisers; that each newspaper was dominant in its own field; that together the newspapers dominated the market; that the unit advertising method was used, notwithstanding the protests of advertisers, with the intent and effect of excluding competition; and that the effect of combination subscriptions was to foreclose the likelihood of subscribers purchasing other competing newspapers. The company had contended that its position of dominance was entirely the result of superior skill, foresight, and industry; and that the purpose of its advertising and subscription rate structures was to enable it to increase its efficiency and to better serve its customers, both advertisers and subscribers.

See Monopolies, Vol. 1, ¶ 2610.856.

Monopolies—Monopolization—Definition of Offense.—In an action charging that a newspaper company monopolized the dissemination of news and advertising in the Kansas City area, a trial court was held to have correctly defined the offense of monopolization. The trial court had instructed the jury that if the newspaper company occupied a monopoly position and that within the statutory period it committed the acts charged in the indictment with the intent to maintain its monopoly or to eliminate competition, then the newspaper company was guilty of monopolization; and that monopolization "means the possession of monopoly power by a party or parties through which power it is possible to exclude actual or potential competitors from any part of the trade or commerce among the several states, provided that he or they have the intent or purpose to exercise that power." It is necessary only to establish the existence of an intent to monopolize coupled with monopoly power.

See Monopolies, Vol. 1, ¶ 2510.100.

Monopolies—Attempt To Monopolize—Definition of Offense.—In an action charging that a newspaper company and the company's advertising director attempted to monopolize the dissemination of news and advertising in the Kansas City area, a trial court was held to have correctly defined the offense of an attempt to monopolize. The trial court had instructed the jury that an attempt to monopolize "means the employment of methods and practices which are utilized for the specific purpose and with the specific intent to achieve or build a monopoly, and which, if successful, would be likely to accomplish such monopolization." The contention that the court should have specifically instructed the jury that the practices employed must have a "dangerous probability" of creating a monopoly was rejected. The trial court's requirement of a finding of "specific intent" plus the likelihood of accomplishment was tantamount to a "dangerous probability."

See Monopolies, Vol. 1, ¶ 2515.10.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Sufficiency of Indictment—Allegations of Acts Constituting Offense.—An indictment charging that a newspaper company and its advertising director attempted to monopolize and monopolized the dissemination of news and advertising in the Kansas City area was held to be sufficient under Rule 7(c) of the Federal Rules of Criminal Procedure since it contained a plain, concise, and definite statement of the essential facts constituting the offenses charged. The indictment charged offenses with sufficient clarity to enable the defendants to properly prepare their defense and with sufficient certainty and definiteness that the trial thereon would be an effective bar to future prosecution for the same acts. In prosecutions under the Sherman Act, there has been no marked reliance upon rigorous common law standards. The indictment did not violate or deny the rights guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.599.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Indictment—Bill of Particulars.—A trial court did not abuse its discretion in denying defendants' motion for a bill of particulars, which was aimed at obtaining in particular the details of the Government's evidence. It is not the function of a bill of particulars to set forth evidentiary detail. Also, there was no showing that the defendants were prejudiced by the denial of their motion. The defendants had examined the documentary evidence relied upon by the Government when the trial court subsequently granted the defendants' motion for discovery and inspection.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.800.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Trial—Admissibility of Evidence—Acts Occurring Prior to Limitations Period.—A trial court did not err in denying defendants' motion for an order fixing the time within which evidence would be admitted to a period of three years (the period of the applicable statute of limitations) prior to the return of the indictment and excluding evidence of events occurring prior to that period. In order to show intent, it was entirely proper for the trial court to receive evidence of a course of conduct engaged in by the defendants over a period of years leading up to the indictment period which might assist the jury in attempting to determine whether or not the defendants possessed that necessary intent during the time covered by the indictment. It would be illogical not to admit evidence as to a course of conduct over many years which manifested an intent to monopolize. In antitrust cases, the Federal courts have long admitted evidence of conduct prior to the statutory period. Also, the trial court did not err in fixing a cut-off date for the evidence.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8029.600.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Trial—Severance.—In a criminal action charging that a newspaper company and its advertising director attempted to monopolize and monopolized the dissemination of news and advertising in the Kansas City area, the trial court did not err in denying the director's motion for severance. Separate trials are not necessarily a matter of right. Persons jointly indicted should be tried together, and the granting of separate trials is a matter of discre-

tion. In the instant case, the trial court repeatedly admonished the jury that certain evidence received was not applicable to the director and carefully charged the jury that the director could be held responsible only for acts performed by him or under his direction. The trial court did not abuse its discretion in denying the motion for severance.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8029.750.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Defenses —Freedom of the Press.—A newspaper company's contentions that a criminal antitrust action against it endangers the freedom of the press guaranteed by the First Amendment to the United States Constitution, and that a newspaper is intimidated if it is subject to prosecution under the Sherman Act whenever it opposes or antagonizes public officials, were rejected. Publishers of newspapers must answer for their actions in the same manner as anyone else. "A monopolistic press could attain in tremendous measure the evils sought to be prevented by the Sherman Antitrust Act. Freedom to print does not mean freedom to destroy. To use the freedom of the press * * * to destroy competition would defeat its own ends, for freedom to print news and express opinions as one chooses is not tantamount to having freedom to monopolize. To monopolize freedom is to destroy it."

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8029.

For the appellants: Elton L. Marshall (Henry N. Ess, Carl E. Enggas, Colvin A. Peterson, Jr., and Watson, Ess, Marshall and Enggas were with him on the brief) for The Kansas City Star Company. Carl E. Enggas (Henry N. Ess, Elton L. Marshall, Melvin J. Spencer, and Watson, Ess, Marshall and Enggas were with him on the brief) for Emil A. Sees.

For the appellee: Earl A. Jinkinson, Attorney, Department of Justice, and Joseph E. McDowell, Attorney, Department of Justice (Edward L. Scheufler, United States Attorney; Victor H. Kramer and Daniel M. Friedman, Attorneys, Department of Justice; Victor R. Hansen, Assistant Attorney General; and Raymond P. Hernacki and Willis L. Hotchkiss, Attorneys, Department of Justice, were with them on the brief).

For prior opinions of the U. S. District Court, Western District of Missouri, Western Division, see 1955 Trade Cases ¶ 68,117 and 1954 Trade Cases ¶ 67,683; for jury instructions of the District Court, see 1955 Trade Cases ¶ 68,040.

Before GARDNER, Chief Judge, and WOODROUGH and VOGEL, Circuit Judges.

[*Indictment—Verdicts*]

VOGEL, Circuit Judge [*In full text*]: The Kansas City Star Company, Roy A. Roberts, its president and chairman of the Board of Directors, and Emil A. Sees, its director of advertising, treasurer and a member of the Board of Directors, were all charged in an indictment with a violation of Section 2 of the Sherman Anti-Trust Act, 15 U. S. C. A. § 2. The indictment was in two counts. The first count charged that the appellants had been and were up to the time of the return of the indictment engaged in an attempt to monopolize interstate trade and commerce in the dissemination of news and advertising. In Count No. 2 the appellants were charged with a monopolization of interstate trade and commerce in the dissemination of news and advertising. Prior to trial, and on motion of the government, the indictment was dismissed as to Roy A. Roberts. After a trial, lasting from January 17, 1955 to February 22, 1955, the jury returned a verdict of guilty as to The Kansas City Star Company on both counts of the indictment and a verdict of guilty as to Emil A. Sees on Count 1 and not guilty on Count 2. The court, concluding that the offense of attempting to monopolize as charged in Count 1 of the indictment merged into the greater offense of monopolization as charged in Count 2, imposed a single penalty of a $5,000.00 fine as to the appellant The Kansas City Star Company, hereinafter referred to as The Star. Appellant Sees, having been convicted on Count 1 only, was punished by a fine of $2500.00. Both parties separately prosecuted an appeal to this court. They were, however, indicted together, tried and convicted together, and will be considered together in this opinion, separate reference being made to each where that becomes necessary or expedient.

[*Sherman Act*]

That portion of the statute under which the indictment was found, 15 U. S. C. A. § 2, is as follows:

> "*Every person who shall monopolize, or attempt to monopolize,* or combine or conspire with any other person or persons, to monopolize *any part of the trade or commerce among the several States,* or with foreign nations, *shall be deemed guilty of a misdemeanor,* and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." (Emphasis supplied.)

The Sherman Act aims at the evils of monopoly and monopolistic practices in interstate trade and commerce. That it can apply to the dissemination of news and advertising there can be no doubt. In a case quite similar to this one, the Supreme Court commented, *Lorain Journal v. United States,* 1951 [1950-1951 Trade Cases ¶ 62,957], 342 U. S. 143, 152:

> "The distribution within Lorain of the news and advertisements transmitted to Lorain in interstate commerce for the sole purpose of immediate and profitable reproduction and distribution to the reading public is an inseparable part of the flow of the interstate commerce involved. See *Binderup v. Pathe Exchange,* 263 U. S. 291, 309; *Stafford v. Wallace,* 258 U. S. 495, 516; *Illinois Central R. Co. v. Louisiana R. Comm'n,* 236 U. S. 157, 163; *Swift & Co. v. United States,* 196 U. S. 375, 398. Unless protected by law, the consuming public is at the mercy of restraints and monopolizations of interstate commerce at whatever points they occur. Without the protection of competition at the outlets of the flow of interstate commerce, the protection of its earlier stages is of little worth."

See also *Associated Press v. United States,* 1945 [1944-1945 Trade Cases ¶ 57,384], 326 U. S. 1, 14, holding trade in news among the several states to be interstate commerce.

In this appeal, both appellants allege many errors in rulings on various motions, the receipts of certain evidence, the exclusion of other evidence, and the court's charge to the jury.

Pre-Trial Orders

[*Sufficiency of Indictment*]

At the outset, appellants moved to dismiss the indictment and each count thereof on the grounds that each count failed to state the particular act or acts charged to constitute the offense with reasonable definiteness and that each count was so vague and indefinite that it did not inform the appellants of the nature and cause of the accusation against them, thereby denying rights guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States and Rule 7(c) of the Federal Rules of Criminal Procedure, 18 U. S. C. A.

The indictment identifies and describes The Kansas City Star Company as being a corporation and the publisher of a morning daily newspaper known as The Kansas City Times, an evening daily newspaper known as The Kansas City Star and a Sunday newspaper known as The Sunday Star. It alleges that The Star also owns and operates radio station WDAF and television station WDAF-TV at Kansas City, Missouri. Sees is described as the director of advertising, treasurer and a director of The Kansas City Star Company. The indictment makes it clear that the geographical area in which the appellants are charged with monopolization and attempt to monopolize news and advertising in metropolitan Kansas City, Missouri, covered the Counties of Jackson and Clay in the State of Missouri and the Counties of Wyandotte and Johnson in the State of Kansas. In addition, it sets forth its definitions of the terms "classified advertising", "display advertising", "local display advertising" and "general advertising". It describes the nature of the trade and commerce of an interstate nature to which the indictment was applicable; that The Times and Star are delivered to 96% of all the homes in metropolitan Kansas City each day; that The Times' total net paid circulation exceeds 353,000 copies daily, The Star's total net paid circulation exceeds 361,000 copies daily; that The Sunday Star exceeds 378,000 copies each Sunday. It sets forth the formation and growth of The Kansas City Star, and the acts and practices upon which it is charged that there was an attempt to monopolize, as well as the acts and practices on the part of the appellants which it is charged resulted in monopolization.

From an examination of the indictment and the particularizations set forth therein, we are convinced that Rule 7(c) of the Federal Rules of Criminal Procedure was satisfied in that the indictment does contain "* * * a plain, concise and definite written

statement of the essential facts constituting the offense charged." We are of the opinion that it charges offenses with sufficient clarity to enable the appellants to properly prepare their defense and with sufficient certainty and definiteness that trial thereon would be an effective bar to future prosecution for the same acts. *United States v. Cruikshank,* 1875, 92 U. S. 542, 566, 568; *Bennett v. United States,* 1913, 227 U. S. 333, 338; *Berger v. United States,* 1935, 295 U. S. 78, 82; *Hewitt v. United States,* 8 Cir., 1940, 110 F. 2d 1, 6, cert. den. 310 U. S. 641; *Claiborne v. United States,* 8 Cir., 1935, 77 F. 2d 682, 689. In prosecutions under the Sherman Act, it would seem particularly true that there has been no marked reliance upon rigorous common law standards. E.g., *Nash v. United States,* 1913, 229 U. S. 373; *Knauer v. United States,* 8 Cir., 1916, 237 F. 8; *United States v. American Medical Association,* C. A. D. C., 1940 [1940-1943 TRADE CASES ¶ 56,010], 110 F. 2d 703, 715, 716, aff'd. [1940-1943 TRADE CASES ¶ 56,254] 317 U. S. 519; *United States v. Armour & Co.,* 10 Cir., 1943 [1940-1943 TRADE CASES ¶ 56,288], 137 F. 2d 269, 270.

We are satisfied that the indictment complies with the provisions of Rule 7(c) and does not violate or deny the rights guaranteed by the Fifth and Sixth Amendments to the Constitution. There was no error in overruling appellants' motion.

[*Discretion of Trial Court*]

All of the pre-trial motions hereafter discussed are addressed to the discretion of the trial judge. It is a fundamental rule of our appellate procedure that the trial judge will not be reversed after using his considered judgment on discretionary orders provided there has been no abuse of such discretion. With this rule in mind, we proceed to examine separately the pre-trial motions and the alleged erroneous orders issued as a result of those motions.

[*Bill of Particulars*]

Subsequent to the court's denial of the motion to dismiss the indictment, appellants made a motion for a bill of particulars, the denial of which is cited as error. An examination of the motion for a bill of particulars convinces us that it was aimed at obtaining in particular the details of the government's evidence. It is not the function of a bill of particulars to set forth evidentiary detail. Furthermore, the granting or denial of a motion for a bill of particulars is generally addressed to the sound discretion of the trial court. The rulings of the trial court thereon will not be disturbed excepting for clear abuse of that discretion. *American Tobacco Co., et al. v. United States,* 6 Cir., 1944 [1944-1945 TRADE CASES ¶ 57,317], 147 F. 2d 93, 117, aff'd. [1946-1947 TRADE CASES ¶ 57,468] 328 U. S. 781 (an anti-trust case):

> "The granting or denying of demands for particulars is a matter within the discretion of the trial court and, unless there is an abuse thereof, its actions will not be disturbed."

In *Sawyer v. United States,* 8 Cir., 1937, 89 F. 2d 139, 141, this court said:

> "If the language of the indictment is so far definite and certain as to safeguard all of the rights of a defendant and to enable him properly to prepare his defense, a bill of particulars will not be required. *Bedell v. United States* (C. C. A.) 78 F. (2d) 358. The granting or the refusal of a motion for a bill of particulars is a matter that is governed by the sound judicial discretion of the trial court, and unless it shall be shown affirmatively that such discretion has been abused by the trial court a refusal to require a bill of particulars will not be disturbed by an appellate court."

There is no showing here that appellants were prejudiced by the court's denial of their demand. This is particularly true in light of the fact that appellants subsequently on August 13, 1954, filed a motion for discovery and inspection which the court granted by order on September 2, 1954, making available to the appellants all documents covered by previous orders impounding such documents at the request of the grand jury. The case did not go to trial until January 17, 1955—apparently a sufficient length of time for the appellants to examine and become familiar with the documentary evidence relied upon by the government.

[*Evidence—Cut-Off Date*]

The appellants moved the court for an order fixing the time within which evidence would be admitted to a period of three years [1] prior to the return of the indictment

[1] 18 U. S. C. A. § 3282 provides for a three-year limitation to prosecutions such as here involved.

and requested that evidence of events occurring prior thereto be excluded. In denying that motion, the trial court fixed January 1, 1936, as the cut-off date. Evidence of events occurring prior thereto was not to be admitted.

Intent was a vital element of the charges against the appellants. *Times-Picayune v. United States,* 1953 [1953 Trade Cases ¶ 67,494], 345 U. S. 594, 626. Where that is true, "* * * it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment". *Wood v. United States,* 16 Peters 341, 358. In *United States v. Pullman Co., et al.* [1940-1943 Trade Cases ¶ 56,272], 50 F. Supp. 123 (E. D. Pa., 1943), aff'd. [1946-1947 Trade Cases ¶ 57,550] 330 U. S. 806, an anti-trust case, the court, in commenting on evidence prior to the indictment period, stated at page 126:

> "We think they are competent evidence to show defendants' state of mind at the time. The time, of course, was a good while ago, long before the Sherman Act. But if such declarations point in the direction of a path which has been followed continuously since their adoption, it is not unfair to take them as the initiation of a consistent Pullman policy. *Standard Oil Company of New Jersey v. United States,* 1911, 221 U. S. 1, 46, 47, 75, 76, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A., N. S., 834, Ann. Cas. 1912D, 734; *United States v. Reading Company,* 1920, 253 U. S. 26, 43-45, 40 S. Ct. 425, 64 L. Ed. 760."

In order to show intent, it was entirely proper to receive evidence of a course of conduct engaged in by the appellants over a period of years leading up to the indictment period which might assist the jury in attempting to determine whether or not the appellants possessed that necessary intent during the time covered by the indictment. It would be illogical not to admit evidence as to a course of conduct over many years which manifested an intent to monopolize. But we need not use a rationale to explain this state of the law. The federal courts in anti-trust cases have long admitted evidence of conduct prior to the statutory period. *Standard Oil Co. v. United States,* 1911, 221 U. S. 1, 75-76; *United States v. Pullman Co., supra; American Tobacco Co. v. United States,* 1944, 6 Cir., [1944-1945 Trade Cases ¶ 57,317], 147 F. 2d 93, aff'd. [1946-1947 Trade Cases ¶ 57,468] 328 U. S. 781. The evidence here of prior conduct was admitted by the trial court and the jury instructed that:

> "* * * you may consider all evidence of acts which occurred prior to January 6, 1950, insofar as it may show a design or intent or pattern of conduct of the defendants with respect to their actions after January 7, 1950."

They were specifically told:

> "Under the law the defendants cannot be convicted for acts which occurred prior to the three years immediately preceding the date of indictment."

After the court's denial of appellants' motion to confine the evidence to the three-year period, the appellants objected to the 1936 cut-off date for evidence as being arbitrary and without regard to their own relevant evidence. In fixing a cut-off date, the trial court's purpose was to eliminate remote evidence and keep the trial within reasonable bounds. Apparently the trial court felt that 1936 was the most practical date for such a cut-off. The trial court is given a wide range of discretion in exercising its right and duty to control the trial and keep it within reasonable time limits. *United States v. Socony-Vacuum Oil Co.,* 1940 [1940-1943 Trade Cases ¶ 56,031], 310 U. S. 150, 229-231. In considering the numerous witnesses and the mass of evidence, some conceivably going back as far as 1880, the founding date of The Star, the trial court was exercising its considered judgment in fixing the cut-off date. We see no justification in the record for disturbing the court's determination.

[*Continuances and Adjournments*]

Complaint is made of the trial court's overruling of appellants' motion for a continuance filed on January 10, 1955. Such a motion is addressed to the sound discretion of the trial court. In the absence of a pure abuse of such discretion, the action of the trial court will be sustained. We find no such abuse here. We come to the same conclusion with reference to several motions for adjournment made during the trial.

[*Severance*]

Prior to trial, Sees filed a motion for severance which he claimed was improperly and erroneously denied. Separate trials are not necessarily a matter of right. See Rule 8(b) Federal Rules of Criminal Procedure,

18 U. S. C. A. In *Mellor v. United States*, 8 Cir., 1947, 160 F. 2d 757, cert. den. 331 U. S. 848, this court, speaking through Judge Woodrough, stated at page 761:

"It is contended that it was improper to join two defendants in this single count indictment charging a substantive offense and not a conspiracy. However, the right to charge two defendants jointly in a single indictment is recognized in a number of well reasoned cases, which hold that such procedure does not result in misjoinder of defendants, nor render the indictment subject to attack for duplicity."

In dealing with a similar contention, the Court of Appeals for the District of Columbia, in *Hall v. United States*, C. A. D. C., 1948, 168 F. 2d 161, 163, cert. den. 334 U. S. 853, stated:

"Hall and Gray assert that their motions for severance were improperly denied. It is the general rule that persons jointly indicted should be tried together, and granting separate trials is a matter of discretion. The mere fact that admissions have been made by one which are not evidence as against the others is not a conclusive ground for ordering the parties to be tried separately. *Lucas v. United States*, 70 App. D. C. 92, 104 F. 2d 225."

Even where defendants have been separately indicted the ordering of a joint trial by the District Court may be sustained under the provisions of Rule 13 of the Federal Rules of Criminal Procedure, 18 U. S. C. A. In the case of *Malatkofski v. United States*, 1 Cir., 1950, 179 F. 2d 905, the Court of Appeals stated, at page 909:

"Since the defendants were alleged 'to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses', they might, under Rule 8(b) of the Federal Rules of Criminal Procedure, 18 U. S. C. A. have been joined as defendants in a single indictment. Under these circumstances the District Court was authorized by Rule 13 to order the indictments to be tried together. Each defendant moved for a separate trial on the general ground (no details being specified) that standing trial with the other defendant would be prejudicial. These motions for severance were denied. In this there was no error. The matter lay in the discretion of the trial judge, and no extraordinary facts appear from which it could be said that denial of the motions was an abuse of discretion. See *Stilson v. United States*, 1919, 250 U. S. 583, 40 S. Ct. 28, 63 L. Ed. 1154. Throughout the trial, whenever evidence was introduced which was competent against one defendant and incompetent against the other, the judge duly admonished the jury that the evidence was received only as against the one defendant and must be disregarded by them in their consideration of the case of the other defendant. See *United States v. Ball*, 1896, 163 U. S. 662, 672, 16 S. Ct. 1192, 41 L. Ed. 300."

The Supreme Court has lent finality to the rule of discretion on the part of the trial court in determining a motion for severance in the recent case of *Opper v. United States*, 1954, 348 U. S. 84, 95:

"It was within the sound discretion of the trial judge as to whether the defendants should be tried together or severally and there is nothing in the record to indicate an abuse of such discretion when petitioner's motion for severance was overruled. The trial judge here made clear and repeated admonitions to the jury at appropriate times that Hollifield's incriminatory statements were not to be considered in establishing the guilt of the petitioner. To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial."

See also Note and cases cited in 70 A. L. R. 1172.

In this case, the court repeatedly throughout the trial admonished the jury that certain evidence received was not applicable to Sees and carefully charged the jury that Sees could be held responsible only for acts performed by him or under his direction. The fact that the jury returned a verdict of not guilty on the second count as to Sees but nevertheless found The Star guilty shows they gave individual treatment to each and lends impetus to the statement that "our theory of trial relies upon the abiltiy of a jury to follow instructions." The refusal of the trial court to grant Sees' motion for severance was a valid exercise of discretion and in the absence of a showing that such discretion was abused is not reversible here. No error was committed in denying Sees' motion for severance.

EVIDENCE, TRIAL RULINGS AND INSTRUCTIONS
[*Competitive Position*]

The Kansas City Star was founded in 1880. Among its competitors at that time were the Kansas City Journal, founded in 1854, and The Kansas City Times, founded in 1867. In 1894 The Sunday Star was established. In 1901 the owner of The Kansas City Star acquired The Times and thereafter published The Kansas City Times (morning), The Kansas City Star (evening) and The Sunday Star. In 1905 the Kansas City Post was established. The Journal and the Post were merged in 1922. The Kansas City Star Company (the present appellant) was incorporated in 1926, at which time it commenced operation of radio station WDAF, later owning and operating television station WDAF-TV. In 1928 the morning Journal discontinued publication. The Sunday Journal discontinued in 1941 and the evening Journal discontinued in March, 1942.

The metropolitan Kansas City area in which the appellants were charged with attempting to monopolize and monopolization of interstate trade and commerce in the dissemination of news and advertising is made up of four counties: Jackson and Clay in the State of Missouri and Wyandotte and Johnson in the State of Kansas. Within this area there are located four major urban communities: Kansas City, Missouri; Kansas City, Kansas; North Kansas City, Missouri; and Independence, Missouri. This metropolitan area contains a population of approximately 854,000 persons. During the indictment years The Star advertised and the evidence justified the conclusion that it possessed 95% coverage of all households in the four counties referred to. In 1952, one of the indictment years, there were seven daily newspapers published in the four-county area in addition to those published by The Star. These daily newspapers were The Kansas City Kansan, The Independence Examiner, The Excelsior Springs Standard, The Independence Daily News, The Daily Record, The Kansas City News-Press, and The Daily Drovers Telegram.[x] The Star's dominance in the area is evidenced by circulation figures.

	"1951 [1]		1952 [1]	
	Average Daily Circulation	Per Cent of Total	Average Daily Circulation	Per Cent of Total
1. Kansas City Star Company				
Kansas City Times (M)	351,126 [2]	46.58	350,206 [2]	46.74
Kansas City Star (E)	360,143 [2]	47.78	358,231 [2]	47.81
Total Times and Star	711,269 [2]	94.36	708,437 [2]	94.56
2. Kansas City Kansan (E)	29,084 [2]	3.86	27,873 [2]	3.69
3. Independence Examiner (E)	7,754 [3]	1.03	7,862 [3]	1.05
4. Excelsior Springs Standard (E*)	3,189 [3]	.42	3,283 [3]	.44
5. Independence Daily News (E ex. Sat.)	1,448 [3]	.19	550 [3]	.07
6. Daily Record (D)	1,015 [3]	.14	1,004 [3]	.13
7. Daily News Press (D)	Not published		445** [3]	.06
Total Kansas City	753,759	100.00	749,454	100.00

x A trade journal limited to livestock reports.
[1] Figures refer to twelve-month period ended September 30 of each year.
[2] Source: Audit Bureau of Circulations, Audit Reports.
[3] Source: Statement of ownership, management and circulation required by Act of Congress of August 24, 1912 (Title 39, U. S. Code, Sec. 233).
* Tuesday, Wednesday, Thursday and Friday.
** Three months preceding October 1, 1952.
M—Morning
E—Evening
D—Daily."

Evidence reflecting the advertising revenue of daily newspapers in the Kansas City area for 1951 and 1952 discloses that in 1951 the appellant Star received a net advertising revenue of $17,774,581.17 or 94.11% of the total. The Kansas City Kansan received $716,556.79 or 3.79% of the total. The other newspapers received lesser percentages. In 1952, the appellant Star received a net advertising revenue of $18,655,629.64 or 94.08% of the total. The Kansas City Kansan received $739,509.36 or 3.73% of the total. Other daily newspapers received smaller percentages. A tabulation of advertising revenue from daily newspapers, radio and television stations located in the area for the years 1951 and 1952 indicates that the appellant Star in 1951 received $19,938,484.68, or 84.24% of the total. Its nearest competitor, The Kansas City Kansan, received in 1951 a total of $1,022,003.71, or 4.32% of the total, with other competitors having smaller percentages. In 1952, The Star received of such advertising revenue $21,350,721.97, or 85.40% of the total. Its nearest competitor, The Kansas City Kansan, received $1,044,302.75, or 4.18% of the total, with other competitors having lesser percentages.

The Star's "dominant" position as to both circulation and advertising in the daily newspaper field in metropolitan Kansas City becomes apparent.

[*Exclusion of Competition—Advertising*]

The government sought to show that The Star's dominant position gave it the power to exclude competition and that it, through appellant Sees and others, exercised such power for the purpose and with the intent of excluding competition. Evidence tended to show and the jury was justified in concluding that The Star was an indispensable advertising medium for many advertisers and that it threatened advertisers with refusal to take their ads if they advertised in competitive publications. As an example, the manager of three theaters in Kansas City, Missouri, was told that his ad should be taken out of the Journal-Post and that if he didn't do so, his advertising would be left out of The Kansas City Star and Times. The manager of a store in Kansas City who had been advertising in the Journal-Post and who wanted to get his ads back into The Star was given to understand that it would be on an exclusive basis only. The then advertising manager of The Star instructed a Star solicitor to see one of The Star's regular advertisers who was also using the Journal-Post, "* * * to go over there and either get him out of the Journal or get him out of The Star." Appellant Sees instructed solicitors to get advertisers out of the Journal-Post. The local advertising manager for Sears, Roebuck was told by a Star solicitor that The Star did not like to see ads running in the News Press and stated, "If you don't desist, you will either injure your position in the Kansas City Star or if we have additional newsprint to allocate you may not get your share." Appellant Sees, speaking in behalf of the appellant Star, told an advertiser, "That is all right, you can go ahead and advertise in that medium if you want to, but if you have other mediums to advertise in, then you don't need the Kansas City Star." During the newsprint shortage of 1946-1947 an advertiser who planned on using other advertising publications was told by a Star solicitor that if he continued to use other media "the chances were that the space in the Star would no longer be available * * *." These are but some of the instances shown in the record of the use of threats and coercion on the part of The Star and Sees to destroy competition.

Other evidence is disclosed in the record whereby the jury could have concluded that advertisers were threatened with loss of desirable position in The Star papers if they placed ads in competitive publications. The evidence indicated The Star extended its discipline to potential competitors. When several Kansas City merchants had made short term contracts with Prom, a new monthly magazine for children of school age, Star solicitors informed them as to the merits of terminating their use of Prom. As the merchants began to receive poor positions in The Star, they got the hint and at least two withdrew the Prom advertisements.

The course of conduct of The Star and Sees continued on through the preliminary period subsequent to 1936 into the indictment years extending from January 7, 1950, through January 6, 1953. A store manager testified that in 1952 and prior years he would receive from The Star clippings of ads he had placed in other media. A solicitor told him that his other ads were looked upon unfavorably and that if he wished a

more favorable position in The Star it would be better if he confined his advertising only to The Star. As a result, the manager discontinued his use of a rival paper, the News Press. A dance studio manager testified that in 1952 he found the studio's ad missing from the usual position in The Sunday Star. One of the studio owners said that she had spent considerable time in search for it and then complained to The Star. In explanation of the change of position, a solicitor told her, "Well, I assumed that you didn't appreciate the place which you have been getting because I notice you have an ad in the News Press." The ad was withdrawn from the News Press and the following week the studio ad reappeared in the customary position in The Sunday Star. A patron of 18 years discovered in July of 1952 that his ad was much further back than usual. The reason, as Sees explained while pointing to a rival paper was, "Do you have to advertise, do you have to run such a large size ad in that particular paper?"

It may well have been, as The Star suggests, that innocent motives dictated the placing of ads in one position or another but the jury decided, as was their prerogative, that the motive was otherwise.

Evidence in the record would have justified the jury in finding that with some advertisers The Star threatened to discontinue their ads unless The Star was given "equal space" with competitive publications, regardless of how limited their circulation and the fact that "equal space" in a large publication such as The Star would cost a great deal more than the same space in one of its small competitors. The record further justifies the conclusion that some advertisers were threatened with having their credit cut off where they also used competitive publications for advertising.

[*Dissemination of News*]

An example of the use of the dissemination of news to control advertising is illustrated in the instance of a big league baseball player who was a partner in a florist's shop in Kansas City. The florist shop also advertised in the Journal-Post. A Star solicitor informed one of the partners that The Star would discontinue publicizing the baseball player if the florist shop continued using the Journal-Post for advertising, Sees instrucing a Star solicitor to tell them, "* * * to get out of the Journal-Post or he wouldn't get any sports, that he wouldn't get any cooperation from the sports desk on anything that he did in organized baseball.' Sees instructed the solicitor, "* * * Sees told me that if, that if I didn't get the ad in the Post to go out and tell Gleeson that if he knocked 100 home runs in the year his name would never appear in the paper outside of the box score and it got so hot to me that I told Gleeson to come down to The Star to get me off the hook with Mr. Sees," and the solictor for The Star then told the advertiser, "I told him that they wanted him out of the Post and that if he didn't get out of the Post that he wouldn't get much sport write-up from the sport desks."

[*Advertising Quota*]

The record discloses instances of the appellants using the dominant position of The Star to dictate to advertisers how much of their advertising quota would have to be spent with The Star. An instance in 1950 is illustrative: The representative of an advertising agency which had charge of advertising a forthcoming auto show talked with appellant Sees and was told, "Well, we can make or break your show," and was told what portion of their budget was to be spent in The Star papers. Sometimes the threat to close an account was enough to curtail use of other media. In 1951, a cloth supplier to The Star who placed ads in The Star also placed another ad in the News Press. A Star solicitor subtly suggested that it was not "right" to run an ad elsewhere than in The Star. To this the firm agreed. The ad in the News Press was promptly and permanently withdrawn because they "appreciated the business * * * from The Star."

[*Radio and Television Stations*]

From 1949 to the date of the return of the indictment The Star owned WDAF-TV, the only television station in the metropolitan Kansas City area. In addition, it owned radio station WDAF. The evidence in the record would justify the jury in concluding that The Star used its dominant position to aid in the newspaper advertising, making it clear in some instances that advertisers could not buy time on WDAF-TV unless they also advertised in The Star papers. For example, in 1952 The Star refused time on WDAF-TV to a furniture company. A

Star solicitor called attention to the fact that the company did not use The Star columns. When the solicitor was told that they had no need for newspaper advertising, he then in effect told them that if that were the case the company had no need for television and refused the request for time.

Another instance of using television as a weapon to exclude competition was related by a part owner of Television Preview magazine. In 1952, one Dean Fitzer, general manager of WDAF-TV and a director of The Star, told the part owner, in response to a request for television time, "We won't tell you that we can't sell you time, but just don't ask me for it, because I won't have any." And if this was not quite clear enough, he added, "I don't want to see this magazine on television." The Star having the only television outlet available in the area, Television Preview was unable to advertise in the most logical medium—television.

These and other instances indicate that the television and radio facilities of The Star were being used more as appendages to the successful operation of The Star than they were being used as independent entities.

[*Joint Subscriptions*]

It was The Star's practice to sell its daily newspapers to its subscribers in combination only. Subscribers were required to subscribe to the morning Times and the evening Star in combination with The Sunday Star for a total of thirteen papers per week for a single price (all papers could be individually purchased at newsstands). This joint subscription was an invariable policy and insisted upon under any circumstances.

[*Unit Advertising Rates*]

With reference to classified advertisers and general advertisers, The Star required that they run their advertisements in both the morning Times and the evening Star, regardless of the desire of the advertisers to use only one of the papers. The evidence indicated that The Star used its dominant position to force advertisers to advertise in both the morning Times and the evening Star regardless of their wishes and regardless of the fact that some of them felt that because of their particular type of business either the morning issue of The Times or the evening issue of The Star was the only advertising vehicle from which they derived benefit. It was the government's claim that such forced combination of The Times and Star advertising had the effect of foreclosing competition in that advertisers who had of necessity to depend upon either The Times or The Star and were forced to use both could not advertise in competing publications because of their unnecessary expenditures in the forced combination.

The Star contends that it publishes but one newspaper of thirteen issues per week; that these issues are sold in combination in order that the reader may obtain a complete round-the-clock news report, thus enabling The Star's readers to get news more frequently than is possible in a 24-hour newspaper. The morning paper is designated "The Kansas City Times" but nevertheless carries in parentheses over its name "The Morning Kansas City Star."

It was the position of the government that the morning Times and the evening Star constituted two separate and distinct newspapers owned by The Star and that it was the intention of The Star to exclude competition by means of a forced combination subscription policy and unit advertising rate; that it maintained the subscription rate at an arbitrarily and unreasonably low level during the period when the most serious competition existed, that is, while the Journal-Post was still being published, and that in April, 1942, a month after the Journal-Post ceased publication The Star raised its subscription rates. The government points out that from 1938 to 1941 The Star's total revenue remained relatively constant, whereas starting with the demise of the Journal-Post and the increase in subscription rates immediately thereafter The Star's revenue went from $7,924,516.66 in 1941 to $10,231,883.47 in 1943, while its operation expenses declined from $6,530,757.24 to $6,497,837.31 during the same period.

It is The Star's claim that its survival and present position of dominance were entirely the result of superior skill, foresight and industry; that its continuous growth and expansion were the result of efficient management and public acceptance; that its thirteen issues per week were published in such a manner as to fully and efficiently utilize its plant equipment and personnel; that its advertising and subscription rate structures were to enable it to increase its efficiency and to better serve

its customers, both advertisers and subscribers. It asserts that its unit advertising rates are legal and that the court erred in charging that the use thereof could constitute a monopolization.

[*Separate Newspapers*]

In the first place, appellants' contention is prefaced with the assumption that The Star published but one newspaper of thirteen issues per week and not two newspapers, the morning Times and the evening Star, as contended by the government. On this point, the trial court commented to the jury:

"The papers apparently are distinct in appearance, except that the morning paper carries the parenthetical heading stated aforesaid, that it is the morning edition of The Kansas City Star and it carried entirely different news, different syndicated columns, different comics,"

but stated:

"* * * you must consider whether The Kansas City Times and The Kansas City Star are separate and distinct newspapers, for obviously the forced combination could operate only between two newspapers and not between editions of the same paper."

We think a question of fact was raised and that it was properly left for the determination of the jury. In contending that the unit advertising plan was legal, appellants place substantial reliance upon *Times-Picayune Publishing Co., et al. v. United States, supra,* 1953 [1953 Trade Cases ¶ 67,494], 345 U. S. 594, wherein the United States Supreme Court reversed the trial court and held that the unit advertising rate therein involved was not a violation of the Sherman Anti-Trust Act. The *Times-Picayune* case was, in the last analysis, determined on the basis of a failure of proof. Tying arrangements in advertising may be in violation of the Sherman Act, but the Supreme Court found in the *Times-Picayune* case that the record there did not justify that conclusion. The Supreme Court has said that tying or unit arrangements are not of themselves unlawful, but also makes it manifest that neither are they of themselves lawful. As with most cases, tying arrangements must be judged amidst the circumstances and surroundings in which they operate. The Supreme Court thus concludes, 345 U. S. 594, 627:

"* * * this record does not establish the charged violations of § 1 and § 2 of the Sherman Act. We do not determine that unit advertising arrangements are lawful in other circumstances or in other proceedings. *Our decision adjudicates solely that this record cannot substantiate the Government's view of this case.*" (Emphasis supplied.)

Unlike *Times-Picayune,* but comparable to the situation presented in the *Lorain Journal Co., et al. v. United States, supra,* 1951 [1950-1951 Trade Cases ¶ 62,957], 342 U. S. 143, we think the record here could justify the jurors' conclusion that the morning Times and evening Star were two separate newspapers with distinct and separate uses for advertisers; that each was dominant in its own field; that together they dominated the market both morning and evening; and that the unit advertising method was used, notwithstanding the protests of advertisers, with the intent and effect of excluding competition. As to the forced combination rate, we think the jurors could properly conclude that the effect upon the average subscriber who must take thirteen papers a week is to foreclose the likelihood he will purchase other competing papers. The result on circulation of smaller papers in the area is self-evident. We find no error in the court's submission of these issues to the jury.

[*Monopolization*]

The Star argues that the court prejudicially erred in overruling its motion for judgment of acquittal for the reason that the evidence was insufficient as a matter of law to establish that it possessed a monopoly of the dissemination of news and advertising in Kansas City and in the surrounding territory. The Star claims that it did not have a monopoly of the dissemination of news and advertising and that effective competition existed in the dissemination of each. Size in itself does not create an unlawful monopoly within the meaning of the Sherman Anti-Trust Act, nor does that Act place a premium upon successful business operation. "The purpose of the Sherman Anti-Trust Act is the preservation of a system of free competitive economic enterprise and the protection of the public against the evils incident to monopolies * * * tending directly toward unreasonable suppression or restraints of interstate trade or commerce." 58 C. J. S. Monopolies § 17, p. 972. The Act aims to secure equality

of opportunity and the protection of the public against the evils incident to monopolistic practices. If The Star here enjoyed a substantial monopoly in the dissemination of news and advertising, and used power therefrom to effectively harm or destroy free competition and did so with the intent to achieve that end, the statute has been violated. There need be no showing of absolutism. If the dominance of The Star in the news and advertising fields gave it the power to thereby effectively destroy competition and it acted with that intent, then monopolization within the meaning of the Sherman Anti-Trust Act has been established. As pointed out by Judge Learned Hand in *United States v. Associated Press, et al.,* D. C. S. D. N. Y. 1943, 52 F. Supp. 362, 371, and quoted approvingly by the Supreme Court in affirming that decision, *Associated Press, et al. v. United States, supra,* 1945 [1944-1945 TRADE CASES ¶ 57,384], 326 U. S. 1, 17:

> "* * * monopoly is a relative word. If one means by it the possession of something absolutely necessary to the conduct of an activity, there are few except the exclusive possession of some natural resource without which the activity is impossible. Most monopolies, like most patents, given control over only some means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; *his monopoly is measured by the handicap he can impose.*" (Emphasis supplied.)

[*Relevant Market*]

The Star claims that it is in direct and vigorous competition with other mass media engaged in the dissemination of news and advertising and that it could not exclude them from the market or control their prices.

The indictment makes it clear that the appellants were charged with attempting to monopolize and monopolizing the dissemination of news and advertising in newspapers and on radio and television broadcasting stations in the four-county area referred to. In other words, the appellants were charged with attempting to monopolize and monopolizing trade in the media in which they did business. The Star refers to the other daily newspapers in the area and to the fact that in 1952 there were 78 weekly newspapers and suburban papers published in the four-county area which it claims disseminated news and advertising in competition with the appellant. The Star also claims that it received competition from radio and television stations, magazines, both monthly and weekly, newsreels, topical books, etc., from which it argues that the evidence was wholly insufficient to sustain the verdict that it had monopolized in the dissemination of news and advertising. What was The Star's market control and who were its competitors? In searching for the answer to that question the appellants rely strongly on the case of *United States v. E. I. du Pont de Nemours & Co.,* 1956 [1956 TRADE CASES ¶ 68,369], 351 U. S. 377. In that case it was shown that du Pont produced approximately 75% of the cellophane sold in the United States, but that cellophane constituted less than 20% of all flexible packaging materials sold in the United States. The trial court found that the relevant market for determining the extent of du Pont's market control was the market for flexible packaging materials and that competition from other materials in that market prevented du Pont from possessing monopoly powers in its sales of cellophane. The Supreme Court sustained. In so doing, it stated at page 394:

> "When a product is controlled by one interest, without substitutes available in the market, there is monoply power. Because most products have possible substitutes, we cannot, as we said in *Times-Picayune Co. v. United States,* 345 U. S. 594, 612, give 'that infinite range' to the definition of substitutes. * * *
>
> "But where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. * * * (page 395) *In considering what is the relevant market* for determining the control of price and competition, *no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal.*" (Emphasis supplied.)

In this case we do not think that radio stations and television stations located outside the metropolitan area herein described, magazines, newsreels, topical books, specialty publications, etc., are "market alternatives" or effective substitutes such as was meant by the Supreme Court in the *du Pont*

case. In that case, the Supreme Court also made clear that the market which must be examined to determine the existence of monopoly power will vary with the part of commerce under study. The considerations that go to determine The Star's relevant market must be with due regard to the realities of newspaper advertising. That is what is meant when the Supreme Court speaks about narrowing the infinite range that market substitutes could encompass. *Times-Picayune v. United States, supra,* at page 612. In footnote 31, at page 612 of the *Times-Picayune* case, the Supreme Court makes specific reference to the kind of market with which we are here concerned:

> "The advertising industry and its customers, for example, markedly differentiate between advertising in newspapers and in other mass media. See, *e. g.,* Frey, Advertising (2d ed. 1953), cc. 12, 15; Duffy, Advertising Media and Markets (2d ed. 1951), cc. 3, 4; Hepner, Effective Advertising, c. 20 (1949); Borden, Taylor and Hovde, National Advertising in Newspapers, *passim* (1946); Sandage, Advertising Theory and Practice (3d ed. 1948), cc. XX, XXI."

The other media mentioned by appellants were not competitors in the real sense of the word and this is true in both advertising and news. Magazines are not effective alternatives for the daily newspapers and certainly the grocer who desires to advertise a specialty in some of his items and has only The Star publications for daily use would hardly find a monthly or weekly magazine an effective substitute. In view of the dominant position The Star enjoyed in the field of advertising and news, the court's instructions on this point were nevertheless eminently fair. The court instructed the jurors that they could take into consideration the existence of a wide range of competing media to determine if The Star was in a monopolistic position, (although the relevant market was restricted to metropolitan Kansas City throughout the trial). While the court commented that weekly and neighborhood newspapers could scarcely be considered sizeable competitors, it nonetheless ended these expressions of opinion by cautioning the jurors that such statements did not imply guilt or innocence, and that the jurors would be the final judges as to what was or was not competition. From these instructions, it is quite clear that the jurors could have considered as sizeable competitors those which the court thought were not, and that other media, with a small field of circulation compared to that of The Star, were actually a bar to monopoly.

[*Acquisition of Power—Legality*]

As to The Star's claim that its position was legally acquired and was the result of superior skill, foresight and industry, we have already stated that size alone does not spell out an unlawful monopoly within the meaning of the Sherman Act. See *United States v. International Harvester Co.,* 1927, 274 U. S. 693, 708. It has, however, been noted that size often affords an opportunity for abuse. *United States v. Swift & Co.,* 1932 [1932-1939 TRADE CASES ¶ 55,005], 286 U. S. 106, 116. There are instances innumerable where skill, foresight and industry as well as happenstance created dominance and no charge of an illegal monopoly could be predicated thereon. If the evidence here disclosed nothing more than that The Star held a position of dominance as the result of the undoubted ability, ingenuity, intelligence and industry of those who directed its activities, this case should fall. It is with the power created by that monopolistic or dominant position, the exercise of that power and the intent with which it is exercised to destroy competion with which we are here concerned. Whether there existed monopolistic power, the intent to destroy competition and the exercise of the power so to do were questions of fact for the jurors, whose province and prerogative to so determine are too often lost sight of in prosecutions of appeals from their judgments. In the last analysis, it was for the jurors to say whether The Star possessed an unlawful monopoly and whether it exercised monopolistic power with the intent and for the purpose of destroying competition. The role of the trial judge was to see that all competent evidence that was offered came before the jury, that incompetent evidence was excluded, and that the jurors were fully instructed on the applicable law. The role that this as an appellate court has is to determine whether the trial judge committed prejudicial error in his rulings or charge and whether there was substantial evidence from which the jury might have concluded that the appellants were guilty.

[*Substantial Evidence*]

In considering the question of whether or not there is substantial evidence in the

record to sustain the verdicts of guilty, we bear in mind that it is not for us to weigh the evidence nor to judge the credibility of the witnesses. If there is substantial evidence in the record viewed in the light most favorable to the government, the verdicts of the jury must be sustained. *Glasser v. United States,* 1942, 315 U. S. 60, 80. In *Myres v. United States,* 8 Cir., 1949, 174 F. 2d 329, 332, cert. den. 338 U. S. 849, this court said:

> "In determining the sufficiency of the evidence to support the verdict of the jury, this Court must take that view of the evidence which is most favorable to the government, and give to the government the benefit of all inferences which reasonably may be drawn in its favor. *Affronti v. United States,* 8 Cir., 145 F. 2d 3, 5, and cases cited."

From an examination of the voluminous record, which by leave of court was printed in its entirety and submitted here, we think it perfectly clear that The Star's position in metropolitan Kansas City was of such dominance in the field in which it did business during the indictment years that it could be found by the jury that it possessed monopoly power, that it was an indispensable medium of advertising for some advertisers (See *Lorain Journal, et al. v. United States, supra,* 1951 [1950-1951 TRADE CASES ¶ 62,957], 342 U. S. 143, 152), that its position gave it the power to exclude competition, and that it exercised such power for the purpose and with the intent so to do, within the meaning of the Sherman Anti-Trust Act. The Star's motion for judgment of acquittal was properly denied.

[*Failure of Competitor*]

It is strenuously urged on this appeal by The Star that it was not responsible for the bankruptcy and suspension of the Journal-Post and that the trial court prejudicially erred in excluding evidence offered by The Star as to the operation of the Journal-Post and the economic and other causes for the Journal-Post's suspension and bankruptcy. The Journal-Post suspended publication during the preliminary period prior to the indictment years. The government introduced evidence with respect to appellant's coercion of advertisers who used the Journal-Post. The purpose of this evidence was to show intent and a course of conduct engaged in by The Star and by Sees that continued into the indictment period. We think the trial court was correct in excluding the proffered testimony. The reason for the failure of the Journal-Post was not an issue in this case. That failure may have been due to mismanagement, lack of skill and industry or a variety of other reasons, but whatever they were, they would not excuse the appellants' actions if such actions were a violation of the law. If The Star here was guilty of attempting to monopolize and monopolizing and Sees was guilty of attempting to monopolize, then the acts of the Journal-Post and the reasons for its demise are not a defense. To have allowed the offered testimony would have set the jurors off on a determination of an issue foreign to the real problems before them. On the other hand, the actions of the two appellants in dealing with the advertisers in the Journal-Post were competent to show intent and course of conduct. This case was not concerned with the activities of the Journal-Post but with those of the appellants and with the preservation of free competitive enterprise and whether or not there was unlawful exercise of monopoly power.

[*Purchase of Assets*]

The Star also contends that the trial court erred in allowing the evidence to go to the jury concerning The Star's purchase of the assets of the Journal-Post, consisting of presses, names and its newspaper morgue or library. We think the assertion is without merit and that the jurors, under the instructions of the trial court, had the right to consider whether or not the purchase of such assets (some of which were indispensable to anyone contemplating the starting of a newspaper in that area) indicated intent, design or course of conduct on the part of The Star. We find no error in allowing the evidence to go to the jury.

[*Attempt To Monopolize*]

As already indicated, the evidence as to Sees' attempts to monopolize in the dissemination of advertising is substantial. Sees lays particular stress on the fact that the evidence indicates and the court charged:

> "The evidence shows that the extent of his (Sees') activities was confined to the Advertising Department and the dissemination of advertising."

In the indictment he was charged in Count 1 with attempting to monopolize the dis-

semination of news *and* advertising, and he argues therefore that the government has failed to prove every element of the offense charged against him. Sees was director of advertising, treasurer and a member of the board of directors of The Kansas City Star Company. Advertising revenues for which he was responsible made up a vast percentage of the total income of The Star, thus supporting its news dissemination. In 1952 its revenues from advertising alone in daily newspapers, radio and television totalled $22,152,291.68,[2] with revenue from both advertising and circulation for the same year totalling $25,963,271.86.[2] Reliance in the dissemination of news upon advertising revenue is apparent. In fact, each was dependent upon the other and each without the other would fall. But aside from this, the fact that Sees meddled or attempted to meddle in the news department is borne out by the record. His threat to see that a certain baseball player's name never again appeared on the sport sheets of The Star unless certain advertising was taken out of a competitor's publication, this occurring during the preliminary period, is evidence of Sees' intent and design. The fact that that intent and design were carried over into the indictment period is justified by his threat to make or break a certain show unless a named amount was spent for advertising with The Star.

Aside from such direct instances, monopolistic control of advertising strikes at the very heart of a competitor's dissemination of news. The Supreme Court, in the *Lorain Journal* case, *supra,* 342 U. S. at 149, gave approval to the lower court's statement in *United States v. Lorain Journal Co., et al.,* E. D. Ohio 1950 [1950-1951 TRADE CASES ¶ 62,685], 92 F. Supp. 794, 798, 799, as follows:

> "Having the plan and desire to injure the radio station, no more effective and more direct device to impede the operations and to restrain the commerce of WEOL could be found by the Journal than to cut off its bloodstream of existence—the advertising revenues which control its life or demise.
>
> * * * * * * *
>
> * * * the very existence of WEOL is imperiled by this attack upon one of its principal sources of business and income."

In the last analysis, Sees' claim of innocence with reference to attempting to monopolize the dissemination of news is not sustained. If Sees, as the advertising director and chief person responsible for the advertising methods of The Star, so handled and manipulated the advertising as to destroy competition from the disseminators of news, it can hardly be said that he was not attempting to monopolize the dissemination of news. The effect of his advertising methods was to destroy news publications for whom advertising was their life blood.

We think this interdependence of news and advertising plus Sees' position, in addition to the instances referred to, justified the jury's verdict against him under Count 1. Denial of Sees' motion for judgment of acquittal was not error.

[*Definitions of Offenses*]

Complaint is made that the court's instructions to the jury misdefined the offenses of monopolization and attempting to monopolize as charged in the indictment. The jurors were told that if The Star occupied a monopoly position and that within the statutory period it committed the acts charged in the indictment with the intent to maintain is [its] monopoly or to eliminate competition, then The Star was guilty of monopolization. They were instructed that monopolization "* * * means the possession of monopoly power by a party or parties through which power it is possible to exclude actual or potential competitors from any part of the trade or commerce among the several states, provided that he or they have the intent or purpose to exercise that power." In considering the charge as a whole, we find no fault with the court's definition.

As to the claim that the court erred in defining the offense of attempting to monopolize, Sees asserts that the essential elements of an attempt to monopolize are a specific intent to monopolize coupled with overt acts which, though not successfully monopolizing, approach so near as to create a *dangerous probability* of successful monopolization. Reliance is had on *American Tobacco Co., et al. v. United States,* 1946 [1946-1947 TRADE CASES ¶ 57,468], 328 U. S. 781, 785, wherein the Supreme Court approved the trial court's definitions of the term "monopolize" and the phrase "attempt

[2] Including $801,569.71 income from weekly Star Farmer not included in former figures.

to monopolize." The approved instruction there as to "attempt to monopolize" was as follows, page 785:

> "The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, * * *."

In the instant case, the trial court told the jury that an attempt to monopolize "* * * means the employment of methods and practices which are utilized for the specific purpose and with the specific intent to achieve or build a monopoly, and which, if successful, would be likely to accomplish such monopolization." In place of "dangerous probability" the trial court used the words "would be likely to accomplish." We do not think that the court's charge here placed a lesser burden on the government than that contained in the definition approved by the Supreme Court in the *American Tobacco Co.* case. The phrase "dangerous probability" carries with it no substantially different meaning to the average person than the phrase "likely to accomplish." Trial courts are not bound to use the specific language contained in requested instructions or in instructions approved by appellate courts, but may use their own language so long as it conveys to the jurors proper understanding and meaning. Attempts to commit crime have been defined by many courts in many ways. An attempt to monopolize has been defined as an attempt to gain control of an industry by means which prevent other men from engaging in fair competition. *United States v. Whiting,* 1914, 212 F. 466, 478; *United States v. Klearflax Linen Looms, Inc.,* 1945, D. C. Minn. [1944-1945 TRADE CASES ¶ 57,407] 63 F. Supp. 32, 41. Here the trial court's requirement of a finding of "specific intent" plus likelihood of accomplishment is certainly tantamount to the "dangerous probability" in the definition relied on by Sees. In the *American Tobacco Co.* case, the Supreme Court was merely approving the trial court's definition but was not saying that that exact language had to be used in all such instruments. In the *American Tobacco Co.* case, containing the definition relied on by Sees, the Supreme Court specifically stated at page 811:

> "The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded *but that power exists to raise prices or to exclude competition when it is desired to do so.*" (Italics supplied.)

Where the charge is that of monopolization, it is necessary only to establish the existence of an intent to monopolize coupled with monopoly power. In *United States v. Griffith,* 1948 [1948-1949 TRADE CASES ¶ 62,246], 334 U. S. 100, the Supreme Court stated at page 106:

> *"Section 2 is not restricted to conspiracies or combinations to monopolize but also makes it a crime for any person to monopolize or to attempt to monopolize any part of interstate or foreign trade or commerce. So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised.* For § 2 of the Act is aimed, *inter alia,* at the acquisition or retention of effective market control. See *United States v. Aluminum Co. of America,* 148 F. 2d 416, 428, 429. Hence the existence of power 'to exclude competition when it is desired to do so' is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power. *American Tobacco Co. v. United States,* 328 U. S. 781, 809, 811, 814. It is indeed 'unreasonable, *per se,* to foreclose competitors from any substantial market'. *International Salt Co. v. United States,* 332 U. S. 392, 396. The anti-trust laws are as much violated by the prevention of competition as by its destruction. *United States v. Aluminum Co. of America, supra.* It follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor is unlawful." (Italics supplied.)

See also *Schine Chain Theatres, Inc., et al. v. United States,* 1948 [1948-1949 TRADE CASES ¶ 62,245], 334 U. S. 110, 130; *United States v. Paramount Pictures, Inc., et al.,* 1948 [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131, 174; *United States v. United Shoe Machinery Corp.,* 1953 [1953 TRADE CASES ¶ 67,436] 110 F. Supp. 295, aff'd [1954 TRADE CASES ¶ 67,755] 347 U. S. 521.

Appellants claim that the *Griffith* case and other cases relied on by the government do not support the government's contention here in that those cases are conspiracy cases. That is but to argue that the cases cited place an individual monopolist in a

much more favorable position than several who act together in a conspiracy. If the essential elements of the offense of monopoly are present, the law applies, whether the prosecution is against one or several acting in concert. We think that is made clear by the Supreme Court's language in the *Griffith* case. Therein the Supreme Court specifically points out that Section 2 of the Sherman Act is not restricted to conspiracies but *makes it a crime for any person to monopolize or attempt to monopolize,* and in the next sentence states, at page 107:

> "* * * monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised."

But be that as it may, the trial court here went farther and required the jury, before a verdict of guilty could be returned, to find three elements: 1, Existence of monopoly power; 2, intent to monopolize; 3, performance of the acts charged in the indictment within the three-year period. We think the charge was eminently fair to both appellants.

[*Comments of Trial Court*]

It is claimed that the trial court made prejudicial comments in his charge to the jury. We find no justification for that assertion. A federal judge has a right to fairly comment upon the evidence and even to express his opinion thereon, provided he makes clear that the ultimate fact determinations are for the jurors. *Quercia v. United States,* 1933, 289 U. S. 466, 469. In *Buchanan v. United States,* 8 Cir., 1926, 15 F. 2d 496, 498, this court clearly set out the limitations on judicial comment in jury instructions:

> "Under the rule, as stated and applied by the Supreme Court, it seems that, when a judge expresses his opinion as to the facts to the jury, making it clear that it is nothing but his opinion, and not binding upon them in any way, and that it is their duty and responsibility to determine all of the facts, he is within his rights, and that he is only subject to reversal when his comments upon the evidence or opinion as to the facts amount to partisan argument or advocacy, or constitute an appeal to passion or prejudice."

We believe that the charge here, examined in its entirety, which is as it should be, fairly and fully apprised the jury of the applicable law and that the trial court's comments on the evidence were sufficiently guarded to come within the limitations referred to. The jurors were told that they were supreme in determining the facts and that their determinations were binding upon the court. As if to doubly impress them with the idea that their responsibility was to be exercised without restraint and to make the point clear beyond cavil, the court explained further:

> "In the Federal Courts, as distinguished from the State Courts, in charging the jury as to the law, the Court has the right to express an opinion with respect to or comment upon the evidence. It is the duty of the Court to charge the jury as to the law and the Court may advise the jury as to the facts. There may be instances during this charge when the Court may make some comment upon the evidence, or express some opinion in regard to it, or you may infer from the Court's language that the Court may have some view relating to the evidence, but I have stated to you heretofore that you are the finders of the facts; you are the sole judges of the credibility of the witnesses and of the weight and value you will place upon their testimony, and I charge and admonish you that if there is any expression of opinion or comment upon the evidence by the Court, it is not binding upon you in a determination of such facts. It is simply the expression of the Judge, and it is not meant to invade your province as the finders of the facts."

We find no error in the court's comments.

CONCLUSION

[*Freedom of the Press*]

Finally, it is contended that this prosecution endangers the freedom of the press guaranteed by the First Amendment, and that "* * * A newspaper is intimidated if it is subject at any moment to prosecution under the Sherman Act whenever it opposes or antagonizes those public officials in power." The suggestion that freedom of the press requires immunity from law to which the general public is not exempt is not new. The Supreme Court, in *Associated Press v. N. L. R. B.,* 301 U. S. 103, 132-133, said:

> "The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.

He must answer for libel. He may be punished for contempt of court. *He is subject to the anti-trust laws*" (Citing *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., et al.*, 1934, 293 U. S. 268.) (Italics supplied.)

The words of Mr. Justice Black eloquently answered a similar contention in *Associated Press, et al. v. United States, supra*, 1944 [1944-1945 TRADE CASES ¶ 57,384], 326 U. S. 1, 20:

"It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."

The theory of equal justice under law does not admit to the proposition that there is one brand of justice for some people and a different brand for others. Publishers of newspapers must answer for their actions in the same manner as anyone else. A monopolistic press could attain in tremendous measure the evils sought to be prevented by the Sherman Anti-Trust Act. Freedom to print does not mean freedom to destroy. To use the freedom of the press guaranteed by the First Amendment to destroy competition would defeat its own ends, for freedom to print news and express opinions as one chooses is not tantamount to having freedom to monopolize. To monopolize freedom is to destroy it.

[*Affirmed*]

We have considered the many other claims of error presented by the appellants and find them to be repetitious or without substantial merit.

Affirmed.

[¶ 68,602] Snow Crest Beverages, Inc., et al. v. Recipe Foods, Inc.

In the United States District Court for the District of Massachusetts. Civil Action No. 55-770-W. Dated December 19, 1956.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Person Who May Bring Suit—Supplier of Party Injured—Stock Related Company.—A manufacturer of extracts used in the manufacture of beverage syrups could not maintain a treble damage action against a manufacturer of beverage syrups, which allegedly violated the antitrust laws to the direct injury of a competing manufacturer of beverage syrups to whom the extract manufacturer sold almost all of its extract production. The extract manufacturer alleged that approximately 97 per cent of its extract production was sold to the injured manufacturer and that the losses of such manufacturer by reason of the violations have caused it similar financial injury. The extract manufacturer was not a person injured in its business or property within the meaning of Section 4 of the Clayton Act, which does not give a private cause of action to a person whose losses result only from an interruption or diminution of profitable relationships with the party directly affected by alleged violations of the antitrust laws. Also, the fact that an individual owned stock in the injured beverage syrup manufacturer and in the extract manufacturer did not entitle the extract manufacturer to maintain the action. The extract manufacturer and

the beverage syrup manufacturer were separate legal entities, although it was claimed that they were commonly operated as an integrated business unit.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.55.

For the plaintiffs: A. Morris Kobrick, of Mintz, Levin and Cohn, Boston, Mass., and James D. St. Clair, of Hale & Dorr, Boston, Mass.

For the defendant: John R. Hally and Robert W. Meserve, of Nutter, McClennen & Fish, Boston, Mass.

Opinion

[*Motion for Summary Judgment*]

WYZANSKI, District Judge [*In full text*]: Under Rule 56b, defendant moves for summary judgment on the claim of plaintiff, Polar Cola of America, Inc., (not the claim of Snow Crest Beverages, Inc.,) on the ground that the complaint does not show that it is a "person injured in his business or property" within § 4 of the Clayton Act 15 U. S. § 15.

[*Complaint*]

The complaint is in two parts, part one being the statement of Snow Crest Beverages, Inc. and part two being the statement of Polar Cola Company of America, Inc. Part one alleges that Snow Crest is a bottler whose principal business was the sale in bottles of various flavors of a syrup, sold under the trade name "Snow Crest" and designed to be mixed with water to yield a soft drink. Defendant Recipe Foods, Inc. is a competitor of Snow Crest, manufacturing and selling in the same markets similar syrups. It is further alleged that, with the effect of restraining commerce, substantially lessening commerce, and attempting to monopolize commerce, defendant damaged Snow Crest by inducing dealers to enter into exclusive purchasing contracts for syrup, and in connection therewith to sell such Snow Crest syrup as they had on hand. Other allegations respecting defendant's selling practices are set forth; but no allegations refer to its manufacturing activities. Defendant's alleged selling activities are said to be unlawful as contracts in restraint of trade (see § 1 of the Sherman Act), an attempt to monopolize (see § 2 of the Sherman Act), and as tieing agreements (see § 5 [3] of the Clayton Act). Thus the gist of the complaint turns on competitive practices in the market for the sale of syrup.

Part two alleges the same conduct of defendant but describes Polar Cola's business as consisting "solely of the manufacture and sale (apparently only to bottlers and not to dealers) of extracts which are used as a major ingredient in the manufacture of beverage syrup." It is alleged that there is "common operating control with Snow Crest the two together being conducted substantially as an integrated business unit." "Polar Cola's primary function is to supply Snow Crest its full requirement of extracts." "More than 90% of Polar Cola's product goes to Snow Crest. Of this quantity, purchased by Snow Crest, more than 90% is used by Snow Crest in the manufacture of syrups." Polar Cola claims that it is "intimately tied in with Snow Crest" and that the latter's losses have "directly caused similar financial injury to Polar Cola."

[*Stock Ownership*]

From affidavits of Polar Cola's treasurer, Edward Rachins, and a deposition taken of him it appears that at all relevant times he has been the sole owner of all the stock of Snow Crest Beverages, Inc., and that the stock of Polar Cola Company has been so divided that he continuously held 50 per cent of the outstanding capital stock and the other 50 per cent was held until her death in September 1954 by his wife, and thereafter by her administrator for the benefit of Mr. Rachins and his 14 year old son.

[*Dealings Between Plaintiffs*]

From the same affidavits it appears that in each of the years 1952, 1953, and 1954 over 97 per cent of Polar Cola's extract was sold to Snow Crest and 92 per cent or over of Polar Cola's extract was used by Snow Crest for syrup.

[*Persons Who May Recover*]

It is well settled that despite its broad language § 4 of the Clayton Act does not

give a private cause of action to a person whose losses result only from an interruption or diminution of profitable relationships with the party directly affected by alleged violations of the anti-trust laws. Recovery under that section has been denied to a landlord of a competitor injured by the defendant although the landlord had a percentage rental. *Melrose Realty Co. v. Loew's Inc. et al* (3rd Cir. 1956) [1956 TRADE CASES ¶ 68,358, 68,423] 234 F. (2d) 518, 519, cert. den. 25 U. S. L. W., p. 3137 (1956). Likewise, recovery was denied to a patent licensor who would have received royalties from one of the defendant's competitors injured by the defendant's violations of the anti-trust laws. *Productive Inventions, Inc. v. Trico Products Corp.*, (2d Cir. 1955) [1955 TRADE CASES ¶ 68,104] 224 F. (2d) 678, cert. den. 350 U. S. 936 (1955). The same attitude has precluded employees of an injured competitor from recovering under the anti-trust acts. *Corey v. Boston Ice Co.*, (D. Mass. 1913) 207 Fed. 465, 466; *Gerli v. Silk Association of America*, (S. D. N. Y. 1929) 36 F. (2d) 959; *Walder v. Paramount Publix* (S. D. N. Y. 1955 [1955 TRADE CASES ¶ 68,097] 132 F. Supp. 912, 916. Without trying to spell out in detail the justification for these decisions, it may be noted that if they had gone the other way, there would as a result of the treble damage provisions of the anti-trust acts have been given in each case to the plaintiff what has sometimes been called a "windfall." *Conference of Studio Unions v. Loews, Inc.*, C. C. A. 9 [1950-1951 TRADE CASES ¶ 62,953], 193 F. (2d) 51, 55. In effect, businessmen would be subjected to liabilities of indefinable scope for conduct already subject to drastic private remedies. Courts aware of these considerations have been reluctant to allow those who were not in direct competition with the defendant to have a private action even though as a matter of logic their losses were foreseeable. Congress has failed to amend the anti-trust laws on this point in the face of repeated decisions. It seems to have been content for the judiciary to take a position narrower than that often applied in non-statutory tort cases and in cases where plaintiffs are not allowed a multiple recovery.

The policy considerations which have led to a narrow construction of § 4 of the Clayton Act are not overborne by any fact alleged in the complaint, or shown in the affidavits or deposition.

[*Separate Legal Personalities*]

It is not sufficient to show that Mr. Rachins owns all the stock of Polar Cola, and that he owns half, and an estate of which he and his minor son are the beneficiaries owns the other half, of the stock of Snow Crest. First, there is not identity of equitable ownership. Second, if there were identity it would be immaterial. Those who organized the corporations chose to take the advantages and disadvantages which flow from separate legal personalities. *Cf. Timken Co. v. United States* [1950-1951 TRADE CASES ¶ 62,837], 341 U. S. 593. They placed only one of the two corporations in direct competition with defendant. And their choice limits their potential recovery. A possible further reason for this conclusion is that in this particular case the organizers of these two corporations have so divided the business functions between the two corporations that it is easy to allocate economic losses occurring at three separate stages: (1) manufacturing, (2) sales from the manufacturer to the bottler, and (3) sales from the bottler to the dealer. If the complainants had not made such an allocation, probably a tribunal would not make it no matter how logical, because of its inherent difficulty of proof. But the allocation having been made, and the losses at the third stage being the only ones occurring in the field of the alleged unlawful competition, limitation of recovery to losses in that field coincides with the policy considerations which have led to a narrow construction of Section 4 of the Clayton Act.

[*Business Relations*]

Nor is it sufficient to show that plaintiff Polar Cola supplies virtually all its extract to plaintiff Snow Crest. This is the plain teaching of the already cited cases involving landlords and employees. In the employee and presumably in the landlord situation plaintiff who was denied recovery was supplying to the competitor directly injured all his services or all his property.

[*Summary Judgment Granted*]

The motion for summary judgment should be granted. If plaintiff Polar Cola desires to appeal this ruling, the appeal should be finally adjudicated before part one of the

complaint is tried. If a reversal is in order, and Polar Cola's claim is appropriate for trial, it would be advantageous to have Polar Cola's claim heard simultaneously and not subsequent to Snow Crest's. There being no just reason for delay, a final judgment on Polar Cola's claim will be entered, after its form is submitted to me and duly executed pursuant to Rule 54b.

[¶ 68,603] Bissell Carpet Sweeper Company v. Masters Mail Order Company of Washington, D. C., Inc.

In the United States Court of Appeals for the Fourth Circuit. No. 7250. Argued November 12, 1956. Decided January 7, 1957.

Appeal from the United States District Court for the District of Maryland, at Baltimore. R. DORSEY WATKINS, District Judge.

Maryland Fair Trade Act and McGuire Act

Fair Trade—Advertising of Sales Below Fair Trade Prices—Noncontracting Dealers—Sales from Non-Fair Trade Jurisdiction to Fair Trade Jurisdiction—Applicability of State Fair Trade Act—McGuire Act.—The Maryland Fair Trade Act does not prohibit a District of Columbia mail order company from advertising in Maryland that a fair trader's products can be purchased in the District of Columbia at less than their established Maryland fair trade prices. The advertisements originated in the District of Columbia and were directed to residents of Maryland, and the sales of the fair traded products took place in the District of Columbia and not in Maryland. Such advertisements must relate to a sale of products within Maryland in order to fall within the Maryland Fair Trade Act. Since the prohibition of the Act against selling below fair trade prices is of necessity confined to Maryland sales, the associated prohibited acts of advertising or offering for sale must likewise be concerned with sales within the state. The contention that the Act prohibits advertising of discount prices in Maryland no matter where the sales actually take effect was rejected. An attempt to effectuate the purposes of the Act by controlling the activities of persons beyond the jurisdiction of the state would raise serious constitutional questions.

The provisions of the McGuire Act do not broaden the scope of the Maryland statute insofar as the advertisement of sales of commodities at less than fair trade prices is concerned. The purpose of the McGuire Act was served by the grant of the authority to the states to pass fair trade statutes and make violations of price agreements unfair competition; therefore, controversies as to the rights of sellers and buyers under these acts must be resolved by reference to the state statutes themselves.

See Fair Trade, Vol. 1, ¶ 3258.22, 3258.80, 3262, 3262.80.

For the appellant: J. Cookman Boyd, Jr., and Gilbert H. Weil (Alfred T. Lee on brief).

For the appellee: Norman Diamond (Thurman Arnold, James Robert Miller, H. R. & J. R. Miller, and Arnold, Fortas & Porter on brief).

Affirming a decision of the U. S. District Court, District of Maryland, at Baltimore, 1956 Trade Cases ¶ 68,326.

Before PARKER, Chief Judge, SOPER, Circuit Judge, and HOFFMAN, District Judge.

[*Issue*]

SOPER, Circuit Judge [*In full text*]: The question for decision on this appeal is whether the Maryland Fair Trade Act is violated by the advertisement in Maryland of goods sold below fair trade prices in the District of Columbia, which is a free trade jurisdiction.

[*Fair Trader*]

The Bissell Carpet Sweeper Company is a Michigan corporation and is engaged throughout the United States in the business of manufacturing, selling and distributing carpet sweepers. All of its merchandise bears the company's trademarks for which it has established a valuable

name, reputation and good will by the expenditure of large sums of money. Its goods are in free and open competition with carpet sweepers of the same general class manufactured by others. The company has entered into written agreements with dealers and distributors in Maryland and in all other States which have fair trade laws under which the dealers agree not to resell certain merchandise at less than certain specified prices.

[*Mail Order Sales*]

Master Mail Order Company of Washington, D. C., Inc., the defendant in the District Court, was a Maryland corporation when the suit was instituted and process was served, but later it was reincorporated under the laws of the District of Columbia. It operates only one business establishment, which consists of a single retail store in the city of Washington where it maintains a stock of merchandise which it offers for sale over the counter and by mail. More than two-thirds of its sales are made over the counter. It advertises and offers for sale Bissell carpet sweepers at prices substantially lower than those specified in the fair trade agreements between Bissell and the dealers and distributors who sell the goods in Maryland and other States. All of the defendant's sales by mail, including sales of Bissell carpet sweepers, have been made to consumers pursuant to orders received directly from them at its Washington store, and all such orders have been filled by direct shipment to purchasers either by mail or by other carriers. It has not advertised or offered carpet sweepers for sale except by mail from or over the counter at its place of business in Washington.

[*Complaint*]

The complaint stated that Masters' advertisement of carpet sweepers for sale at less than fair trade prices was in violation of the Maryland statute and was causing irreparable damage to the plaintiff, in that it tended to impair and destroy the plaintiff's good will; and, accordingly, the complaint prayed the Court to enjoin Masters from advertising, offering for sale, or selling any commodity bearing the plaintiff's name or trademarks at prices less than those stipulated in agreements between Bissell and the retail dealers in Maryland and other fair trade States.

[*Summary Judgment*]

Upon these undisputed facts Masters filed a motion for summary judgment supported by affidavit and the motion was granted by the District Judge on the ground that the activities described do not violate the Maryland statute. See [1956 TRADE CASES ¶ 68,326] 140 F. Supp. 165. The pleadings and affidavit do not explicitly state that the defendant advertised the goods in the State of Maryland, but it was conceded by both parties that such advertisement took place and that the pleadings were intentionally framed to present the question as to whether or not advertising originating in the District of Columbia directed to residents of Maryland and other fair trade States, either by newspaper or by direct mail, offering goods for sale at discount prices only in the District of Columbia is a violation of the Maryland statute, and if so, whether the application of the Maryland statute to such advertising is authorized by the McGuire Act, 15 U. S. C. § 45(a) (1)-(5). The factual situation is stated as follows in the appellant's brief:

> "Defendant conducts an over-the-counter and mail order business in Washington, D. C., from which it purposefully sends into Maryland advertising materials quoting plaintiff's products at prices less than those which have been duly established by plaintiff in Maryland, and which are observed by retail dealers therein pursuant to that state's fair trade law. In response to such solicitations, Maryland residents are induced, as defendant intends them to be, to order the products by letter addressed to defendant at its place of business in the District. Defendant, in turn, fills such orders by mail, taking particular pains to assure that legal title technically passes in The District of Columbia where no fair trade law exists."

[*Maryland Act*]

Bissell relies upon the provisions of the Maryland Fair Trade Act, Annotated Code of Maryland, 1951, Article 83, §§ 102 to 110, and particularly upon §§ 102D, 103 and 107 thereof.

> "The applicable portions of the Maryland Fair Trade Act, Annotated Code of Maryland, 1951 Edition, Article 83, are Sections 102(D), 103 and 107, reading as follows:
>
> 'Sec. 102(D) 'Retailer' means any person selling a commodity to consumers for use.

'Sec. 103. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, or the vending equipment from which a commodity is sold to consumer bears the trademark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Maryland by reason of any of the following provisions which may be contained in such contract:

'(A) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

'(B) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

'(C) That the seller will not sell such commodity:

'(1) to any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

'(2) to any retailer, unless the retailer will agree not to resell the same except to consumers for use at not less than the stipulated minimum price.

'Sec. 107. Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Sections 102-110, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.' "

The purpose of the Act, as stated in the preamble, Laws of Maryland, 1937, Chapter 239, was to protect trademark owners, producers, distributors and the general public against injurious practices in the distribution of competitive commodities bearing a distinguishing trademark or name through the use of volunteer contracts establishing minimum resale prices. Under § 103 it becomes lawful to make contracts between a producer or distributor and a buyer of trademarked goods, which are in competition with similar commodities produced by others, wherein the buyer agrees not to resell the goods at less than a stipulated minimum price and the seller agrees that he will not sell the goods to any wholesaler unless the wholesaler exacts a similar price agreement from any dealer to whom he resells the goods, and the seller also agrees not to sell the goods to any retailer without a similar price agreement.

The case turns on the interpretation of § 107, which provides that wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in a fair trade contract is unfair competition, whether or not the advertiser or seller is a party to the contract.

[*Legality of Advertising*]

The specific question is whether Masters has been guilty of "advertising" goods for less than the minimum price within the meaning of this Act. It is conceded that all of Masters' sales of carpet sweepers took place in Washington and none of them took place in Maryland. It is also conceded that the phrase in § 107, which denounces, as unfair competition, *"selling"* any commodity for less than the price stipulated in any contract, must refer to sales in Maryland since Maryland would have no right to prohibit a sale at less than fair trade prices outside the State. Nevertheless, it is argued that the statute condemns advertising of discount prices in Maryland no matter where the sales actually take effect. Much is said, much indeed may fairly be said, as to the injury to the business of the producer in the debasement of the trademark by advertising to buyers in Maryland that a few miles away across the border the same goods may be purchased for much less than in their home State. Moreover, it is emphasized that the statute is phrased in the disjunctive, so that it is not necessary to show both sale and advertisement, but only one or the other, in order to establish unfair competition in the State. To construe the Act otherwise, it is said, would render ineffective the policy expressed in the fair trade law of the State which has been approved by the decisions of its higher Court in such cases as *Goldsmith v. Mead Johnson & Co.*, [1932-1939 TRADE CASES ¶ 55,232], 176 Md. 682; *Schill v. Remington Putnam Co.* [1940-1943 TRADE CASES ¶ 56,095, 56,117], 179 Md. 83; *Don-*

ner v. Calvert Distillers Corp. [1950-1951 TRADE CASES ¶ 62,740], 196 Md. 475.

We agree with the appellant that advertising the sale of a commodity at less than the stipulated fair price is of itself unfair competition within the meaning of § 107 of the Maryland statute, whether or not a sale takes place; but we are satisfied that the advertisement must relate to a sale of goods within the State in order to fall within the condemnation of the statute. All advertisements of merchandise are aimed at the sale of commodities; and so we find, in this instance, that the prohibited acts are listed in a single phrase as "advertising, offering for sale or selling any commodity," and since the prohibition against selling is of necessity confined to Maryland sales, the associated acts of advertising or offering for sale must likewise be concerned with sales within the State. The appellant interprets the statute as if the phrase were modified so as to read "advertising or offering for sale any commodity at any place or selling it in the State of Maryland." In our view it is far more reasonable, when construing a statute which was enacted to authorize the formation and enforcement of fair trade agreements in the State of Maryland, to interpret the disputed phrase as if it read "advertising, offering for sale or selling any commodity *within the State.*"

[*Supporting Rulings*]

In reaching this conclusion we are aided by the admonition of the Court of Appeals of Maryland in *Venable v. J. Engel & Co., Inc.* [1948-1949 TRADE CASES ¶ 62,523], 193 Md. 544, where an injunction against a seller was refused who had advertised a fair traded article in such a way that the public might be led to believe that he had cut the price although he had not actually done so. The court said, p. 549:

> ". . . . . The Fair Trade Act is in derogation of the general rule of the common law that any person has the right to sell his property at any price that he and the purchaser may agree upon, and the courts should accordingly construe the Act strictly and should not infer that the Legislature intended to change any common-law principle beyond what the Act explicitly provides."

The same interpretation was given to the statute not only in the decision of Judge R. Dorsey Watkins in the District Court, but also by Judge Chesnut in *Revere Camera Co. v. Masters Mail Order Co.*, D. C. Md. [1955 TRADE CASES ¶ 67,981], 128 F. Supp. 457, 461 and 462.

This conclusion is also fortified by the doubt which arises as to the constitutionality of a statute which seeks to regulate the interstate commerce, which is inherent in advertising on a national scale. See *Lorain Journal v. United States* [1950-1951 TRADE CASES ¶ 62,957], 342 U. S. 143, 151. This doubt is not allayed by the fact that a prohibition of the advertisement of discount prices in Maryland would undoubtedly aid in the protection of the trademark on fair traded commodities. There are many instances in which extraterritorial activities injuriously affect the internal business of a State, but under our system of government it is not always possible for the State to find the remedy. Such a situation was considered by the Supreme Court in *Miller Bros. Co. v. Maryland,* 347 U. S. 340, in which an attempt was made to enforce a Maryland excise tax on the use in the State of articles which had been purchased in Delaware. The tax was designed to support a Maryland sales tax; and it was brought out that vendors in Delaware reached Maryland inhabitants and induced them to purchase commodities in Delaware for delivery in Maryland whereby the sales tax was avoided. The Court held that the Maryland statute violated the due process clause of the Fourteenth Amendment in so far as it sought to make the Delaware vendor an agent for the collection of the use tax from Maryland purchasers. The situation resembles that now before the Court, in that it involved an attempt to effectuate the purposes of a Maryland statute by controlling the activities of persons beyond the jurisdiction of the State, so that a serious constitutional question cannot be avoided.

[*McGuire Act*]

The provisions of the McGuire Act do not broaden the scope of the Maryland statute in so far as the advertisement of sales of commodities at less than fair trade prices is concerned. The purpose of the McGuire Act, as stated in 15 U. S. C. 45(a), was to protect the rights of the States to regulate their internal affairs and to enable them to enact laws authorizing contracts prescribing minimum prices for the resale of commodities, and to extend the stipulated prices to persons who are not parties to the

contracts. To this extent the States were relieved from the prohibitions of the antitrust Acts. To effectuate this purpose § 45 (3) of the statute was passed. It furnishes the basis of § 107 of the Maryland Act, in that it makes it lawful for a State to pass a statute which, in substance, provides that wilfully and knowingly advertising, offering for sale or selling any commodity at less than the prescribed prices is unfair competition and actionable at the suit of any person damaged thereby. The purpose of the Federal statute was served by this grant of authority of the States to pass fair trade statutes and make violations of price agreements unfair competition, and hence it follows that controversies as to the rights of sellers and buyers under these statutes must be resolved by reference to the State statutes themselves. Here again the principle of strict construction applies, for it was held in *United States v. McKesson & Robbins* [1956 TRADE CASES ¶ 68,368], 351 U. S. 305, 316, that Congress has marked the limitations beyond which price fixing cannot go and these limitataions must be construed strictly since resale price maintenance is a privilege restrictive of a free economy.

[*Affirmed*]

The issue in the pending case therefore reverts to the meaning of the Maryland statute which, in our opinion, was correctly interpreted by the Court below.

Affirmed.

[¶ 68,604] United States v. Logan Co., Mathews Conveyer Company, Mesta Machine Company, Palmer-Bee Company, Standard Conveyor Company, and United Engineering and Foundry Company.

In the United States District Court for the Western District of Pennsylvania. Civil Action No. 9658. Dated January 4, 1957.

Case No. 1093 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Defenses—Mootness.—An action to enjoin manufacturers of sheet chargers from conspiring to fix and maintain minimum prices for patented sheet chargers by means of uniform patent license agreements was dismissed, without prejudice, on the ground that the action was rendered moot by the expiration of the patent (subsequent to the commencement of the action) covering the sheet chargers. Since the patent had expired and it affirmatively appeared that the alleged illegal license agreements could survive no longer than the patent, there remained no subject matter upon which the conspiracy charged against the manufacturers could operate. Summary judgment for the manufacturers was not precluded by the Government's allegation of a continuing conspiracy, since the allegation did not create an issue of fact as to whether there was a "reasonable expectation" of a resumption of the manufacturers' activities upon which evidence should be adduced. There could be no reasonable expectation of a resumption of illegal acts with respect to sheet chargers licensed under a patent which had expired. In the absence of a reasonable expectation that the wrong alleged against the manufacturers would be repeated, the court cannot exceed its jurisdiction in determining issues for the Government in future cases.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8229.675.

For the plaintiff: D. Malcolm Anderson, U. S. Attorney, Pittsburgh, Pa., and William L. Maher, Department of Justice, Philadelphia, Pa.

For the defendants: Robert E. Hatton, Louisville, Ky., Samuel McCune of Kirkpatrick, Pomeroy, Lockhart & Johnson; Edmund K. Trent of Reed, Smith, Shaw & McClay; G. Harold Blaxter of Blaxter, O'Neill & Houston; Alexander Unkovic of Kountz, Fry & Meyer; Robert F. Patton of Smith, Buchanan, Ingersoll, Rodewald & Eckert; and Walter J. Blenko of Blenko, Hoopes, Leonard & Buell, all of Pittsburgh, Pa.

For a consent decree entered in the U. S. District Court, Western District of Pennsylvania, see 1956 Trade Cases ¶ 68,375, and for a prior opinion of the Court, see 1955 Trade Cases ¶ 67,946.

Opinion

[*Summary Judgment Motion*]

MILLER, District Judge [*In full text*]: This action was commenced by the government to "prevent and restrain continuing violations by defendants" of Section 1 of the Sherman Act, 15 U. S. C. A. § 1, upon a charge that defendants illegally conspired to fix and maintain minimum prices of patented sheet chargers by means of uniform patent license agreements. The question before the court is whether the action should now be dismissed upon the motion of defendants under federal procedural rule 56, inasmuch as the patent underlying the agreements has expired.

Rule 56(c) provides that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

[*Patent Licensing Agreements*]

Defendant Mesta Machine Company (Mesta) was the assignee of patent No. 2,141,394 which issued to Iversen on December 27, 1938, covering his inventions embodied in a sheet charger device, useful to the steel industry, in the process of feeding individual sheets of steel into rolling mills. Between 1939 and 1941, Mesta entered into patent license agreements with each of the other defendants, authorizing the other defendants to manufacture and vend sheet chargers covered by the Iversen patent. The agreements were substantially identical and provided for the payment of identical royalties and for the observance by the licensees and Mesta of minimum sales prices to be fixed from time to time by Mesta, which prices were to be the same for Mesta and all parties licensed. As alleged in the complaint, each agreement was to expire at the end of the life of the patent.

[*Offense Charged*]

Paragraph 13 of the complaint alleged as follows:

> "Beginning in or about the year 1939, and continuing thereafter up to and including the date of the filing of this complaint, the defendants have entered into unlawful contracts and have engaged in and are now engaged in an unlawful combination and conspiracy in unreasonable restraint of interstate trade and commerce in the manufacture and sale of sheet chargers among the several states of the United States, in violation of Section 1 of the Sherman Act. The defendants are continuing, and threaten to, and will continue the aforesaid offense, unless the relief hereinafter prayed for in this Complaint is granted.
>
> "Certain of the specific agreements, licenses, arrangements, understandings and acts which formed a part of said offense and which were used in effectuation thereof are hereinafter more fully set forth and described."

Thereafter plaintiff details the alleged conspiratorial transactions, understandings and agreements between defendants, all of which relate to the patent licenses granted by Mesta under the Iversen patent, and prays that the agreements be declared illegal and canceled; that injunctive relief be granted to enjoin defendants from further operations under the license agreements described; that defendants be perpetually enjoined from entering into any agreements or arrangements, or performing any acts having the purpose or effect "of continuing, reviving, or renewing the hereinabove alleged violation of the Sherman Act;" and that other relief be granted as the nature of the case may require. Defendants deny the allegations of illegality and conspiracy.*

[*Affidavits*]

The motion to dismiss proceeds upon the fact, not disputed, that the Iversen patent expired on December 27, 1955. Each of the defendants has submitted two affidavits in support of the motion. The first group of affidavits is intended to demonstrate that defendants made relatively few sales under the patent license agreements and that the minimum sales provision was a dead letter almost from the outset. The second group of affidavits is intended to show that except for defendant United Engineering and Foundry Company (United) none of the defendants owns or contemplates acquiring patents relating to sheet chargers and that none of the defendants is licensed or intends to become licensed under patents relating to

* After the oral argument upon the present motion, defendant Logan Company consented to the entry of a final judgment against it.

sheet chargers. In an opposing affidavit, counsel for the government sets forth numerous recitals from the answers of the defendants to the complaint, responses to interrogatories and requests for admissions along with certain informal remarks of counsel for defendant Mesta and contends, principally, that the foregoing establish that there are genuine issues as to material facts which must be resolved at trial; that there is a reasonable probability that the practices charged will be resumed or repeated; and that adjudication of the legality of the questioned practices is required as a guide to future action, thus precluding a holding of mootness.

[*Summary Judgment*]

Summary judgment may not be granted upon the basis of evidence which a jury would be free to disbelieve, *Sartor v. Arkansas Natural Gas Corp.*, 1944, 321 U. S. 620, 624, and affidavits in support thereof may be considered only in determining whether an issue of fact is presented. *Frederick Hart v. Recordgraph Corp.*, 3 Cir., 1948, 169 F. 2d 580, 581. Where material facts averred in an affidavit are peculiarly within the knowledge of the moving party, the cause must proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying. *Subin v. Goldsmith,* 2 Cir., 1955, 224 F. 2d 753, 758-760.

[*Issue of Fact*]

The court agrees with plaintiff that the pleadings, admissions and affidavits on file indicate that an issue of fact is presented as to whether defendants engaged in an unlawful conspiracy in restraint of trade which continued up until the date of the filing of the complaint. However, if the controversy has become moot, the legality of defendants' conduct is the very question which the court is forbidden to consider.

[*Moot Controversy*]

The court has previously held, in refusing a motion for judgment on the pleadings filed by the defendant United, that the described licensing agreements did not constitute the sole illegality alleged in Paragraph 13, *supra,* in view of plaintiff's allegations that a conspiracy existed among the defendants. The court adheres to the view that a conspiracy in restraint of trade is broader and more than a contract in restraint of trade, *United States v. Kissel,* 1910, 218 U. S. 601, 608, but nevertheless is satisfied that the present controvery is moot.

While the allegations of Paragraph 13 are very broad, the only illegal acts charged against defendants in the complaint are those by which they allegedly conspired in restraint of trade to fix and maintain minimum prices at which sheet chargers covered by Mesta's patent would be sold. Such interpretation of the complaint becomes obligatory, moreover, in light of the express stipulation by counsel for plaintiff during the course of a pre-trial conference held in these proceedings that for the purpose of the present action "the conspiracy alleged relates only to sheet chargers licensed under the Iversen patent." * Since the Iversen patent has expired and it affirmatively appears that the alleged illegal license agreements could survive no longer than the patent, there remains no subject matter upon which the conspiracy charged against defendants could operate. The court is therefore of the opinion that the question as to the actuality of any presently existing controversy between the parties is ruled by *United States v. Hamburg-American Co.*, 1915, 239 U. S. 466. In that case, the legality of a contract between steamship companies in alleged violation of the Sherman Act was held to be moot because World War I automatically dissolved it and made continued relationship between the companies impossible. Inasmuch as the controversy between the parties had no present actuality, the court dismissed the action, saying:

> "The legal proposition is not in substance controverted, but it is urged in view of the character of the questions and the possibility or probability that on the cessation of war the parties will resume or recreate their asserted illegal combination, we should now decide the controversies in order that by operation of the rule to be established any attempt at renewal of or creation of the combination in the future will be rendered impossible. But this merely upon a prophecy as to future conditions invokes the exercise of judicial power not to decide an existing controversy, but to establish a rule for controlling predicted future conduct, contrary to the elementary principle which was thus stated in *California v. San Pablo*

* Pre-trial Record, pp. 7, 34.

& Tulare R. R., 149 U. S. 308, 314: 'The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.'" (239 U. S. at 475)

In the *Hamburg-American* case, the court notes that mere discontinuance of an unlawful practice by the parties charged with violating the law does not relieve the court of the duty to pass on the question of legality where at the will of the parties the illegal practice may be resumed. *United States v. Trans-Missouri Freight Association,* 1897, 166 U. S. 290; *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 1911, 219 U. S. 498. However, the court distinguishes such cases, saying:

"But if the intervening event is owing to the plaintiff's own act or to a power beyond the control of either party, the court will stay its hand." (p. 477)

United States v. American Asiatic Steamship Co., 1917, 242 U. S. 537; *cf. Standard Oil Co. v. United States,* 1931, 283 U. S. 163, 181; *United States v. Alaska S. S. Co.,* 253 U. S. 113, 115-116.

Termination of defendant Mesta's patent rights was brought about by operation of law, a force over which the present parties had no control, and further relations between defendants are impossible with respect to the subject matter of the alleged conspiracy, i. e., sheet chargers licensed under the Iversen patent. Although plaintiff contends the case is not moot because it has alleged a continuing conspiracy against defendants, nothing remains in the record save the accusation of past wrongdoing to sustain the foregoing averment. Plaintiff has made it evident both in the complaint and at the pre-trial conference that it does not allege a conspiracy to fix prices of sheet chargers generally but only in the framework of defendants' patent license agreements. It has indicated throughout the pre-trial conference that its proof at trial will be so confined.

The parties have submitted separate briefs on the question of authority of the court to award injunctive relief with respect to unpatented as well as patented sheet chargers. The court is agreed that if authority to retain jurisdiction of the present action existed, a decree entered could regulate practices connected with acts found to be illegal and could "close all roads to the prohibited goal." *International Salt Co. v. United States,* 1947 [1946-1947 Trade Cases ¶ 57,635], 332 U. S. 392; *United States v. United States Gypsum Co.,* 1950 [1950-1951 Trade Cases ¶ 62,729], 340 U. S. 76. Such eventual considerations do not alter the circumstance that the conspiracy upon which the decree of the court may operate is that which has been defined by the complaint. *United States v. National City Lines,* 1955 [1955 Trade Cases ¶ 68,158], 134 F. Supp. 350, 355; *United States v. W. T. Grant Co.,* 1953 [1953 Trade Cases ¶ 67,493], 345 U. S. 629, 635.

[*Resumption of Illegal Activity*]

Numerous authorities hold that voluntary discontinuance of illegal practices does not render a controversy moot where the defendant is free to return to his old ways, unless it can be demonstrated that "there is no reasonable expectation that the wrong will be repeated." *United States v. Aluminum Co. of America,* 1945 [1944-1945 Trade Cases ¶ 57,342], 148 F. 2d 416, 448; *United States v. W. T. Grant Co., supra,* 345 U. S. at 632; *cf. Walling v. Helmerich & Payne,* 1944, 323 U. S. 37, 43; *United States v. Imperial Chemical Industries,* 1951 [1950-1951 Trade Cases ¶ 62,923], 100 F. Supp. 504, 591-593, decree entered [1952 Trade Cases ¶ 67,282], 105 F. Supp. 215; *United States v. United States Alkali Export Assn.,* 1949 [1948-1949 Trade Cases ¶ 62,474], 86 F. Supp. 59, 79-80; *United States v. National City Lines,* 1953 [1954 Trade Cases ¶ 67,654], 118 F. Supp. 465, 467. It is argued that the allegation of a continuing conspiracy creates an issue of fact whether there is a "reasonable expectation" of resumption of defendants' activities upon which evidence should be adduced. *Cf. United States v. Standard Register Co.,* 1947 [1946-1947 Trade Cases ¶ 57,613], 7 F. R. D. 287. There could be no reasonable expectation of a resumption of illegal acts with respect to sheet chargers licensed under the

Iversen patent. Plaintiff's argument therefore requires the court to give to the conspiracy described in the complaint broader scope than accorded by plaintiff itself, but even so must be rejected.

Neither the answers filed by defendants, their responses to requests for admissions or interrogatories, nor the affidavits filed in support of or in opposition to the motion reveal the existence of a genuine issue of fact on the question of the threat of future violations. Plaintiff's fear that defendants will revive their agreements with respect to other patents in the future is based only on the fact that defendants continue to maintain the legality of their conduct under the principle of *United States v. General Electric Co.,* 1926, 272 U. S. 476. No statement of counsel for defendant Mesta brought to the attention of the court can be regarded as evidence that Mesta intends to enter into "similar agreements in the future if the occasion arose" as argued; and in the absence of a judgment for plaintiff, no evidence of Mesta's alleged illegal proclivities may be found in the fact that other anti-trust proceedings have been instituted against it. The plaintiff has throughout argued that defendants may resume their alleged illegal agreements at will, but in so doing, has overlooked the fact that ownership or control of valuable patents relating to sheet chargers is a prerequisite to revival of agreements like those described in the complaint. But it may be taken as established by uncontroverted averments of defendants' affidavits that neither defendant Mesta nor any defendant except United has such ownership or control.* There is a possibility that defendants may in the future violate the anti-trust laws, but as the court says in *United States v. W. T. Grant Co., supra,* 345 U. S. at 633:

> "The purpose of an injunction is to prevent future violations, . . . and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive."

[*Decision As Guide*]

The plaintiff's final contention is that the case is saved from being moot because the applicability of the *General Electric* case to factual situations like that presented here "must be finally determined so that all parties might be guided thereby." However, even though the exact limits of the *General Electric* case may be undefined, there could be no dispute that a patent owner may not by confederation, combination, or conspiracy, unite with others in restraint of trade in connection with his patent. *United States v. L. D. Caulk Co.,* 1954 [1954 TRADE CASES ¶ 67,919], 126 F. Supp. 693, 708; see *United States v. Masonite Corp.,* 1942 [1940-1943 TRADE CASES ¶ 56,209], 316 U. S. 265, 277.

Cases cited by plaintiff support the principle that where public agencies are involved, termination of alleged illegal practices does not necessarily render the controversy moot, when the situation presents a need for decision as a guide to the public agency in future similar situations. *Walling v. Mutual Wholesale Food & Supply Co.,* 8 Cir., 1944, 141 F. 2d 331, 334-335; *Walling v. Haile Gold Mines, Inc.,* 4 Cir., 1943, 136 F. 2d 102, 105-106; *Gay Union Corp., Inc. v. Wallace,* C. A. D. C., 1940, 112 F. 2d 192, 195. But in none of the cases cited or in others examined by the court was the need for guidance to the public agency the only basis for the decision. In the absence of a reasonable expectation that the wrong alleged against the present defendants will be repeated, this court may not exceed its jurisdiction in determining issues for the government of future cases.

[*Dismissed Without Prejudice*]

In accordance with established practice, the action will be dismissed without prejudice. *United States v. Munsingwear,* 1950, 340 U. S. 36, 39; *United States v. Aluminum Co., supra; United States v. W. T. Grant Co., supra.* When, and if, defendants attempt to resume or enter into similar alleged conspiracies and agreements, it will be time enough for the government to commence new litigation against them. Such course is preferable, in the view of the court, to entering into a protracted trial of issues without present vitality.

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* United is the owner by assignment of patent No. 2,278,140 issued to M. P. Sieger on March 31, 1942. United avers under oath it has never discussed the possible granting of licenses thereunder with other manufacturers and "does not now intend or contemplate the granting of any such right to anyone."

[¶ 68,605] **United States v. National Screen Service Corporation; Paramount Pictures Corporation; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation; Twentieth Century-Fox Film Coporation; RKO Radio Pictures, Inc.; United Artists Corporation; Columbia Pictures Corporation; and Universal Pictures Company, Inc.**

In the United States District Court for the Southern District of New York. Civ. 75-138. Filed January 3, 1957.

Case No. 1128 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Additional Parties Defendant.—A Government motion for an order joining two corporations as additional parties defendant was granted over the objections of the corporations that (1) they were not guilty of the charges made against them in the proposed supplemental complaint, (2) the Government had failed to establish any need to join them since a decree against the present parties would effectively bind their successors (the corporations), and (3) the application of the Government was made on the very eve of trial. The court ruled that only a trial can resolve the issue of whether or not they are guilty; that the proposed supplemental complaint alleges that the corporations have participated in unlawful activities, independently of any vicarious liability for the conduct of their respective predecessor corporations; and that no trial date had been fixed and no prejudice to any person had been shown. Also, the court ruled that the exercise of the extra-territorial jurisdiction of the court, conferred by Section 5 of the Sherman Act, was unnecessary since the corporations had principal offices and places of business in the district in which the action was brought.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8221.

For the plaintiff: Walter W. K. Bennett, E. Winslow Turner, and Elliott H. Feldman (Richard B. O'Donnell, of counsel), New York, N. Y.

For the defendants: Phillips, Nizer, Benjamin & Krim, for National Screen Service Corporation; Louis Phillips for Paramount Pictures Corporation; R. W. Perkins for Warner Bros. Pictures, Inc. and Warner Bros. Distributing Corporation; Dwight, Royall, Harris, Koegel & Caskey for Twentieth Century-Fox Film Corporation; J. Miller Walker for RKO Radio Pictures, Inc.; O'Brien, Driscoll & Raftery for United Artists Corporation; Schwartz & Frohlich for Columbia Pictures Corporation; and Aldolph Schimel for Universal Pictures Company, Inc.; all of New York, N. Y.

Memorandum

[*Additional Parties*]

SUGARMAN, District Judge [*In full text*]: The plaintiff, United States of America, moves "for an order, pursuant to 15 U. S. C. § 5, that the ends of justice require that plaintiff be granted leave to:

"(1) join Warner Bros. Pictures, Inc., and Twentieth Century-Fox Film Corporation as additional parties defendant herein; and

"(2) cause them to be summoned and served with a supplemental complaint in the form hereto annexed."

[*Objections Rejected*]

In opposition to granting the relief sought, the proposed new parties are heard to argue,[1] in substance: (1) they are not guilty of the charges leveled against them in the proposed supplemental pleading, (2) plaintiff has failed to establish any need to join the proposed new parties, since a decree against present parties will effectively bind their successors "New Warner" and "New Fox" and (3) the application of the plaintiff is made on the very eve of trial.

The short answer to (1) *supra* is that only a trial can resolve the issue.

As to (2) *supra,* the argument ignores the allegations of the proposed supplemental complaint, wherein it is alleged that "New Warner" and "New Fox" *have* participated in unlawful activities, independently of any vicarious liability for the conduct of their respective predecessor corporations.

[1] 3 *Moore's Fed. Prac.,* 2d Ed., para. 21.05, p. 2909.

Plaintiff does not seek a substitution of parties under Federal Rule of Civil Procedure 25(c); it seeks to add new parties who must answer for their own deeds. Authority for the motion is found in Federal Rule of Civil Procedure 21 [2] and Federal Rule of Civil Procedure 15(d). Exercise of the extra-territorial jurisdiction of the court, conferred by 15 U. S. C. A. § 5, is unnecessary since both "New Warner" and "New Fox" have principal offices and places of business in New York City, according to the proposed supplemental complaint.

As to (3) *supra,* no trial date has been fixed in the instant action. No prejudice is shown to result to any person, including the proposed new parties, by reason of any undue delay on the plaintiff's part. This objection, too, is without merit.

[*Motion Granted*]

Oral argument appearing to be unnecessary, the motion of the plaintiff is granted. Settle an appropriate order on notice.

[¶ 68,606] Music Merchants, Inc. v. Capitol Records, Inc., Capitol Records Distributing Corp., Decca Records Inc., Decca Distributing Corporation.

In the United States District Court for the Eastern District of New York. Civil No. 14596. Dated January 4, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Joinder of Claims and Parties—Motion To Sever.—A motion to sever from a complaint different causes of action against different defendants was denied where the causes of action charged, in effect, that all of the defendants engaged in a conspiracy to fix prices. The plaintiff asserted against the defendants a right to relief "in respect of or arising out of the same * * * series of transactions or occurrences," namely, arising out of an alleged conspiracy by and among all of the defendants. Furthermore, the principal question of law involved was whether the alleged price fixing conspiracy violated the Sherman Act. Rule 20(a) of the Federal Rules of Civil Procedure provides for permissive joinder of defendants if there is any question of law or fact common to all, and the rule does not require that all facts to be adduced be common to all. However, the motion was granted with respect to causes of action charging discriminatory pricing practices since it was not claimed that the practices of one of the defendants arose out of the same series of transactions as the practices of another defendant. In asserting a right to relief against multiple parties, the right to relief must arise out of the same series of transactions and there must be a common question of law or fact.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.275.

For the plaintiff: Socolow, Stein & Seton, New York, N. Y.

For the defendants: Young, Kaplan & Edelstein, and Cohen & Bingham, New York, N. Y.

Memorandum

[*Joinder of Claims and Parties*]

GALSTON, District Judge [*In full text*]: This is a motion by defendants Capitol Records, Inc. and Capitol Records Distributing Corp. to sever from the complaint the second and fifth causes of action against defendants Decca Records, Inc., and Decca Distributing Corporation, to drop the latter defendants from the third cause of action and to direct plaintiff to amend its present complaint accordingly and to proceed solely against defendants Capitol Records and Capitol Distributing on the first, third and fourth causes of action, on the ground that the requirements of Rules 18(a) and 20(a) of the Federal Rules of Civil Procedure, 28

[2] 3 *Moore's Fed. Prac.,* 2d Ed., para. 21.04, p. 2906.

U. S. C. A., with respect to permissive joinder of claims and of parties have not been satisfied.

[*Complaint*]

The complaint alleges that plaintiff is a corporation organized and existing under the laws of Pennsylvania, and has a place of business in the Eastern District of New York. The action is brought pursuant to provisions of the Sherman Act, 15 U. S. C. A. 1-7, the Clayton Act, 15 U. S. C. A. 12-17, and the Robinson-Patman Act, 15 U. S. C. A. 13.

[*Causes of Action*]

In the first cause of action it is alleged that Capitol Records and its wholly-owned subsidiary, Capitol Distributing Corp., have contracted, combined and conspired with others and with each other to restrain trade in the distribution of popular records. It further alleges that in furtherance of this "illegal conspiracy" Capitol Records has established distributors, including Capitol Distributing, each of which in its particular territory has an exclusive franchise; that as a condition to the maintenance of such franchise, Capitol Records has insisted that all its distributors agree to sell records at a price fixed by Capitol Records; and that all of such distributors have agreed with Capitol Records to sell all records produced by it throughout the entire United States at the uniform prices fixed by Capitol Records.

The second cause of action contains substantially the same allegations with respect to the formation and maintenance of a resale price-fixing conspiracy by Decca Records, Inc., and its wholly-owned subsidiary, Decca Distributing Corp. and "others."

The third cause of action incorporates by reference all of the paragraphs of the first and the second causes of action. It then alleges that the maintenance of nationally uniform prices at the wholesale distributors' level on records produced by Capitol Records and Decca Records has been the result of an agreement and arrangement among the four defendants, the terms of which were that Capitol Records and Decca Records would require each of its distributors to maintain throughout the United States a uniform price scale, and that the price scale for both of said defendants would be identical. Capitol Distributing and Decca Distributing were alleged to have joined in the agreements and to have acted in furtherance of the alleged conspiracy. The effect of the foregoing arrangement and agreement, it is alleged, has been to restrain trade and commerce in the distribution of phonograph records among the several states. By reason of the facts complained of in the first, second and third causes of action, plaintiff claims it has been damaged in the amount of $200,000.

The fourth cause of action alleges that Capitol Distributing has discriminated against plaintiff and in favor of certain others purchasing from said defendant by selling at a lower price, by giving greater discounts, rebates and return privileges, and by granting certain allowances to such other purchasers. It is further alleged that these acts of Capitol Distributing were taken at the insistence and demand of Capitol Records, which ordered Capitol Distributing to carry out these practices as a condition to the continuance of its franchise. Damages are alleged in the amount of $50,000.

The fifth cause of action contains similar allegations with respect to alleged discriminatory practices by Decca Distributing at the instance and demand of Decca Records. It also alleges damages of $50,000.

[*Rules of Civil Procedure*]

Rule 18(a) of the Federal Rules of Civil Procedure provides, in pertinent part,

> "* * * There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied."

Rule 20(a) of the Federal Rules states, in pertinent part,

> "* * * All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

Rule 19, dealing with necessary joinder of parties, and Rule 22, dealing with interpleader, are not material on this motion.

[*Common Questions*]

The allegations of the third cause of action incorporating the allegations of the first and second causes of action, in effect charge that Capitol Records entered into

a price fixing agreement with Capitol Distributing and others, and that Decca Records entered into an identical price fixing agreement with Decca Distributing and others as a result of a combination and conspiracy of the four defendants to fix and maintain uniform prices at the wholesale distributors' level. It appears, therefore, that there is asserted against the defendants a right to relief "in respect of or arising out of the same * * * series of transactions or occurrences," namely, arising out of an alleged conspiracy by and among the four defendants. Moreover, the principal question of law involved is whether the alleged price fixing conspiracy is a violation of the Sherman Act.

It may be, as the moving parties contend, that facts evidencing any agreement between Capitol Records and Capitol Distributing will be different from the facts with respect to an agreement between Decca Records and Decca Distributing. However, Rule 20(a) provides for permissive joinder if "any" fact is common to all defendants; it does not require that all facts to be adduced be common to all. The facts to determine a conspiracy among all four defendants which resulted in their entering into the alleged illegal uniform price fixing arrangements will be common to them all. In any event, Rule 20(a) provides for a joinder of defendants if there is *any* question of law *or* fact common to all.

[*Claims Severed*]

With respect to the fourth and fifth causes of action alleging discriminatory pricing practices, it is not claimed in the allegations set forth therein that the practices of Capitol Distributing arose out of the same transaction, occurrence or series of transactions or occurrences as the practices of Decca Distributing. Moreover, it is not alleged in either the fourth or fifth causes of action that the acts complained of therein arose out of the conspiracy alleged in the first three causes of action. There appears to be a common question of law involved in the fourth and fifth causes of action, namely, whether the price discrimination practices alleged violated the Clayton Act and the Robinson-Patman Act. In Rule 20(a), however, the conjunctive "and" rather than the disjunctive "or" is employed in requiring that in asserting a right to relief against multiple parties such right arise out of the same transactions or occurrences and there be a common question of law or fact. Therefore, the provisions of Rule 20(a) are not satisfied, and the fourth and fifth causes of action should be severed from the complaint.

[*Ruling*]

It appears that for the purposes of this motion, Capitol Records and Capitol Distributing do not object to combining in one complaint the causes of action against Capitol Records and Capitol Distributing. Consequently, plaintiff may proceed against these two defendants in one complaint on the first and fourth causes of action in the manner alleged therein, and on the third cause of action as against all defendants.

The plaintiff is directed to amend its complaint as indicated herein within twenty days from the entry of the order.

Settle order.

[¶ 68,607] TCF Film Corporation, Paramount Pictures, Inc., United Artists Corporation, Columbia Pictures Corporation, Loew's Incorporated, Universal Film Exchanges, Inc., Monogram Pictures Inc., Alexander Theatre Supply Inc. and RKO Teleradio Pictures, Inc., Petitioners v. The Honorable Wallace S. Gourley, Chief Judge of the United States District Court for the Western District of Pennsylvania, Respondent, and United Exhibitors Inc., Penn State Theatre, Warner Bros. Pictures Distributing Corporation, Warner Theatres, Inc., Erie Amusement Company, Intervenor-Respondents.

In the United States Court of Appeals for the Third Circuit. No. 11,937. Argued January 9, 1957. Filed January 22, 1957.

Petition for Writ of Mandamus and Prohibition.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Denial of Motion to Amend Complaint—Power of District Judge to Overrule Decision of Another District

Judge.—Where a District Court Judge denied a motion for leave to file an amended and supplemental complaint, and, subsequently, on a motion for rehearing, another District Court Judge vacated the order denying the motion and entered an order permitting the filing of an amended and supplemental complaint, a petition for a writ of mandamus directing the second judge to vacate his order was denied. Although the general rule is that judges of co-ordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other, an exception to the rule exists where the judge who made the original decision is not available to consider an application to rehear and reverse his decision. In the present case, the assignment of the original judge to the court was terminated and he was no longer available to entertain the application for rehearing.

See Private Enforcement and Procedure, Vol. 2, ¶ 9007.

Before BIGGS, Chief Judge and MARIS, GOODRICH, McLAUGHLIN, KALODNER, STALEY and HASTIE, Circuit Judges.

Opinion of the Court

[*Writ of Mandamus Sought*]

By MARIS, Circuit Judge [*In full text*]: This is a petition for a writ of mandamus and prohibition directed to Chief Judge Wallace S. Gourley of the District Court for the Western District of Pennsylvania requiring him to vacate an order made by him on April 24, 1956 and restraining him from taking any further action or proceedings pursuant to the provisions of that order which was entered in a civil action pending in that court entitled *"United Exhibitors Inc., et al. v. Twentieth Century Fox Film Corporation, et al.,"* No. 14, Erie. The petitioners are defendants in that action and all the other defendants therein have joined in the petition. The plaintiffs in the action have intervened in the present proceeding as respondents.

[*Complaint—Motion*]

The original complaint in the United Exhibitors action was filed in the District Court for the Western District of Pennsylvania on September 8, 1939 and alleged a conspiracy, in violation of the federal antitrust laws, to restrain the distribution and exhibition of motion pictures in Erie, Pennsylvania, to the damage of the plaintiffs. On May 3, 1955 the plaintiffs in that action filed a motion for leave to file an amended and supplemental complaint which would eliminate certain parties plaintiff and defendant, exclude the eliminated defendants, who were certain local motion picture exhibitors, from the alleged group of conspirators, and extend the scope of the action to include the period running from 1939 to the date of the motion.

[*Ruling on Motion*]

Prior to May 31, 1955 Judge Frederick V. Follmer was one of the judges of the District Court for the Western District of Pennsylvania, having been commissioned as a district judge for the Eastern, Middle and Western Districts of Pennsylvania, and the United Exhibitors action had been assigned to him. On May 31, 1955 upon the retirement of Judge Albert L. Watson of the Middle District of Pennsylvania, Judge Follmer, pursuant to the provisions of section 6 of the Act of February 10, 1954, 68 Stat. 14, ceased to be a judge of the Eastern and Western Districts of Pennsylvania and became a judge of only one district, the Middle District of Pennsylvania. Shortly thereafter Judge Follmer was specially assigned by the chief judge of the circuit to the Western District of Pennsylvania to hear the United Exhibitors action and on June 10, 1955 he heard argument on the pending motion of the plaintiffs for leave to file an amended and supplemental complaint. On February 3, 1956 he filed an opinion, 18 F. R. D. 469, and entered an order denying the motion. On February 23, 1956 the plaintiffs filed a motion for rehearing and reconsideration of their motion for leave to file an amended and supplemental complaint.

[*Motion for Rehearing*]

On April 13, 1956 the motion for rehearing and reconsideration came on for argument before Chief Judge Gourley. At that hearing counsel for the defendants urged that the established rule of this circuit provides that one judge of a district court may not overrule a prior decision of another judge of the same court in the same case and that Chief Judge Gourley, therefore, did not have power to reverse on rehearing the order which Judge Follmer had previously made in the case. It then was discovered by Chief Judge Gourley that Judge Follmer had been specially assigned to the case by the chief judge of the circuit. Chief Judge Gourley accordingly communicated with the chief judge of the circuit who informed him that for reasons personal to Judge Follmer it would not be possible for the latter to dispose of the motion for rehearing. The chief judge of the circuit accordingly on April 18, 1956 terminated the assignment of Judge Follmer to the Western District of Pennsylvania for the consideration of the United Exhibitors case and informed Chief Judge Gourley that he was at liberty to proceed with it. Thereafter on April 24, 1956 Chief Judge Gourley entered an order in the case vacating and setting aside Judge Follmer's prior order and granting plaintiff's motion to file the amended and supplemental complaint nunc pro tunc as of May 3, 1955. Shortly thereafter the petitioners filed the present petition asking this court to issue a writ of mandamus and prohibition directed to Chief Judge Gourley to cause him to vacate the order entered on April 24, 1956 and to restrain him from any further proceedings thereunder.

[*Contentions*]

The petitioners base their claim for relief by way of mandamus and prohibition upon the rule that judges of co-ordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other, a rule which this court followed in *Jurgenson v. National Oil & Supply Co.*, 1933, 63 F. 2d 727, 729, and *Price v. Greenway*, 1948, 167 F. 2d 196, 199-200, and which has been applied in many other cases in this circuit [1] as well as elsewhere.[2] The respondents on the other hand contend that the rule, which is perhaps best exemplified by the opinion of the Court of Appeals for the Second Circuit in the case of *Commercial Union of America v. Anglo-South American Bank*, 1925, 10 F. 2d 937, has been deprived of its authoritative basis by the recent decision of that court in *Dictograph Products Company v. Sanotone Corporation*, 1956, 230 F. 2d 131.

[*Exception to General Rule*]

It is true that the *Dictograph* case indicates that the rule under discussion is not absolute and all-embracing in its scope. There are, as that case illustrates, exceptional circumstances under which courts have held that one judge of a district court may overrule a decision by another judge of his court in the same case. Nonetheless we think that the rule is a most salutary one. We adhere to it and hold that except under the most extraordinary circumstances it should be followed by the district judges of this circuit. The reasons for the rule have been reiterated in the many cases in which it has been applied and need not be repeated here in detail. It is sufficient to say that we regard it as a necessary rule

[1] *Wright v. Barnard*, D. C. Del. 1919, 264 F. 582, 584; *United States v. Parker*, D. C. N. J. 1938, 23 F. Supp. 880, 889; *Etten v. Lovell Mfg. Co.*, D. C. W. D. Pa. 1949, 83 F. Supp. 178, 187; *McArthur v. Rosenbaum Co. of Pittsburgh*, D. C. W. D. Pa. 1949, 85 F. Supp. 5, 6; *Dionne v. Erie Concrete & Steel Supply Co.*, D. C. W. D. Pa. 1951, 97 F. Supp. 441; *United States v. Firman*, D. C. W. D. Pa. 1951, 98 F. Supp. 944, 946; *Dow v. Carnegie-Illinois Steel Corp.*, D. C. W. D. Pa. 1952, 108 F. Supp. 88, 89; *United States v. Ginn*, D. C. E. D. Pa. 1954, 124 F. Supp. 658, 660; *United States v. Skurla*, D. C. W. D. Pa. 1954, 126 F. Supp. 713, 716; *Fried v. Feola*, D. C. W. D. Pa. 1954, 129 F. Supp. 699, 701.

[2] *Appleton v. Smith*, C. C. Ark. 1870, Case No. 498, 1 Fed. Cas. 1075; *Cole Silver Min. Co. v. Virginia & Gold Hill Water Co.*, C. C. Nev. 1871, Case No. 2,990, 6 Fed. Cas. 72, 74; *Reynolds v. Iron Silver Min. Co.*, C. C. Colo. 1888, 33 F. 354, 355; *Shreve v. Cheesman*, 8 Cir. 1895, 69 F. 785, 791; *Commercial Union of America v. Anglo-South American Bank*, 2 Cir. 1925, 10 F. 2d 937; *Hardy v. North Butte Mining Co.*, 9 Cir. 1927, 22 F. 2d 62; *Humphrey v. Bankers Mortg. Co. of Topeka, Kan.*, 10 Cir. 1935, 79 F. 2d 345, 352; *National Ben. Life Ins. Co. v. Shaw-Walker Co.*, D. C. Cir. 1940, 111 F. 2d 497, 508; *Donnelly Garment Co. v. National Labor Relations Bd.*, 8 Cir. 1942, 123 F. 2d 215, 220; *In Re Joslyn's Estate*, 7 Cir. 1948, 171 F. 2d 159, 164; *The Material Service* D. C. Ill. 1934, 11 F. Supp. 1006, 1007; *United States v. Thomas Steel Corporation*, D. C. Ohio 1952, 107 F. Supp. 418, 423. See also annotation 132 A. L. R. 14; 33 C. J., Judges § 99; 21 C. J. S., Courts, § 501.

of judicial comity to preserve the orderly functioning of the judicial process.

As we have said, there may be exceptional circumstances under which the rule is not to be applied. Such circumstances exist when the judge who made the original decision is not available to consider the application to rehear and reverse his decision. If the judge who made the decision dies[3] or resigns from the court he obviously is no longer available to reconsider it and such reconsideration must perforce be by another judge if it is to be had at all. Likewise if the decision has been made by a judge temporarily assigned to the court for the hearing of a specified case and his assignment is terminated he is no longer available to entertain an application for rehearing and it must accordingly be considered by another judge. That was the situation in the present case. Judge Follmer's power to act as a permanent judge of the District Court for the Western District of Pennsylvania ended on May 31, 1955 and his power to act temporarily as judge assigned to the court for purposes of this case ended on April 18, 1956. We conclude that it was entirely within the competence of Chief Judge Gourley after April 18, 1956 to decide the motion for rehearing and reconsideration as he did. Whether his decision upon that motion was within his discretionary power or amounted to an abuse of it is not now before us and we intimate no opinion upon that subject. It is a matter which may be considered upon appeal after a final judgment has been rendered in the case.[4] However this may be we are clear that Chief Judge Gourley had the power to hear and decide the motion and that accordingly the issuance of a writ of mandamus and prohibition would be wholly unwarranted.[5]

In conclusion we think it useful to point out that the rule here under consideration likewise does not apply to rehearing by the full court of a decision by a single judge of the court. Every district court has the power to review in banc a decision rendered by one of its individual members and upon such reconsideration by the full bench to overrule the prior decision of the single judge. Such power is necessary in order to enable a court to preserve its integrity of decision by itself eliminating conflicting rulings by its own members without having to wait for the resolution of such conflicts through the appellate process.[6]

[*Petition Denied*]

The petition for a writ of mandamus and prohibition will be denied.

[¶ 68,608] Alpha Beta Food Markets, Inc., et al. v. Amalgamated Meat Cutters and Butcher Workmen of North America, et al.

In the California District Court of Appeal, Second District, Division One. Civ. No. 22090. Dated December 31, 1956.

Appeal from a judgment of the Superior Court of Los Angeles County. PHILIP H. RICHARDS, Judge. Affirmed.

California Cartwright Act and Sherman Antitrust Act

Combinations and Conspiracies Under Federal and State Laws—Labor Unions—Collective Bargaining Agreement—Restriction on Preparation and Sale of Prepackaged Meats and Fish—Legality.—A provision of a collective bargaining agreement between retail market operators and unions of meat cutters which provided that all fresh meats,

[3] See *Magee v. General Motors Corp.*, 3 Cir. 1954, 213 F. 2d 899.

[4] See, for example, *Sutherland Paper Co. v. Grant Paper Box Co.*, 3 Cir. 1950, 183 F. 2d 926. 931, cert. den. 340 U. S. 906, reversing *Sutherland Paper Co. v. Grant Paper Box Co.*, D. C. W. D. Pa. 1949, 9 F. R. D. 422.

[5] We accordingly need not consider the question whether mandamus and prohibition would lie to correct a departure from the rule under discussion in a case to which it properly applied. But see *Gulf Research & Development Co. v. Leahy*, 3 Cir. 1951, 193 F. 2d 302, affirmed by an equally divided court, 344 U. S. 861, and compare *La Buy v. Howes Leather Co.*, 1957 [1957 TRADE CASES ¶ 68,585], — U. S. —.

[6] For illustrations of the useful exercise of this power see *In re Stein*, D. C. E. D. Pa. 1936, 17 F. Supp. 587; *United States v. Warden of Philadelphia County Prison*, D. C. E. D. Pa. 1949, 87 F. Supp. 339; *United States v. Baldi*, D. C. E. D. Pa. 1951, 96 F. Supp. 100. And for a discussion of the employment of this power by this court to preserve uniformity in its decisions see Maris, Hearing and Rehearing Cases in Banc, 1953, 14 F. R. D. 91.

poultry, fish, and rabbits should be cut, prepared, and packaged on the premises of such markets by members of the unions was held illegal and void under the California Cartwright Act and the Sherman Antitrust Act. Frozen prepackaged products are competitive to fresh meat, fish, and poultry, which are regularly cut and wrapped in retail stores. The enforcement of the provision would have the effect of prohibiting the handling and sale of the prepackaged frozen products in the retail markets. The unions' contention that they are seeking only that to which organized labor is entitled, and, therefore, there could be no violation of the antitrust laws, was rejected. The provision was held to constitute a conspiracy, a combination, and an unlawful agreement under the Sherman Act. Under the provision, the sale of such products would be restrained, and the means for marketing such products would be destroyed with the result that the sale and distribution of the products would be for all intents and purposes an impossibility.

See Combinations and Conspiracies, Vol. 1, ¶ 2101.063, 2449.05.

Private Enforcement and Procedure—Declaratory Judgment Action in State Court—Legality of Collective Bargaining Agreement—Jurisdiction of State Court.—In a state court declaratory judgment action to determine the legality of a provision of a collective bargaining agreement under the California and Federal antitrust laws, contention that jurisdiction of the matter is in the National Labor Relations Board or in the Federal courts, rather than in the California courts, was rejected. The agreement was executed in California and was performable in the state. The California courts have jurisdiction to determine whether the provision violates the law of the state as well as the federal law. This was not an action to enforce compliance with the National Labor Relations Act, and the pleadings did not show any unfair labor practice under the Act. Furthermore, there was no labor dispute. The National Labor Relations Board has no jurisdiction over laws relating to monopolies and restraints of trade. Also, the legality of the provision was not a proper subject of arbitration.

See Combinations and Conspiracies, Vol. 1, ¶ 2441.05; Private Enforcement and Procedure, Vol. 2, ¶ 9047.

For the appellants: David Sokol.

For the respondents: Musick, Peeler & Garrett; Harold F. Collins; McLaughlin & Casey; and James A. McLaughlin.

Affirming a decision of the California Superior Court, County of Los Angeles, 1956 Trade Cases ¶ 68,357.

Action for declaratory relief to secure a ruling as to whether certain language in a collective bargaining agreement evidences an unlawful conspiracy between employers and unions to restrict and prohibit the sale of certain commodities. Judgment determining such contractual language void and invalid, affirmed.

[*Declaratory Relief*]

FOURT, Justice [*In full text*]: This is an appeal by the defendants from a judgment in a declaratory relief action wherein the court determined that certain controversial provisions of a collective bargaining agreement were void and invalid in that such provisions violated the laws of the United States and the laws of the State of California.

[*Collective Bargaining Agreement*]

The facts are substantially as follows: The action was instituted by 12 retail market operators doing business in various localities in Southern California. The four appellant unions represent the employees who are employed in the various markets of the respondents. Each union represents certain employees in a distinct geographical area in which one or more of the respondents operate markets. Agreements were entered into between the respondents and appellants and in each instance the agreement contained substantially the following language: Self-Service Markets: All fresh meats, fresh poultry, fresh fish, fresh rabbits, shall be cut, prepared and packaged on the premises and dispensed by members of Meat Cutters Local.

The agreements with which we are concerned were negotiated during November and December of 1955, and were signed as of about December 10, 1955. The same, or substantially the same language as above set fourth was in earlier agreements between

the parties hereto for several years immediately prior to December 10, 1955. During the immediate previous years the practice of freezing and packaging frozen meats, fish and poultry had become more widespread, whereas at the time of the agreements were first entered into, there apparently was little if any prepackaged frozen meat available at retail markets. During the latter part of 1955, and the early part of 1956, large meat packers greatly expanded their business of precutting, prepackaging and freezing all of the usual types and cuts of meat. In this new procedure, there were utilized new types of wrapping materials which were more adaptable to the continued preservation of frozen foods whereby such products could be kept substantially fresh for indefinite periods of time in self-service freezers such as were used in the respondents' markets. The process used by the large meat packers was essentially an assembly-line system where the bones and fat were removed before the cuts were packaged and frozen. The products are quickly frozen to prevent destruction of the meats and to enable them to keep fresh for an extended period of time. They are machine wrapped and packaged with special materials which tend to keep out oxygen and moisture and thereby prevent deterioration.

About January 20, 1956, each of the appellant unions directed a notice to the respondents demanding that the sale of such prepackaged frozen meat products be discontinued until the disputed provisions of the collective bargaining agreements could be arbitrated. The respondents declined to arbitrate because they contended it was not subject to arbitration. The action here was in declaratory relief to have it determined whether the provisions of the agreement in question were illegal and void as constituting unlawful restraints of trade under both federal and state laws.

[*Injunction Denied*]

The respondents sought an injunction against the unions to restrain a threatened strike. However, the trial court denied any such injunction upon the ground, apparently, that the unions had not, in fact, called any strike.

[*Issue*]

The sole question involved here, therefore, is whether a union or a group of unions can combine or conspire with an employer or group of employers, by means of a collective bargaining agreement, to restrain and prevent the manufacture and sale of commodities, such as frozen meats, poultry and fish, even though the objective of the union or unions may be to monopolize the work on such meat products for their own members to the exclusion of workmen employed in the plants of the processors or packers of such products, and regardless of whether such workmen are union members.

We are of the opinion that such provisions in such a contract are illegal and void as being in violation of the federal and state antitrust laws.

[*California Antitrust Law*]

The frozen prepackaged products are competitive to fresh meat, fish and poultry, which are regularly cut and wrapped in retail stores, and to enforce the terms of the agreement in question would obviously result in prohibiting the handling and sale of the prepackaged frozen products in the retail markets. There is set forth in a footnote hereto the provisions of sections 16720 and 16722 of the Business and Professions Code.[1]

[1] "§ 16720. Trust defined: Purposes. A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

"(a) To create or carry out restrictions in trade or commerce.

"(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

"(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

"(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

"(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any combination of any of the following:

"(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

"(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

"(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any pur-

Section 16750 of the same code provides a remedy to a person injured as a result of any combination or conspiracy, and section 16755 provides for criminal penalties for participating in any such violation.

[*Kold Kist Decision*]

In the case of *Kold Kist, Inc. v. Amalgamated Meat Cutters* [1950-1951 TRADE CASES ¶ 62,695], 99 Cal. App. 2d 191 [221 P. 2d 724], the defendants caused a provision to be placed in a collective bargaining agreement which prohibited the sale of frozen meat products after 6 o'clock p. m. from the refrigerated display cases in the retail markets. The court said, among other things, in deciding the case the following (at page 197):

> "While combined action which is in restraint of trade, as the term is commonly used, is illegal, regardless of the objective of the parties, it is also illegal if it is entered into for the purpose of restraining trade. Even though it appeared to be the purpose of the unions to improve the status of their members by limiting hours of work it was a proper inquiry whether it was intended to accomplish this purpose by placing restrictions upon the trade in plaintiffs' products through the prevention of the sale thereof except through union members."

Further, in answer to the contention of the appellants that as long as they are seeking only that to which organized labor is entitled, there can be no violation of the antitrust laws, the court in the *Kold Kist* case (*supra*), at pages 200-201 stated:

> "As we have heretofore pointed out, defendants have not denied that detriment has resulted and will continue to result to plaintiffs' business in the manner and to the extent alleged in the complaint and supporting affidavit. Nevertheless they argue that even though there has been and will be restraint there is no remedy available to plaintiffs for the reason that they, the unions, are seeking only to obtain uniform working hours for all employees. They say that it must be demonstrated from the face of the contract or from the pleadings of plaintiffs that the purpose of the provisions of the contract is to 'directly, intentionally and specifically' unreasonably and illegally restrain trade in a way which is unconcerned with the accomplishment of a legitimate labor objective or the contract cannot be deemed an illegal restraint of trade. This is to claim, in effect, that whenever their efforts are calculated to advance the interests of their members the effect upon others is not to be considered. This contention has frequently been advanced and rejected. If we were to agree with it, the result would be that the assertion of any lawful labor objective, regardless of the means proposed for the accomplishment thereof, would preclude the courts from making inquiry to determine whether the objective was indeed lawful.
>
> "In *Giboney v. Empire Storage & Ice Co.,* 336 U. S. 490 [69 S. Ct. 684, 93 L. Ed. 834], the union argued that the primary objective of their combination and picketing was to improve wage and working conditions, admittedly a lawful purpose, and that 'their violation of the state antitrade restraint laws must be dismissed as merely incidental to this lawful purpose.' The court said, quoting from *International Harvester Co. v. Missouri,* 234 U. S. 199, 209 [34 S. Ct. 859, 58 L. Ed. 1276], ' "It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions. . . ." ' It was also said that 'To exalt all labor union conduct in restraint of trade above all state control would greatly reduce the traditional powers of states over their domestic economy and might conceivably make it impossible for them to enforce their antitrade restraint laws.' The courts of this state have held that the letter and paramount object of the law (Cartwright Act) is satisfied if the tendency of the action or proposed action is to restrain trade. (Citing cases.)
>
> "Defendants also argue that only those combinations are in unlawful restraint of trade which seek to control prices and create a monopoly. A complete answer to this contention is found in the statute itself. Under subdivisions (a), (b) and (c), of section 16720, Business and Professions Code, it is unlawful for two or more persons to combine to create or

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chasers or consumers in the sale or transportation of any such article or commodity.

"(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected."

"§ 16722. Contracts void. Any contract or agreement in violation of this chapter is absolutely void and is not enforceable at law or in equity."

carry out restrictions in trade or commerce; to limit or reduce the production of any commodity; or to prevent competition in the sale or purchase of merchandise, produce or any commodity. These enactments are distinct from the remainder of the section which has to do with price fixing. Although price fixing and monopolistic practices tend to affect competition, production and restrictions in trade, the Legislature has not limited illegal combinations in restraint of trade to those which involve price fixing or monopoly. (*People v. Sacramento Butchers' Protective Assn.*, 12 Cal. App. 471 [107 P. 712]; *Overland Pub. Co. v. H. S. Crocker Co.*, 193 Cal. 109 [222 P. 812].)"

[*Similar Rulings*]

Similar statutes in other states have been similarly interpreted, as in *Austin v. Painters' Dist. Council No. 22*, 339 Mich. 462 [64 N. W. 2d 550]; *Giboney v. Empire Storage & Ice Co.* [1948-1949 TRADE CASES ¶ 62,391], 336 U. S. 490 [69 S. Ct. 684, 93 L. Ed. 834]; *Foust v. Truck Drivers Union*, (Ohio Court of Common Pleas, April 3, 1956), 38 L. R. R. M. 2645; *Commonwealth v. McHugh* [1950-1951 TRADE CASES ¶ 62,678], 326 Mass. 249 [93 N. E. 2d 751].

Appellants have cited three California cases in an effort to support the last mentioned contention, namely, that the provisions of the agreements do not violate the state antitrust laws. One is a superior court decision, namely *McDonnell v. Meat Drivers Local* [1952 TRADE CASES ¶ 67,202], 29 L. R. R. M. 2176; and the other two are *Los Angeles Pie Bakers Assn. v. Bakery Drivers* [1954 TRADE CASES ¶ 67,657], 122 Cal. App. 2d 237 [264 P. 2d 615], and *Schweizer v. Local Joint Executive Board* [1953 TRADE CASES ¶ 67,620], 121 Cal. App. 2d 45 [262 P. 2d 568]. None of the cases cited are in our opinion, in point.

[*Federal Antitrust Laws*]

Coming now to the question whether the prohibitions in the agreement violated the federal antitrust laws: We are of the belief that such language does so violate the federal law. Section 1, title 15, U. S. C. A. specifies that contracts and combinations in restraint of trade are illegal. Section 2, title 15, U. S. C. A., specifies that every person who shall participate in such unlawful acts is guilty of a misdemeanor and subject to a fine or imprisonment or both.

In *Allen Bradley Co. v. Local Union No. 3* [1944-1945 TRADE CASES ¶ 57,386], 325 U. S. 797, 808-810 [65 S. Ct. 1533, 89 L. Ed. 1939], the unions and employers contracted to exclude electrical equipment from use unless purchased from local manufacturers, and in determining the case the court said:

"We have been pointed to no language in any act of Congress or in its reports or debates, nor have we found any, which indicates that it was ever suggested, considered, or legislatively determined that labor unions should be granted an immunity such as is sought in the present case. . . . But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-La Guardia Acts.

"It must be remembered that the exemptions granted the unions were special exceptions to a general legislative plan. The primary objective of all the antitrust legislation has been to preserve business competition and to proscribe business monopoly. It would be a surprising thing if Congress, in order to prevent a misapplication of that legislation to labor unions, had bestowed upon such unions complete and unreviewable authority to aid business groups to frustrate its primary objective. For if business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves. . . .

"Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups."

Also see *Anderson-Friberg, Inc. v. Justin R. Clary & Son, Inc.* [1950-1951 TRADE CASES ¶ 62,852], 98 F. Supp. 75; *Manaka v. Monterey Sardine Industries, Inc.*, 41 F. Supp. 531; *Gulf Coast Shrimpers & Oystermans Assn. v. United States* [1956 TRADE CASES ¶ 68,469], 236 F. 2d 658; *United States v. Employing Plasterers Assn.* [1954 TRADE CASES ¶ 67,692], 347 U. S. 186 [74 S. Ct. 452, 455, 98 L. Ed. 618, 627]; *Lystad v. Local Union No. 223* [1955 TRADE CASES ¶ 68,182], 135 F. Supp. 337.

In our opinion the terms of the agreement in the instant case evidence a conspiracy, combination and unlawful agreement.

The effect of the agreement is to bar from the markets any such frozen, prepackaged products. To comply with the agreement would not only mean, among other things, that the sale of the products is restrained, but that the means for marketing such products are destroyed with the result that the sale and distribution of the products would be for all intents and purposes an impossibility in this area.

[*Arbitration*]

The appellants contend that the matter should have been submitted to arbitration, under the arbitration provisions of the agreement. In the first place, the arbitration provisions relate only to "controversies involving the interpretation of any provisions of" the agreement. The controversy here is as to the legality of the terms of the agreement. Questions of legality are not arbitrable by arbitrators.

In *Loving & Evans v. Blick*, 33 Cal. 2d 603, 610-611 [204 P. 2d 23], the court held that a claim arising out of an illegal provision in a contract was not subject to arbitration, saying, among other things:

> "Section 1281 of the Code of Civil Procedure, providing for submission to arbitration of 'any controversy . . . which arises out of a contract,' does not contemplate that the parties may provide for the arbitration of controversies arising out of contracts which are expressly declared by law to be illegal and against the public policy of the state. So it is generally held that 'a claim arising out of an illegal transaction is not a proper subject matter for submission to arbitration, and that an award springing out of an illegal contract, which no court can enforce, cannot stand on any higher ground than the contract itself.' (6 C. J. S., § 12, p. 160.) Aptly illustrative of this well-settled principle is the fairly recent case of *Smith v. Gladney*, 128 Tex. 354 [98 S. W. 2d 351], where a dispute arose between the parties as a result of trading in 'futures' upon the Chicago Board of Trade. The matter was submitted to arbitration. When suit was brought upon the award and it was affirmed 'on the theory that [it] was final,' the appellate court, in reversing the judgment, said at pages 351-352 [98 S. W. 2d]: 'It appears to be almost universally recognized that a claim arising out of an illegal transaction, such as a speculation in futures, is not a legitimate subject of arbitration, and an award based thereon is void and unenforceable in courts of the country. (Citing cases.)' "

[*Jurisdiction of Court*]

The appellants further contend that jurisdiction in this matter is either in the National Labor Relations Board because an unfair labor practice is involved, or in the federal courts because the enforcement of federal antitrust laws is involved and that therefore the state court has no jurisdiction. This is merely an action for declaratory relief to secure a ruling as to whether certain language evidences an unlawful conspiracy between employers and unions to restrict and prohibit the sale of certain commodities. The agreement was executed in California and is performable here. We believe the state court has jurisdiction to determine whether the agreement violates the law of this state as well as the federal law. (*Morey v. Paladini*, 187 Cal. 727, 736 [203 P. 760]; *Building Contractors v. Gugliemelli*, N. Y. Supreme Ct. [1952 TRADE CASES ¶ 67,310], 30 L. R. R. M. 2439; *Commonwealth v. McHugh* [1950-1951 TRADE CASES ¶ 62,678], 326 Mass. 249 [93 N. E. 2d 751]; *Hunt v. Plavsa*, 103 Cal. App. 2d 222 [229 P. 2d 482]; Code Civ. Proc., § 1060; *Ralphs Grocery Co. v. Amalgamated Meat Cutters*, 98 Cal. App. 2d 539 [220 P. 2d 802]; *Harvey Machine Co. Inc. v. Western etc. Union*, 76 Cal. App. 2d 421 [173 P. 2d 330]; *Harvey Machine Co., Inc. v. Alvarez*, 76 Cal. App. 2d 427 [173 P. 2d 65].)

This is not an action to enforce compliance with any provisions of the Labor Management Relations Act. The pleadings do not show any unfair labor practices, as defined by that Act. There is no labor dispute with any employee who manufactures the products with which we are concerned. The laws which are violated relate to monopolies and restraints of trade and the National Labor Relations Board has no jurisdiction over such matters.

There was no allegation in the complaint in this instance to the effect that the Unions had used any coercion against any employees of the markets. In this case there is no question of any "hot cargo," or any secondary boycott. It was stated by counsel for respondent in the oral argument, and apparently concurred in by counsel for the appellants, that the products in question are processed and packaged by union labor in the first instance

Subsequent to the filing of the briefs in this cause, the parties filed a stipulation in this court to the effect that a new collective bargaining agreement between the parties hereto, effective from November 5, 1956, to November 5, 1959, had been executed, which new agreement contains certain language in lieu of the disputed language in the contract now before us. The appellants state, "it would therefore appear that the entire matter is now moot." At the same time, appellants assert that they are confronted with the judgment of the trial court, and that they cannot dismiss the appeal, thus leaving as res judicata the judgment of the trial court.

As we view it, the matter of the new agreement is not before us for any determination, and it obviously was not before the trial court. Under the circumstances, the new agreement can have no bearing on the issue which is to be decided here. It might well be that the provisions of the new agreement are legal and proper, and at least counsel for each of the parties seemed to entertain the belief that such is the case. However, we are not called upon here to decide that question. It is also true that apparently the parties have reconciled their main differences, and there appears to be no controversy over the new agreement; nevertheless, as heretofore indicated, that can have no effect upon the questions submitted to this court.

For the reasons heretofore given, the judgment is affirmed.

White, P. J., and Doran, J., concurred.

[¶ 68,609] J. Thomas Miley v. John Hancock Mutual Life Insurance Company, Boston Mutual Life Insurance Company, Columbian National Life Insurance Company, Loyal Protective Life Insurance Company, Monarch Life Insurance Company, New England Mutual Life Insurance Company, Paul Revere Life Insurance Company, State Mutual Life Assurance Company of Worcester, Clarence W. Wyatt, Edward A. Green, Alan R. Willison, John Hill, Theodore W. Fabisak, Joseph A. Humphreys, John M. Deely, Horace Gooch, Jr., and Carl A. Sheridan.

In the United States District Court for the District of Massachusetts. Civil Action No. 56-682-F. Dated January 18, 1957.

Sherman Antitrust Act

Combinations and Conspiracies—Construction of Sherman Act—Applicability to Insurance Business Under McCarran-Ferguson Act.—An insurance broker's treble damage action charging that certain Massachusetts insurance companies, members of the Massachusetts employee group insurance commission, and others unlawfully conspired to award an insurance contract to a specified insurance company, and thereby deprived him of compensation he would have received if the contract had been awarded to the insurance company which he had represented, was dismissed on the ground that the transactions complained of were not subject to the Sherman Act. Under the McCarran-Ferguson Act, the Sherman Act is applicable to the business of insurance to the extent that such business is not regulated by state law. Even assuming that what was done by the defendants would under other circumstances constitute a conspiracy violative of the Sherman Act, it was nevertheless done in the course of negotiation authorized and regulated by Massachusetts law, and as to such transactions, Congress has expressly provided that the Sherman Act shall not apply. Furthermore, the Massachusetts laws regulate trade practices in the business of insurance, and such regulation is an additional ground for holding that the activity of the defendants is regulated by the law of Massachusetts and hence removed from the application of the Sherman Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2263.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments to State Cause of Action—Injury to Business or Property.—An insurance broker's treble damage action charging that certain Massachusetts insurance companies, members of the Massachusetts employee group insurance commission, and others unlawfully conspired to award an insurance contract to a specified insurance company, and thereby deprived

him of compensation, commissions, and fees on future business he would have received if the insurance contract had been awarded to the insurance company which he had represented, was dismissed on the ground that the broker failed to allege any injury to his business or property sufficient to entitle him to maintain the action. The injuries alleged by the broker were remote and speculative. Under the allegations of the broker's complaint, only the insurance company which he had represented was directly injured by the alleged conspiracy since it lost a potential contract. However, it cannot be said that it lost anything to which it was legally entitled. Any loss allegedly suffered by the broker was not a loss directly due to the acts of the defendants, but an indirect loss flowing from the failure to award the contract to the company which he had represented.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.275.

Private Enforcement and Procedure—Suit for Civil Damages—Persons Who May Be Liable—State Officers.—In an insurance broker's action charging that certain insurance companies, members of the Massachusetts employee group insurance commission, and others unlawfully conspired to award an insurance contract to a specified insurance company in violation of the Sherman Act, the court held that the Sherman Act did not apply to the activities of a state or to the activities of its officers directed by the state legislature. Even though the Commonwealth of Massachusetts itself was not named as a defendant, the action against its official agents, based on their official acts in carrying out their duties under a statute, is in substance an action against the Commonwealth itself, and, therefore, one to which the jurisdiction of the court, in the absence of any waiver by the Commonwealth of its immunity, does not extend.

See Private Enforcement and Procedure, Vol. 2, ¶ 9006.70.

For the plaintiff: Devine, York & Volpe, Boston, Mass.

For the defendants: Charles K. Dunn, Boston, Mass., for Theodore W. Fabisak; Choate, Hall & Stewart, Boston, Mass., for New England Mutual Life Ins. Co., Paul Revere Life Ins. Co., Monarch Life Ins. Co., and John Hill; Ropes, Gray, Best, Coolidge & Rugg, Boston, Mass., for State Mutual Life Assurance Co. and Alan R. Willison; Lyne, Woodworth & Evarts, Boston, Mass., for John Hancock Mutual Life Ins. Co., Monarch Life Insurance Co., Boston Mutual Life Ins. Co., Clarence W. Wyatt, and Edward A. Green; Withington, Cross, Park & McCann, Boston, Mass., for Columbian Natl. Life Ins. Co. and Loyal Protective Life Ins. Co.; Attorney General of Massachusetts, Boston, Mass., and Joseph H. Elcock, Jr., Assistant Attorney General, Boston, Mass., for Theodore W. Fabisak, Joseph A. Humphreys, J. A. Deely, Horace Gooch, Jr., and Carl A. Sheridan; and Warren C. Lane, Jr., Worcester, Mass., for Horace Gooch, Jr.

Memorandum of Decision on Defendants' Motions to Dismiss

[*Parties*]

FORD, District Judge [*In full text*]: This is an action brought under the Sherman Antitrust Act, 15 U. S. C. A. §§ 1 and 15. Plaintiff is an insurance broker licensed in Massachusetts. Defendants are eight Massachusetts insurance companies, four individual officers of such companies, and the five members of the state employees' group insurance commission established by Mass. G. L. Ch. 32A (hereinafter called the commission).

[*Complaint*]

The allegations of the complaint may be summarized as follows. The members of the commission invited life insurance companies doing business in Massachusetts to submit by December 1, 1955, bids or proposals for group life, accidental death and dismemberment insurance, and group hospital, surgical and medical coverage for employees of the Commonwealth in accordance with specifications established by the commission. Miley arranged for submission of a joint bid by Minnesota Mutual Life Insurance Company (hereinafter called Minnesota), a Minnesota corporation licensed to do business in Massachusetts, and Blue Cross and Blue Shield. Minnesota under this proposal offered a rate of 90 cents per month per thousand dollars on the life, accidental death and dismemberment portions of the plan. Among the other proposals submitted was a joint bid by the insurance company defendants (except Boston Mutual Life Insurance Company here-

inafter called Boston), which included a rate of $1.20 for that portion of the insurance covered by Minnesota's 90 cent rate.

It is alleged that thereupon the members of the commission ascertained that Blue Cross and Blue Shield would provide the same medical, surgical and hospital coverage included in its offer with Minnesota in conjunction with any insurance company offering a rate as low as Minnesota's for the life, accidental death and dismemberment coverage. It is then charged that the defendants (except Boston) entered into a combination or conspiracy to equal or better Minnesota's offer and deprive Minnesota of the contract, that the various insurance companies involved could not offer a rate below the $1.20 rate they had filed with the insurance commissioner of New York without jeopardizing their right to do business in that state, that thereupon Boston, which did not do business in New York, was brought into the combination, that Boston submitted an offer at the 90 cent rate and was awarded the contract by the members of the commission, and thereupon allotted 95 per cent of the insurance to the other defendant companies by way of reinsurance.

Plaintiff alleges that he suffered injury because as a result of this combination or conspiracy Minnesota failed to receive the contract and as a result plaintiff was deprived of compensation he would have received for servicing this contract and of commissions and service fees for new business which would have resulted had said contract been awarded to Minnesota.

[*Motion to Dismiss*]

Defendants move to dismiss, urging several grounds in support of their contention that complaint fails to state a claim upon which relief may be granted under the Sherman Act.

[*McCarran-Ferguson Act*]

The first issue is as to the effect of the McCarran-Ferguson Act, 15 U. S. C. A. §§ 1011-1015, providing for continued regulation and taxation of the insurance business by the states. Under § 1012(b) it is provided that the Sherman Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

[*Massachusetts Laws*]

Mass. G. L. Ch. 32A establishes a program of group insurance for the benefit of employees of the Commonwealth. It establishes the state employees group insurance commission with authority to establish such reasonable rules and regulations as may be necessary for the administration of the act. The chapter provides that the state commissioner of insurance, the official charged by statute with the administration of the state laws regulating the insurance business, shall be one of the five members of this commission. It provides in § 4 that the commission shall negotiate with and purchase, on such terms as it deems in the best interest of the Commonwealth and its employees, from one or more insurers a policy or policies for the insurance coverages provided by the chapter. This chapter thus provides a statutory scheme of regulation covering the very transaction complained of here. The commission was not required to invite bids or to award contracts to the lowest bidder. It was required to negotiate with one or more prospective insurers before purchasing insurance, and was given broad discretion to purchase insurance on such terms as it deemed to be in the best interest of the Commonwealth and its employees. Assuming that what was done here by the defendants would under other circumstances constitute a conspiracy or combination violative of the Sherman Act, it was nevertheless done in the course of negotiation authorized and regulated by an applicable state law, and as to such transactions Congress has expressly provided that the Sherman Act shall not apply.

Further, Massachusetts not only provides a comprehensive statutory scheme for the regulation of all phases of the insurance business, Mass. G. L. Ch. 174A through 178, but has specifically included therein Ch. 176D, whose purpose is set forth in § 1 thereof as the regulation of trade practices in the business of insurance in accordance with the intent of Congress as expressed in the act of March 9, 1945 (Public Law 15, 79th Congress)—the McCarran-Ferguson Act, *supra*. The chapter defines certain unfair methods of competition including some acts tending to unreasonable restraint or monopolizing of the insurance business, and sets up a procedure for the determination that any other act or practice in the

business not specifically so defined is unfair or deceptive and hence forbidden. This chapter is an additional ground for holding that the transaction set forth in the complaint is one regulated by the law of Massachusetts and hence removed from the application of the Sherman Act.

There is no allegation that the defendants violated any Massachusetts law regulating this transaction (except for a charge that Boston under its charter could not legally enter into a contract for this type of insurance) or that the contract was not fully as advantageous to the Commonwealth or its employees as any other that could have been negotiated. In any event the fact that the transaction was regulated by Massachusetts law removes it from the scope of the Sherman Act, and any violation of the state regulations is a matter solely of state law. Since diversity of citizenship is lacking, any relief to which plaintiff might be entitled under state law must be sought in the Massachusetts courts.

[*Injury to Business or Property*]

Moreover, it does not appear that plaintiff has alleged any injury to his business or property sufficient to entitle him to bring this action. The injuries alleged are remote and speculative. On the allegations of the complaint it was only Minnesota which was directly injured by the alleged conspiracy, since it lost a potential contract. It cannot be said, however, that it lost anything to which it was legally entitled. The commission was not required to award the contract to Minnesota on the basis of its low bid. It was clearly free to negotiate with other companies to get an equally low offer from some competitor. And even if the best rate it could get from any other company had been higher than that proposed by Minnesota, it could still have considered other factors than the rate in determining what would be in the best interest of the Commonwealth and its employees. For various reasons it could have preferred to deal with a Massachusetts company rather than one from another state.

Any loss which plaintiff says that he himself suffered is not a loss directly due to the acts of the defendants, but an indirect loss flowing from the failure to award the contract to Minnesota. He makes no claim to have been entitled to any commission for securing the contract itself. He does say that he lost fees which he would have received for servicing the policy. Moreover, he makes no allegation that he had any contract with Minnesota which would have given him a legal right to such fees rather than a mere hope that he would be hired by Minnesota to service the policies and thus given a chance to earn the fees. The remaining item of loss of commissions and fees on future business to be done by Minnesota is even more speculative since it seems to be based only on the expectation that if Minnesota secured this contract with the Commonwealth, its prestige would be increased which might lead to an increase in its business here on which plaintiff might become entitled to fees and commissions. The injuries set forth thus seem to fall within the class of indirect and speculative injuries for which plaintiff cannot recover under 15 U. S. C. A. § 15. *Melrose Realty Co., Inc. v. Loew's, Inc.* [1956 Trade Cases ¶ 68,358, 68,423], 234 F. 2d 518; *Productive Inventions, Inc. v. Trico Products Corp.* [1955 Trade Cases ¶ 68,104], 224 F. 2d 678.

[*State Activity*]

Certain further considerations are applicable only to the five defendants who are members of the commission. They are described as such in the complaint and the only actions by them which are set forth therein are actions taken in the carrying out of their official duties as agents of the Commonwealth for the negotiation of contracts under Mass. G. L. Ch. 32A. It is not contended that Ch. 32A, under which they acted, is invalid, or that their actions invade any constitutional rights of plaintiff. Even though Massachusetts itself is not named, the action against its official agents, based on their official acts in carrying out their duties under the statute is in substance an action against the state itself, and hence one to which the jurisdiction of this court, in the absence of any waiver by the state of its immunity, does not extend. *Worcester County Trust Co. v. Riley,* 302 U. S. 292, 296; *Hans v. Louisiana,* 134 U. S. 1. In any event the Sherman Act does not apply to the activities of a state or to the activities of its officers directed by the state legislature. *Parker v. Brown* [1940-1943 Trade Cases ¶ 56,250], 317 U. S. 341, 350, 351.

[*Motions Granted*]

Defendants' motions to dismiss are allowed.

[¶ 68,610] **Federal Trade Commission v. International Paper Company.**

In the United States Court of Appeals for the Second Circuit. October Term, 1956. Docket No. 24409. Petition argued December 14, 1956. Decided December 14, 1956.

Petition by Federal Trade Commission for injunctive relief against International Paper Company until final determination by the Commission of a pending administrative proceeding initiated by its complaint which charges the respondent company with violating Section 7 of the Clayton Act, as amended, 15 U. S. C. A. § 18.

Clayton Antitrust Act

Acquisitions of Stock or Assets—Enforcement of Clayton Act, Section 7—Federal Trade Commission—Petition to Stay Merger Until Administrative Proceedings Terminated.—In a Federal Trade Commission action charging that a paper company violated Section 7 of the Clayton Act when it merged with two other companies, a Commission petition requesting a United States Court of Appeals to issue injunctive relief maintaining the present status of the merger until the conclusion of its administrative proceeding was dismissed for lack of jurisdiction. The Commission had argued that if it should find that the paper company violated Section 7 of the Clayton Act and should order the company to divest itself of the stock and assets it acquired, it would be impossible to separate the assets of the various companies. The Clayton Act does not authorize the Federal Trade Commission to enforce Section 7 of the Act by obtaining an injunction in a court of equity. Furthermore, a United States Court of Appeals does not have the power under the Clayton Act to issue such an injunction. Also, the Clayton Act did not contemplate applications by the Commission for interlocutory relief by way of injunction to maintain the status quo during the pendency of a proceeding before the Commission. Furthermore, the authority for the Commission to seek an injunction cannot be implied from the "all writs" statute, which authorizes Courts of Appeal to issue any writ necessary or appropriate in aid of their respective jurisdictions.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4206.450, 4208.15, 4208.25.

For the petitioner: Earl W. Kintner, General Counsel, Federal Trade Commission; Robert B. Dawkins, Assistant General Counsel; John T. Loughlin, Assistant to the General Counsel; and James E. Corkey, Attorney.

For the respondent: Davis, Polk, Wardwell, Sunderland and Kiendl (Theodore Kiendl, George A. Brownell, John F. Collins, and Edward F. Howrey, of counsel).

Dismissing a petition for injunctive relief in Federal Trade Commission Dkt. 6676.

Before: SWAN, MEDINA and WATERMAN, Circuit Judges.

[*Merger—Injunction Sought*]

PER CURIAM [*In full text*]: When this petition came on for oral argument on December 14, 1956, it was dismissed from the bench for lack of jurisdiction, with the statement that a written opinion would be handed down later.

The petition was filed November 27, 1956 and the respondent's answer on December 11. Without going into greater detail it will suffice to say that the petition alleges in substance that on November 5, 1956 the stockholders of International Paper Company, a New York corporation, and the the stockholders of two Missouri corporations, Long-Bell Lumber Corporation and Long-Bell Lumber Company, voted upon and approved a plan of merger; that on November 6, 1956 the Federal Trade Commission filed a complaint charging that International by acquisition of the two Long-Bell companies had violated section 7 of the amended Clayton Act, in that such acquisition may substantially lessen competition or tend to create a monopoly as more particularly specified in the complaint; and that if the Commission, after hearings, should find that section 7 has been violated and should order International to divest itself of stock and assets acquired, "It will be impossible to separate the acquired assets from those which are the joint result of the combined operations and the assets of International," if action contemplated by the respondent with respect to the acquired companies is allowed to occur. The prayer for injunctive relief in substance

asks that the status quo be maintained until conclusion of the administrative proceeding.

[*Scope of Clayton Act*]

The Clayton Act contains a scheme of dual enforcement. *United States v. W. T. Grant Co.* [1953 TRADE CASES ¶ 67,493], 345 U. S. 629, 632. Section 7 of the Act, and certain other sections not here relevant, may be enforced either by cease and desist orders of the Commission, 15 U. S. C. A. § 21, or by suits in equity instituted by the several district attorneys in their respective districts, under the direction of the Attorney General, 15 U. S. C. A. § 25. *U. S. Alkali Export Assn. v. United States* [1944-1945 TRADE CASES ¶ 57,372], 325 U. S. 196, 208. Individuals may also have injunctive relief against threatened loss or damage by a violation of the anti-trust laws under the same conditions and principles as govern the granting of injunctions by courts of equity, that is to say, district courts, 15 U. S. C. A. § 26. These specific provisions as to who may seek injunctive relief, and in what courts, imply that the Commission itself is not authorized to do so. This implication is required by the statutory provisions of 15 U. S. C. A. § 21, under which a court of appeals acquires jurisdiction to review an order of the Commission only after the administrative proceeding has been concluded and a transcript of the record therein filed with the court.[1] The Commission's findings of fact, if supported by substantial evidence, are conclusive upon the court, and if either party shows grounds for adducing additional evidence, the court may order it to be taken before the Commission. The Clayton Act clearly recognizes that a court of appeals has no fact finding powers, and that if an injunction is to be obtained by a United States Attorney or a private litigant it must be sought in a U. S. District Court under sections 25 or 26 of Title 15, U. S. C. A. Nor did this legislation contemplate applications by the Commission for interlocutory relief by way of injunction to maintain the status quo during the pendency of a proceeding before the Commission.

[*All Writs Statute*]

Relying upon *Board of Governors v. Transamerica Corp.*, 9 Cir., 184 F. 2d 311, the Commission argues that authority for it to seek an injunction here may be implied from the "all writs" section, 28 U. S. C. section 1651(a), which authorizes the Courts of Appeals to issue any writ "necessary or appropriate in aid of their respective jurisdictions." But, since the pattern of enforcement adopted by the Congress in the Clayton Act makes clear that the Commission was not intended to have such authority, the "all writs" section cannot be invoked to circumvent this limitation. And, if the Commission has no authority to seek an injunction, it is clear we have no power to grant it such relief. With all due respect to our brethren of the Ninth Circuit, we are therefore constrained to disagree with the conclusion arrived at in the *Transamerica* case.[2]

Action dismissed.

[¶ 68,611] United States v. The Torrington Company.

In the United States District Court for the District of Connecticut. Civil Action No. 4840. Filed January 29, 1957.

Case No. 1189 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Refusal To Deal—Sewing Machine Needles.—A manufacturer of sewing, knitting, and shoe machine needles was prohibited by a consent decree from engaging in any understanding with any sewing machine manufacturer or seller or shoe machine manufacturer or seller to refrain from selling or otherwise supplying sewing or shoe machine needles to any person.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785.

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[1] Cf. *Fed. Power Comm'n v. Edison Co.*, 304 U. S. 375; *In re Matter of the National Labor Relations Board*, 304 U. S. 486.

[2] It may well be that the Third Circuit in the recent *Farm Journal* case, D. 6388, also disagreed with the *Transamerica* case, but, as no opinion was written, the precise ground on which the Third Circuit refused to grant the requested injunction does not appear.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Resale Price Fixing.—A manufacturer of sewing, knitting, and shoe machine needles was prohibited by a consent decree from suggesting or recommending to any person or attempting to enforce the price or prices, discounts, or conditions for the resale of sewing or shoe machine needles.

See Resale Price Fixing, Vol. 1, ¶ 3015.20.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Acquisition of Stock or Assets.—A manufacturer of sewing, knitting, and shoe machine needles was prohibited by a consent decree from acquiring the business, physical assets or good will, or any capital stock of any person engaged in the manufacture, distribution, or sale of sewing machine needles, knitting machine needles, or shoe machine needles, unless the manufacturer establishes that the effect of such an acquisition may not be to substantially lessen competition or tend to create a monopoly in any section of the country.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.833; Monpolies, Vol. 1, ¶ 2610.120.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Sales and Production.—A manufacturer of sewing, knitting, and shoe machine needles was required by a consent decree to sell to all prospective purchasers all of the types of sewing and shoe machine needles manufactured by it, without discrimination. However, with respect to sewing machine needles now made by the manufacturer pursuant to plans or specifications furnished to it by others, the manufacturer could provide in lieu thereof equivalent needles which are in all respects interchangeable, and with respect to such equivalent needles, the manufacturer was required to establish a stock on hand of those types of needles corresponding to 70 per cent of the volume customarily supplied each sewing machine builder. Also, the manufacturer was required to manufacture sewing machine needles (or equivalent thereof) and shoe machine needles, customarily manufactured by it but which are not in stock at any particular time, for all prospective purchasers, without discrimination, and to manufacture sewing machine needles or shoe machine needles, which are of a special design and which it is equipped to make, without discrimination. However, under certain circumstances, the manufacturer was not required to sell its needles.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.50, 8301.60, 8421.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Notice of Decree.—A manufacturer of sewing and shoe machine needles was required by a consent decree to serve a copy of the decree upon each sewing and shoe machine builder for whom it had produced sewing or shoe machine needles within the five year period preceding the date of the decree. Also, the manufacturer was required to advertise in two trade journals or papers that sewing or shoe machine needles are available to all persons pursuant to the decree.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.60.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Functional Discounts.—A consent decree entered against a manufacturer of sewing, knitting, and shoe machine needles provided that nothing contained in the decree should be deemed to prevent the manufacturer from giving to any person purchasing needles for resale functional discounts otherwise lawful or from requiring that such persons, in order to qualify as jobbers or dealers, perform the regular functions of jobbers and dealers.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.48.

Department of Justice Enforcement and Procedure—Consent Decrees—Enforcement—Proof of Compliance.—A consent decree entered against a manufacturer of sewing and shoe machine needles provided that the burden of proof should be upon the manufacturer to establish that it has complied with the provisions of the decree in any pro-

ceeding in which the manufacturer's compliance or non-compliance with such provisions is in issue.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8401.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; W. D. Kilgore, Jr., Baddia J. Rashid, John D. Swartz, Lawrence Gochberg, Edward F. Corcoran, Richard B. O'Donnell, Attorneys, Department of Justice; and Simon S. Cohen, United States Attorney, Hartford, Conn.

For the defendant: Gumbart, Corbin, Tyler & Cooper, by Morris Tyler, New Haven, Conn., and Chadbourne, Parke, Whiteside & Wolff, by Horace G. Hitchcock, New York, N. Y.

Final Judgment

ROBERT P. ANDERSON, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on March 30, 1954; defendant, having appeared and filed its answer to such complaint, denying the substantive allegations thereof; and plaintiff and defendant by their attorneys herein, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without admission by any party in respect of any such issue;

Now, therefore, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I

[*Sherman Act*]

This Court has jurisdiction of the subject matter herein and of the parties hereto. The complaint states a cause of action against defendant under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Sewing machine needles" means all needles used in any type of sewing machine;

(B) "Shoe machine needles" means all needles and awls used in any type of shoe manufacturing or repairing machine;

(C) "Knitting machine needles" means all needles used in any type of knitting machine;

(D) "Subsidiary" means a corporation owned or controlled by the defendant and engaged in the production or marketing of sewing machine needles, shoe machine needles or knitting machine needles in the United States;

(E) "Person" means an individual, partnership, firm, association, corporation, other than a subsidiary, or any other business or legal entity.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment shall apply to the defendant and its subsidiaries, successors, assigns, officers, agents, servants, employees, and attorneys, and to those persons in active concert or participation with the defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Restrictive Contracts—Prices*]

Defendant is enjoined and restrained:

(A) From engaging in, participating in, maintaining or carrying out any contract, agreement, arrangement or understanding with any sewing machine manufacturer or seller or shoe machine manufacturer or seller or any other person to refrain from selling or otherwise supplying sewing machine needles or shoe machine needles to any person;

(B) From suggesting or recommending to any person or attempting to enforce the price or prices, discounts or terms or conditions for the resale of shoe machine and sewing machine needles.

V

[*Required Sales and Production*]

Defendant is ordered and directed:

(A) To sell to all prospective purchasers in the United States all of the types, sizes

and kinds of sewing machine and shoe machine needles manufactured by it, without discrimination as to availability, price or terms and conditions of sale and payment as it may from time to time lawfully establish, provided that with respect to sewing machine needles now made by defendant pursuant to plans or specifications furnished to it by others, it may provide in lieu thereof, equivalent needles which are in all respects interchangeable therewith and of equivalent dimensions, characteristics, purpose and quality.

With respect to such equivalent needles, it shall, within ninety days after the entry of this Final Judgment, establish a stock on hand of those types and sizes of needles corresponding to 70% of the volume customarily supplied each sewing machine builder. This stock shall be established in quantities of types and sizes equal to a minimum of 10% of those of the corresponding needles supplied each machine builder and shall be maintained in quantities sufficient to meet orders which it might reasonably anticipate on the basis of experience;

(B) To manufacture sewing machine needles, or equivalents thereof as defined in (A) above, and shoe machine needles, customarily manufactured by it but which are not in stock at any particular time, for all prospective purchasers without discrimination as to availability, price or terms and conditions of sale and payment as it may from time to time lawfully establish;

(C) To manufacture sewing machine needles or shoe machine needles, which are of a special design, i. e., not already manufactured by defendant, which it is equipped to make, when ordered in quantities sufficient to permit profitable production, without discrimination as to availability, price or terms and conditions of sale and payment as it may from time to time lawfully establish. Provided, however, that during any period of time defendant may refuse all orders for needles of a special design.

VI

[*Functional Discounts*]

Nothing contained in paragraphs V(A) and (B) above, shall be interpreted to prevent the defendant from giving to any person purchasing needles for resale, functional discounts otherwise lawful or from requiring that such persons, in order to qualify as jobbers or dealers, perform the regular functions of jobbers and dealers such as purchasing a specified number of needles per month, carrying adequate stocks to serve their customers, and, in the case of jobbers, employing a sales force and extending credit to customers.

VII

[*Scope of Required Sales*]

Nothing contained in Section V of this Final Judgment shall be deemed to require defendant:

(A) To sell to any person needles manufactured by defendant bearing the trademark or trade name of any other person; or

(B) To sell to any person needles in a package or container bearing the trademark or trade name of any other person, or the design or label of which is covered by a copyright owned or controlled by any other person;

(C) To sell to any person sewing machine needles or equivalents thereof, manufactured at the present time by defendant with special tools or machines now supplied by any other person, except that defendant shall sell like needles upon being supplied with such tools and machines by the prospective purchaser. Provided, however, that defendant shall not agree to manufacture sewing machine needles exclusively for any person with tools or machines supplied to it after the date of this Final Judgment.

As used above, special tools and machines include only that equipment used in the actual manufacturing of sewing machine needles and not gauges or other equipment used for the testing of sewing machine needles.

VIII

[*Proof of Compliance*]

In any civil suit or proceeding instituted by the plaintiff after the entry of this Final Judgment, in which defendant's compliance or non-compliance with the provisions of Section V shall be an issue, the burden of proof shall be upon the defendant to establish that it has complied with the provisions of Section V.

IX

[*Acquisition of Stock or Assets*]

Defendant is enjoined and restrained from acquiring, directly or indirectly, the business, physical assets or good will, or any

capital stock of any person engaged in the manufacture, distribution or sale of sewing machine needles, shoe machine needles or knitting machine needles in the United States unless the defendant has, upon reasonable notice to the Attorney General with an opportunity on the part of the latter to be heard, shown to this Court that the effect of such acquisition may not be to substantially lessen competition or tend to create a monopoly, in any section of the country, in the manufacture, sale or distribution of sewing machine needles, shoe machine needles or knitting machine needles; provided, however, that this paragraph shall not apply to transactions between the defendant and its subsidiaries.

X

[*Copy of Final Judgment*]

Defendant is ordered and directed within 60 days after the entry of this Final Judgment to serve a copy thereof upon each sewing machine builder and shoe machine builder for whom defendant has manufactured sewing machine needles or shoe machine needles within the five-year period preceding the date of this Final Judgment.

XI

[*Advertisement*]

Defendant is ordered and directed within 90 days from the date of this Final Judgment to advertise in a conspicuous manner in two trade papers or journals—one of which shall have a general circulation in the shoe manufacturing industry and the other of which shall have a general circulalation in the garment industry—that pursuant to this Final Judgment, sewing machine and shoe machine needles are available as provided herein to all purchasers without discrimination as to availability, price or other terms or conditions of sale.

The substance and size of such advertisements shall be in a form satisfactory to the plaintiff.

XII

[*Prohibited Agreements*]

Defendant is enjoined and restrained from entering into, performing, adhering to, maintaining or furthering directly or indirectly or claiming any rights under, any contract, agreement, understanding, plan or program with any person which is inconsistent with the provisions of this Final Judgment.

XIII

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to defendant made to the principal office of defendant, be permitted, subject to any legally recognized privilege when determined by this Court, (1) access, during the office hours of defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession of or under the control of defendant, relating to any matters contained in this Final Judgment, and (2) subject to the reasonable convenience of defendant but without restraint or interference from defendant, to interview officers or employees of defendant, who may have counsel present, regarding any such matters. Upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, defendant shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be reasonably necessary to the enforcement of this Final Judgment. Information obtained by the means permitted in this Section XIII shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

XIV

[*Jurisdiction Retained*]

Jurisdiction of this cause is retained by this Court for the purpose of enabling either of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

[¶ 68,612] **Samuel Freedman, et al. v. Philadelphia Terminals Auction Co.**

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 19847. Filed October 30, 1956.

Robinson-Patman Price Discrimination Act and Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments To State Cause of Action Under Section 2(c), Clayton Act—Unlawful Brokerage Commissions.—Wholesale fruit merchants sufficiently charged a violation of Section 2(c) of the Clayton Act, as amended, when they alleged (1) that they purchase their fruit through an auction company, (2) that the sellers of the fruit pay the auction company a commission for its services, (3) that the auction company levied against, and accepted from, them, as buyers, a separate charge, and (4) that the auction company renders no services to them, but renders all of its services to the sellers of the fruit. The allegations, if true, constituted a violation of Section 2(c) of the Act since they show that the auction company was not performing its services for the wholesalers as buyers at the auction.

See Price Discrimination, Vol. 1, ¶ 3520.150; Private Enforcement and Procedure, Vol. 2, ¶ 9009.850.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments To State Cause of Action Under Sherman Act.—A motion to dismiss a complaint charging (1) that an auction company sells substantially all of the fresh fruit arriving in Philadelphia by rail in less than carload lots, (2) that the company controls the free flow of commerce in fruits and monopolizes the market, and (3) that therefore the company is enabled to exact an unlawful commission from wholesale buyers of fruit was denied, although the court noted that it was unlikely that there has been any violation of Section 1 or 2 of the Sherman Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.575; Monopolies, Vol. 1, ¶ 2610.800.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments To State Cause of Action—Interstate Commerce.—A complaint charging that an auction company operating in Philadelphia unlawfully levied commissions against wholesale fruit merchants sufficiently alleged the interstate character of the auction company's business. The complaint alleged that the fruit comes from all over the United States to Philadelphia, and that the fruit passes through the facilities of the auction company to several states on the eastern seaboard.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.600.

For the plaintiffs: Berger and Gelman, by Frank H. Gelman and David Berger, Philadelphia, Pa.

For the defendant: T. Ewing Montgomery and C. Brewster Rhoads, Philadelphia, Pa.

Opinion

[*Motion to Dismiss*]

VAN DUSEN, District Judge [*In full text except for omissions indicated by asterisks*]: This case, currently before the court on defendant's Motion to Dismiss under Rule 12(b), involves a suit by plaintiffs, members of an unincorporated association of Philadelphia wholesale fruit merchants, against defendant, a New Jersey corporation engaged in the business of auctioning such fruit in Philadelphia. The complaint is founded on certain provisions of the federal anti-trust laws and also on general provisions of the law of fraudulent misrepresentation and restitution as they relate to business transactions, particularly where there is business coercion.

Under the provisions of Rule 12(b), all well pleaded facts averred in the complaint must be taken as admitted for the purposes of the disposition of defendant's motion.[1] In addition, an affidavit and depositions with exhibits have been filed by the parties, and will also be considered by the court

[1] *United States v. Geisler*, 174 F. 2d 992 (7th Cir. 1949).

in the decision of the matter at hand.[2] The complaint in this action is divided into three "Counts," which will be considered separately.

Count I

[*Antitrust Claims*]

Count I alleges certain violations by the defendant of Sections 1 and 2 of the Sherman Anti-Trust Act[3] and of the Robinson-Patman Act's amendment to Section 3 [Section 2] of the Clayton Anti-Trust Act.[4] Factually, this count alleges that plaintiffs' members purchase fruit coming to Philadelphia from other states through defendant; that the defendant is engaged in the fruit auction business in Philadelphia and handles fruit coming from other states;[5] that defendant handles almost all fresh fruit coming to the Philadelphia market, which includes areas in Pennsylvania, New Jersey and Delaware,[6] in less than carload lots; that these sales are made by defendant by arrangement with the growers, shippers and consignees of said fruit; and that defendant is paid a commission by these sellers for its services[7] (Complaint, paragraphs 1 through 3).

[*Interstate Commerce*]

The fruit allegedly comes from all over the United States to a point of distribution in Philadelphia and the depositions show that it passes through the facilities of the defendant to several states on the eastern seaboard (D. 63 ff.). The defendant's operation, if as asserted, is an important link in a chain of commerce. Thus, under the notice type pleading prevailing in federal practice, these paragraphs of the complaint contain satisfactory allegations of the interstate character of the defendant's business.[8]

[*Robinson-Patman Act*]

Also, the record indicates that defendant, without the consent of plaintiffs, levied against, and accepted from, the plaintiffs as buyers a separate charge;[9] that defendant rendered no services to plaintiffs, but, on the contrary, rendered all its services to the growers, shippers and consignees for whom it sold (Complaint, paragraph 4).

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[2] F. R. Civ. P. 12(b) provides, *inter alia:* "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

See, also, *Lane Bryant, Inc. v. Maternity Lane, Ltd.*, 173 F. 2d 559 (9th Cir. 1949).

[3] Section 1 of the Sherman Anti-Trust Act (15 U. S. C. A. § 1) provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . ."

Section 2 of the Sherman Anti-Trust Act (15 U. S. C. A. § 2) provides:

"2. *Monopolizing trade a misdemeanor; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, ..."

[4] 15 U. S. C. A. § 13(c) provides:

"*Payment or Acceptance of Commission, Brokerage, or Other Compensation*

"(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

[5] Deposition, pp. 18-25 (hereinafter designated as "D. 18-25").

[6] D. 62-63.

[7] D. 97-98.

[8] See *United States v. Employing Plasterers Assn.* [1954 TRADE CASES ¶ 67,692], 347 U. S. 186 (1954). But *cf. Hopkins v. United States*, 171 U. S. 578, 592, 595-6 & 598 (1898), where the court said, at pp. 595-6:

"It is possible that exorbitant charges for the use of these facilities might have similar effect as a burden on commerce that a charge upon commerce itself might have. In a case like that the remedy would probably be forthcoming."

[9] D. 96-106; Exhibits P-1 and P-2; and second paragraph starting on page 7 of defendant's affidavit filed 1/20/56, stating that a terminal charge is imposed on the buyer. (The fact that part of this terminal charge is paid to the railroad for unloading, pursuant to I. C. C. order, does not necessarily mean the buyer should bear this expense and, further, the record does not show whether or not the balance of the charge is limited to defendant's cost of collection.)

These allegations, if true, constitute a violation of the Robinson-Patman amendment to Section 3 [Section 2] of the Clayton Anti-Trust Act,[10] since they show that the defendant is not performing its services for the plaintiffs as buyers at auction.

[*Sherman Act*]

The complaint continues that defendant sells, by arrangements with growers, shippers and consignees,[11] substantially all fresh fruit arriving in Philadelphia by rail in less than carload lots; that by virtue of this fact, defendant controlled the free flow of commerce in such fruits, monopolized the market,[12] and was thus enabled to exact the aforementioned separate charge from plaintiffs; that such conduct contravened Sections 1 and 2 of the Sherman Anti-Trust Act (15 U. S. C. A. §§ 1 & 2); and that, by virtue of such conduct, plaintiffs sustained substantial damage.

The record now before the court makes it appear most unlikely that there has been any violation of 15 U. S. C. A. §§ 1 & 2. *Cf.*, for example, *Standard Oil Co. v. F. T. C.* [1950-1951 TRADE CASES ¶ 62,746], 340 U. S. 231, 248-9 (1951); *Lawlor et al. v. National Screen Corp.* [1956 TRADE CASES ¶ 68,509], (opinion of 10/24/56, 3rd Cir., Nos. 11,818-11,831, incl.). However, the plaintiffs are entitled to go to trial on the alleged violation of 15 U. S. C. A. § 13(c), so that Count I may not be dismissed at this time.[13] At the time of the pre-trial conference or at the start of the trial, a motion may be made to limit Count I to the alleged violation of 15 U. S. C. A. § 13(c) on the basis of the record then before the court.

* * *

[¶ 68,613] United States v. J. P. Seeburg Corporation, et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. Civil Action No. 56 C 419. Dated January 31, 1957.

Case No. 1271 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Allocation of Markets—Refusal to Sell—Coin Operated Phonographs.—A manufacturer of coin operated phonographs was prohibited by a consent decree from (1) limiting or restricting the persons to whom or the territory within which any distributor or operator may choose to sell such phonographs, (2) requiring any distributor to advise it of the name or address of any purchaser of such phonographs, or (3) limiting or restricting the right of any

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[10] See 15 U. S. C. A. § 13(c), quoted in footnote 4 above. Exhibit P-19 makes clear that defendant accepts compensation from buyers and sellers even though the record presently before the court indicates that its primary function is as agent for the sellers, to whom it owes its primary loyalty. See, also, *Great Atlantic & Pacific Tea Co. v. F. T. C.* [1932-1939 TRADE CASES ¶ 55,242], 106 F. 2d 667 (3rd Cir. 1939), *cf.* 51 H. L. R. 1303 (1938); *Quality Bakers of America v. F. T. C.* [1940-1943 TRADE CASES ¶ 56,060], 114 F. 2d 393, 398-9 (1st Cir. 1940); *Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co.*, 37 F. Supp. 728, 734-5 (W. D. Ky. 1941), aff'd. 136 F. 2d 12 (6th Cir. 1943); 149 A. L. R. 657-677 (1944), and cases there cited. In the *Great Atlantic and Pacific Tea Co.* case, the court said at pp. 674-5:

"The phrase 'except for services rendered' is employed by Congress to indicate that if there be compensation to an agent it must be for *bona fide* brokerage, viz., for actual services rendered to his principal by the agent. The agent cannot serve two masters, simultaneously rendering service in an arm's length transaction to both. While the phrase, 'for services rendered', does not prohibit payment by the seller to his broker for bona fide brokerage services, it requires that such service be rendered by the broker to the person who has engaged him. In short, a buying and selling service cannot be combined in one person."

But *cf. Allgair v. Glenmore Distilleries Co., Inc.* [1950-1951 TRADE CASES ¶ 62,659], 91 F. Supp. 93 (S. D. N. Y. 1950), and *Interborough News Co. v. Curtis Pub. Co.* [1950-1951 TRADE CASES ¶ 62,658], 10 F. R. D. 330, 332 (S. D. N. Y. 1950), pointing out that there must be such strong compulsion motivating the alleged improper payment by the buyers "as to amount to substantial economic coercion."

[11] *Supra* note 5; Exhibits P-10, P-11, P-12 & P-17.

[12] See D. 16.

[13] The Third Circuit Court of Appeals has recently emphasized that summary judgment should not be granted in cases arising under the anti-trust laws if there is "any doubt as to the existence of a genuine issue of fact." See *Lawlor v. National Screen Corp., supra*, pp. 12-13.

* * *

purchaser from any distributor to resell such phonographs after they have been paid for in full. Also, the manufacturer was prohibited from refusing to enter into or canceling any contract with a distributor because of such distributor's refusal to do any of the above acts and from maintaining any index or record of the names or addresses of any purchasers from distributors or the serial numbers of such phonographs. Distributors of such phonographs were prohibited from engaging in similar practices. Subject to the prohibitions of the decree, the manufacturer and distributors were permitted to exercise the right to select their customers.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.468, 2005.785.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Right To Choose Customers.—A consent decree entered against a manufacturer and distributors of coin operated phonographs provided that, subject to the prohibitions of the decree, (1) the manufacturer may exercise its right to choose and select its distributors and customers, to designate geographical areas in which such distributors shall respectively be primarily responsible for distributing its phonographs, and to terminate the franchises of such distributors who do not adequately represent the manufacturer and promote the sale of all coin operated phonographs manufactured by the manufacturer in areas so designated as their primary responsibility, and (2) each of the distributors may, individually, exercise its right to choose and select its customers and to fix the terms and conditions upon which it will make sales of coin operated phonographs.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.48, 8421.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Notice of Judgment.—A manufacturer of coin operated phonographs was required by a consent decree to serve upon each of its distributors a conformed copy of the decree. Also, each of the phonograph distributors which signed the decree was required to furnish a conformed copy of the decree to each of its customers regularly called upon or circularized by mail and required to advise such customers that it (1) is required not to impose any restrictions on the right of purchasers to resell such phonographs, (2) is free to sell such phonographs to any person, and (3) is required not to discriminate against a prospective customer because he may reside or do business outside of a particular territory.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.60.

For the plaintiff: Victor R. Hansen, Assistant Attorney General, and William D. Kilgore, Jr., Earl A. Jinkinson, Harold E. Baily, and James E. Mann, Attorneys, Department of Justice.

For the defendants: Thomas M. Thomas and E. Houston Harsha for J. P. Seeburg Corp. Miller, Gorham, Wescott & Adams, by Edward R. Adams, for Ajax Michigan Corporation; American Steel Export Company, Inc.; Atlantic Connecticut Corporation; Atlantic New Jersey Corporation; Atlantic New York Corporation; S. L. London Music Co., Inc.; S. H. Lynch & Co., Inc.; Minthorne Music Company, Inc.; The Musical Sales Co.; Music Systems, Inc., an Ohio corporation; Music Systems, Inc. "Michigan," an Ohio corporation; Sparks Specialty Company; S. L. Stiebel Co.; W. B. Distributors, Inc.; W. B. Music Company, Inc.; and John H. Lynch and Adrian H. Zander, co-partners d.b.a. Lynch & Zander Co. Daniel D. Carmell for Shafer Music Co.; Dickson Distributing Company; Atlas Music Corporation, an Illinois corporation; Atlas Music Corporation, an Iowa corporation; Atlas Music Corporation, a corporation of the Commonwealth of Pennsylvania; Davis Distributing Corporation; Wolfe Distributing Company, Inc., an Alabama corporation; Simon Wolfe and Gordon F. Williams, co-partners, d.b.a. Wolfe Distributing Company; Sammons-Pennington Co.; Trimount Automatic Sales Corp.; Atlantic Pennsylvania Corp.; R. F. Jones Co., a Utah corporation; R. F. Jones Co., a California corporation; R. F. Jones Co., a Delaware corporation; and Music Distributors, Inc.

Final Judgment

JULIUS J. HOFFMAN, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on March 2, 1956, the defendants having filed their several answers denying the substantive allegations thereof, and the United States of America, the defendant J. P. See-

burg Corporation, and the distributor defendants signatory hereof, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or an admission by any party signatory hereto with respect to any such issue;

Now, therefore, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties signatory hereto, it is hereby ordered, adjudged and decreed as follows:

I.

[*Sherman Act*]

This Court has jurisdiction of the subject matter of this action and of the parties signatory hereto. The complaint states claims for relief against the defendant J. P. Seeburg Corporation and the defendant distributors signatory hereto under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce from unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

[*Definitions*]

As used in this Final Judgment:

(A) "Seeburg" shall mean the defendant J. P. Seeburg Corporation, with its principal place of business in Chicago, Illinois;

(B) "Person" shall mean an individual, partnership, firm, corporation, or any other legal entity;

(C) "Distributor" shall mean any person (other than Seeburg and its subsidiaries) engaged in the purchase from Seeburg, for resale, of coin operated phonographs manufactured by it;

(D) "Operator" shall mean any person who owns coin operated phonographs and leases said machines to location owners;

(E) "Location owner" shall mean any person owning or operating a restaurant, tavern or other place of business in the Continental United States where coin operated phonographs are placed for use by the public;

(F) "Coin operated phonographs" shall mean new and used coin operated phonographs manufactured originally by Seeburg.

III.

[*Applicability of Judgment*]

The provisions of this Final Judgment shall apply to Seeburg and to the distributor defendants signatory hereto and to each of their subsidiaries, successors, assigns, officers, directors, servants, employees and agents, and to all persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

This Final Judgment is not to be construed as relating to commerce outside the United States.

IV.

[*Prohibited Practices—Manufacturer*]

Defendant Seeburg is enjoined and restrained from:

(A)(1) Limiting or restricting, directly or indirectly, the persons to whom or the territory within which any distributor or operator may choose to sell coin operated phonographs;

(2) Requiring any distributor to advise Seeburg of the name or address of any purchaser from such distributor of any coin operated phonographs or the serial number or numbers of such phonographs, except where such name, address and serial number or numbers are necessary to fill an order for repair or maintenance parts, or for services, for maintenance or replacement of parts or components, or to resolve a complaint or inquiry involving loss or theft or the fulfillment or breach of a conditional sales agreement or other credit or collateral agreement;

(3) Limiting or restricting, directly or indirectly, the right of any purchaser from any distributor of coin operated phonographs to resell such phonograph or phonographs after they have been paid for in full.

(B) Entering into, adhering to or enforcing any contract, agreement, or understanding with any distributor:

(1) Limiting or restricting, directly or indirectly, the persons to whom or the territory within which any distributor or operator may choose to sell a coin operated phonograph or phonographs;

(2) Limiting or restricting, directly or indirectly, the right of any purchaser from any distributor of coin operated

phonographs to resell such phonograph or phonographs after they have been paid for in full.

(C) Refusing to enter into or canceling any contract with a distributor for the distribution of coin operated phonographs because of such distributor's refusal to do any of the following acts:

(1) Limit or restrict, directly or indirectly, the persons to whom or the territory within which he sells coin operated phonographs;

(2) Advise Seeburg of the name or address of any purchaser from such distributor of any coin operated phonographs or the serial number or numbers of such phonographs, except where such name, address and serial number or numbers are necessary to fill an order for repair or maintenance parts, or for services, for maintenance or replacement of parts or components, or to resolve a complaint or inquiry involving loss or theft or the fulfillment or breach of a conditional sales agreement or other credit or collateral agreement;

(3) Limit or restrict, directly or indirectly, the right of any purchaser of coin operated phonographs to resell such phonographs after they have been paid for in full.

(D)(1) Maintaining any index, catalog or record of the names or addresses of any purchasers from distributors of coin operated phonographs or the serial numbers of such phonographs; provided, however, that any distributor may advise Seeburg and Seeburg may keep an alphabetical record of the names or addresses of any such purchasers of such phonographs and the serial numbers thereof in connection with an order for repair or maintenance parts, or for services, or in connection with a complaint or inquiry involving loss or theft or fulfillment or breach of a conditional sales agreement or other credit or collateral agreement involving such phonographs;

(2) Using any Seeburg file or record for any purpose contrary to any of the provisions of this Final Judgment.

(E) Subject to subsections (A), (B), (C) and (D) of this Section IV, Seeburg may exercise its right to choose and select its distributors and customers, to designate geographical areas in which such distributors shall respectively be primarily responsible for distributing coin operated phonographs, to terminate the franchises of such distributors who do not adequately represent Seeburg and promote the sale of all coin operated phonographs manufactured by Seeburg in areas so designated as their primary responsibility, and such designation of suggested geographical areas, standing alone, shall not be considered a violation of this Section IV.

V.

[*Prohibited Practices—Distributors*]

Defendant distributors signatory hereto are enjoined, individually and collectively, from:

(A)(1) Limiting or restricting, directly or indirectly, the person or persons to whom or the territory within which any operator or other purchaser may choose to resell coin operated phonographs after they have been paid for in full;

(2) Limiting or restricting, directly or indirectly, the right of any purchaser or any distributor of coin operated phonographs to resell such phonographs after they have been paid for in full;

(3) Refusing to sell to a person because such person may have resold a coin operated phonograph, after it had been paid for in full, to a person outside a particular territory or to a location owner.

(B) Entering into, adhering to or enforcing any contract, agreement or understanding with Seeburg, any distributor or distributors, or any operator or operators:

(1) Limiting or restricting, directly or indirectly, the persons to whom or the territory within which any distributor or operator may choose to sell coin operated phonographs;

(2) Limiting or restricting, directly or indirectly, the right of any purchaser from any distributor of coin operated phonographs to resell such phonographs after they have been paid for in full.

(C) Refusing to enter into or canceling any contract of sale of coin operated phonographs because of the purchaser's refusal to agree or adhere to any contract, agreement or understanding contrary to the provisions of subsection (B) of this Section V.

(D) Subject to subsections (A), (B) and (C) of this Section V, the distributor defendants signatory hereto may each, individually, exercise its right to choose and select its customers and to fix the terms and conditions upon which it will make sales of coin operated phonographs.

VI.

[*Notice of Decree*]

Defendant Seeburg is directed, within sixty (60) days after the entry of this Final Judgment, to serve by mail upon each Seeburg distributor a conformed copy thereof.

Defendant distributors signatory hereto, other than American Steel Export Company, Inc., are directed, within sixty (60) days after the entry of this Final Judgment, to furnish a conformed copy of this Final Judgment to each of the customers regularly called upon or circularized by mail by such distributor, and to advise such customers that such distributor:

(1) Is required not to impose any restrictions on the right of purchasers from such distributor to resell coin operated phonographs after they have been paid for in full;

(2) Is free to sell coin operated phonographs to any person;

(3) Is required not to discriminate against a prospective customer because he may reside or do business outside of a particular territory, subject, however, to the right of any distributor to discriminate between purchasers on the basis of their location as to terms and conditions with respect to service, maintenance, guarantees, warranties, credit, payment and delivery reasonably related to the territory or location in which a customer proposes to use or operate coin operated phonographs if acquired by such customer.

VII.

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the signatories hereto, made to the principal office of such signatories, be permitted, subject to any legally recognized privilege:

(A) Access, during regular office hours, to those parts of the books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such signatories which relate to any matters contained in this Final Judgment;

(B) Subject to the reasonable convenience of the signatories hereto, and without restraint or interference from them, to interview their officers or employees, who may have counsel present, regarding any such matters.

Upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the signatories hereto shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means permitted in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VIII.

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

IX.

[*Effective Date*]

This Final Judgment shall become effective ninety (90) days after entry herein.

[¶ 68,614] Jack Loeks Enterprises, Inc. v. W. S. Butterfield Theatres, Inc., et al.

In the United States District Court for the Eastern District of Michigan, Southern Division. Civil Action No. 7839. Dated January 9, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Subpoenas *Duces Tecum*—Reasonableness.—Defendants' motion to quash a plaintiff's subpoenas *duces tecum* on the ground that they were unreasonable and oppressive was granted where the bulk of the documents covered by the subpoenas were previously produced by the defendants and a great number of the documents so furnished had been copied. A second production by the defendants, for the purpose of marking documents as exhibits, would be no less cumbersome to the defendants than the selection of pertinent documents by the plaintiff from those already copied, and a second request to do so by means of the subpoenas *duces tecum* is unreasonable and oppressive. A showing of good cause must be made prior to the production of documents sought by a subpoena *duces tecum,* and such a showing cannot be made or considered on a motion to quash a subpoena *duces tecum.*

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.975.

Order Granting Defendants' Motions To Quash Subpoenas *Duces Tecum*

[*Subpoena Duces Tecum*]

ARTHUR A. KOSCINSKI, District Judge [*In full text*]: In this anti-trust action plaintiff caused subpoenas *duces tecum* to be served on a number of persons commanding each of them to produce and have available, at the time of taking their depositions on November 19, 1956, records and documents of defendants consisting of some 28 separate categories. Defendants moved to quash the subpoenas as unreasonable and oppressive or, in the alternative, to grant them other relief under Rules 30(b), 45(b) and 45(d) of the Federal Rules of Civil Procedure.

[*Prior Proceedings*]

This action was commenced on December 14, 1948. Russell C. Ashmore was then counsel of record for plaintiff. On June 25, 1951 the firm of Lucking, Van Auken, Schumann & Greiner appeared as of counsel for plaintiff; on August 24, 1955 James O. Smith and Thomas C. McConnell were substituted for counsel of record; and on November 1, 1956 another substitution of counsel was made, Seymore F. Simon and Sheldon O. Collen appearing together with Mr. Ashmore as present counsel of record for plaintiff.

After institution of the suit other defendants were joined. Besides the complaint two amended complaints were filed. Extensive discovery was had on both sides consisting of depositions, motions to produce documents and stipulations of counsel for production, as well as interrogatories. Five amended motions for production under Rule 34 were filed by plaintiff and two orders were entered directing defendants to produce documents and records for inspection and copying.

Two pre-trials scheduled by the court during 1950 and 1953 were adjourned, without date, upon stipulation of counsel, pending disposition of preliminary proceedings instituted before dates of hearing. A third pre-trial set for January 31, 1956 was adjourned to March 27, 1956 because of absence from the country of counsel for some of the defendants and at the adjourned pre-trial hearing plaintiff was represented by attorney McConnell who informed the court that he entered the case only recently and asked for an extension of time for six months for the purpose of taking certain depositions. This request was granted and

the hearing was adjourned to October 1, 1956, on which date the court was furnished an affidavit of McConnell's co-counsel, Smith, to the effect that McConnell suffered a coronary thrombosis two and a half months after his appearance in the case and because of his illness other counsel would be obtained by plaintiff to try the case. The hearing was again continued to November 1, 1956 and at this hearing plaintiff was represented by present counsel of record who informed the court that, to their knowledge, no resort was made on behalf of plaintiff for additional discovery. Counsel Simon further stated that if he had been instituting the action at this time he would take certain depositions but, being mindful of the elapse of time since suit was filed, he was willing to forego the taking of any additional depositions; he later reserved the right to take depositions if he did not succeed in securing certain admissions from defendants; he also requested production by defendants of certain documents to be marked as exhibits for the trial. The request also included documents not previously furnished, admittedly not because of any default on the part of defendants but because plaintiff, at some point, stopped with the examination of documents. Plaintiff was directed to proceed under the rules and time was extended for completion of discovery. The subpoenas now under attack were thereafter served.

[*Documents Inspected*]

Defendants contend that some 80,000 documents were submitted to plaintiff for inspection and copying, and plaintiff admits that some 44,000 documents furnished by defendants were microfilmed; defendants also acknowledge that they inspected some 22,000 documents furnished by plaintiff. According to defendants as many as 50 to 100 boxes of transfer files were placed in the Butterfield offices and plaintiff's counsel Ashmore admits that he spent the equivalent of at least 360 full days in those offices examining the records so furnished. Other defendants also claim that voluminous documents and records were transferred from offices in New York and Detroit and placed in the office of their counsel, in compliance with orders and stipulations for production; that documents were examined by plaintiff's counsel Ashmore, Schumann, and Smith and that defendants' attorney was then informed that all documents which plaintiff needed had been inspected and the documents could be returned to defendants and this was done; that many of the files had to be removed from storage in New York and Detroit and that the documents were located, assembled, and made available to plaintiff at considerable expense to defendants; and that the subpoenas *duces tecum* now request that the same documents be furnished.

Counsel for plaintiff, Simon, admits that approximately 90% of the documents covered by the subpoenas were intended primarily for marking as exhibits for trial and that the remaining documents constitute a new request; that he made no examination and proposes to make none of the microfilms of the documents previously submitted by defendants for inspection and copying as such procedure would be too cumbersome, if not physically impossible. Counsel Ashmore informed the court that he is familiar with the material which he microfilmed and knows what the films contain. Counsel Simon also indicated that he would not be interested in taking the depositions of the witnesses under subpoena unless the documents requested were produced at the same time, as he may desire to interrogate them with reference to such documents.

[*Exhibits*]

At previous hearings counsel for both parties were advised by the court that when the issues are formulated documents to be introduced in evidence on a particular issue should be, in advance of trial, segregated into separate categories according to issues presented on which the documentary evidence will be offered, and that the documents will then be marked as exhibits.

Since the last pre-trial hearing plaintiff filed a statement of issues involved. Defendants offered to file a counter-statement of issues upon the completion of all discovery. At the present stage of this litigation a request for production of documents for marking as exhibits is, at least, premature. Marking of all exhibits, proposed by both sides, at the proper time, and after elimination of all extraneous documents, will result in a more orderly preparation for trial than a piece-meal marking.

[*Subpoenas Unreasonable*]

The bulk of the documents covered by the subpoenas *duces tecum*, by plaintiff's

admission, were previously produced by defendants and a great number of documents so furnished had been copied by means of the microfilms. A second production by defendant, for the purpose requested, would be no less cumbersome to defendants, in the court's view, than the selection of pertinent documents by plaintiff from those already copied and a second request to do so by means of the subpoenas *duces tecum* is unreasonable and oppressive. After resorting to considerable discovery plaintiff apparently now feels it previously copied too much, and by a method which it now finds impractical and cumbersome, and, by way of a request to produce documents for marking at the trial on discovery depositions, is attempting to initiate discovery proceedings all over again, although more than eight years elapsed since filing of the suit, and defendants apparently complied with all orders for discovery thus far made by the court and with all stipulations therefor entered into between counsel.

[*Proper Procedure*]

In *Joseph L. Lee Inc. v. Margon Corporation* [1956 TRADE CASES ¶ 68,256], 18 F. R. D. 390, the court granted a motion to quash subpoenas *duces tecum* on the ground that they were unreasonable and oppressive. The court in that case criticizes a growing tendency to combine Rules 26(c) with Rule 45(d) as a substitute for the discovery and production of documents and things for inspection, copying or photographing "upon motion of any party showing good cause therefor," allowed by Rule 34. Rule 26(b) permits a litigant to ascertain upon a deposition the existence, description, nature, custody, condition and location of any books, documents, or other tangible things. Rule 45(d) permits the party noticing a deposition to obtain from the clerk, without order of court, a subpoena to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b). Rule 34 authorizes an order for production of documents and things for inspection, copying or photographing upon a motion of any party showing good cause therefor. The court states in its opinion that the rules did not intend to eliminate the original necessity for court order, pursuant to Rule 45(d)(1) before its amendment in 1948, permitting the use of a subpoena *duces tecum*. It notes the important distinction between the subpoena *duces tecum* and discovery and inspection—in case of the subpoena the one *upon* whom it is served may seek relief for *unreasonableness or oppressiveness*, whereas in case of discovery and inspection *the one seeking it* must establish *good cause* therefor. The court then held that even where the one upon whom the subpoena *duces tecum* is served does not attack it for unreasonableness or oppressiveness but complies and produces the identified document at a deposition, that still does not give the examiner the right to inspect or copy it without an independent order under Rule 34 upon a showing of good cause. It also holds that the assertions of the plaintiff in that case, in its answering papers to the motion to quash, tending to establish good cause for the production of the documents and its right to inspect them, are inapposite on the motion to quash its subpoena.

Other cases hold that a showing of good cause must be made prior to production of documents and records sought by a subpoena *duces tecum. Worth v. Lehigh Valley Transit Co.,* 10 F. R. D. 38; *Continental Distilling Corp. v. Humphrey,* 17 F. R. D. 237; *United States v. 6.82 Acres of Land,* 18 F. R. D. 195.

Plaintiff in this case sought to justify the need for production of documents not previously furnished by defendants. According to the precedents cited, such showing is not one which should be made or considered on a motion to quash subpoenas *duces tecum.*

For reasons herein stated the motions to quash subpoenas *duces tecum,* filed by defendants, are hereby granted.

[¶ 68,615] Independent Productions Corporation and IPC Distributors, Inc. v. Loew's Incorporated, et al.

In the United States District Court for the Southern District of New York. Civ. 110-304. Filed February 5, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Where Suit May Be Brought—Proper Judicial District—Conspiracy Action—Co-conspirators as Agents.— In a treble damage action filed in the United States District Court for the Southern District of New York, motions by corporate defendants to quash service of process and to dismiss the action for lack of venue were granted where the corporations were not incorporated or authorized to do business in New York, had no offices or agents there, and did not transact any business there. The complaint alleged a conspiracy in the district, and that each of the defendants acted in person or by their co-defendants in the consummation of the alleged conspiracy. The plaintiffs had contended that the corporations' disclaimer of commercial activities within the district was irrelevant and, that, irrespective of the situs of the corporations or of their ordinary commercial activities, the corporations were suable in the district since the corporations, through their co-defendants or their co-conspirators, participated in the alleged conspiracy. The mere allegation of a conspiracy does not make an alleged co-conspirator a foreign corporation's agent, for purposes of venue under Section 12 of the Clayton Act, in any district where such co-conspirator is amenable to suit. Under the Clayton Act, it cannot be said that venue is proper as to all conspirators in the district in which the impact of the conspiracy caused the damage to the plaintiff.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.210, 9008.350.

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Depositions—Priority—Expenses.—In a private treble damage action, it was held that the defendants who first served notices to examine the plaintiffs should be granted priority; that each defendant was entitled to separately conduct its own examination of the plaintiffs, but that such examinations should be scheduled so as to follow one another with reasonable promptness; and that the plaintiffs should not be required to pay the defendants' expenses in bringing their out-of-state officers to New York for examination by the plaintiffs, since the defendants had offices in the state which their officers visited regularly in the performance of their duties.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.775.

For the plaintiffs: Rosston, Hort & Brussel, New York, N. Y.

For the defendants: Donovan, Leisure, Newton & Irvine for General Film Laboratories, Inc.; Schwartz & Frohlich for Columbia Pictures Corporation and Columbia Pictures International Corporation; Sidney Schreiber for Motion Picture Association of America, Inc. and Association of Motion Picture Producers, Inc.; Benjamin Melniker for Loew's Incorporated and Loew's International Corporation; Meyer H. Lavenstein for Republic Pictures Corporation, Republic Pictures International Corporation, and Republic Productions, Inc.; Robert W. Perkins for Warner Bros. Pictures, Inc. (1953) (Del.), Warner Bros. Pictures International Corporation, and Warner Bros. Pictures Distributing Corporation; Dwight, Royall, Harris, Koegel & Caskey for Twentieth Century-Fox Film Corporation (Del.), Twentieth Century-Fox International Corporation, and Twentieth Century-Fox Inter-America, Inc.; Louis Phillips for Paramount Pictures Corporation, Paramount International Films, Inc., and Paramount Film Distributing Corporation; Adolph Schimel for Universal Pictures Company, Inc., Universal Film Exchanges, Inc., and Universal International Films, Inc.; J. Miller Walker for RKO Teleradio Pictures, Inc. (formerly known and referred to in the complaint as RKO Radio Pictures, Inc.); Phillips, Nizer, Benjamin & Krim for United Artists Corporation, Eagle Lion Classics, Inc., National Screen Service Corporation, and Comedia Enterprises, Inc.; Frederick W. R. Pride and Charles F. Young for Fox West Coast Theatres Corporation and Fox West Coast Agency; Wechsler & Solodar (McConnell, Van Hook & Paschen, Chicago,

Ill., of counsel) for H. Schoenstadt & Sons, Inc.; Davis & Gilbert for Ryder Sound Services, Inc., Glen Glenn Sound Co. (a corporation), and Glen Glenn Sound Co. (a partnership); Cahill, Gordon, Reindel & Ohl for Radio Corporation of America; and Spivak & Kantor for Walsh and Francavilla; all of New York, N. Y., except as otherwise indicated.

[*Motions*]

JOHN F. X. MCGOHEY, District Judge [*In full text*]: Ten motions are here considered. One is by the plaintiffs. Nine are by various defendants. Of the latter six are to quash service and to dismiss for lack of venue under Sec. 12 of the Clayton Act;[1] two are to stay depositions; one is to vacate a notice of deposition. The plaintiffs' motion seeks an order regulating the taking of depositions.

[*Complaint*]

The complaint alleges that the plaintiffs are respectively corporations of California and New York engaged in the production, distribution and exhibition of motion pictures. They seek treble damages of $7.5 million alleged to have been sustained by reason of a conspiracy in violation of the Anti-trust laws, carried on by 108 defendants consisting of corporations, partnerships, associations and individuals engaged in various branches of the motion picture industry. Of these 20 individuals and 18 corporations are designated merely as "Doe."

It is alleged that the defendants carried on activities in furtherance of the conspiracy in "the County of New York" and other places throughout the United States and foreign countries and that "each defendant [acted] in said places either in person or by and through their co-defendants and the co-conspirators as their agents in the effectuation and consummation of the conspiracy."

THE MOTIONS TO QUASH AND DISMISS

[*Affidavits*]

General Film Laboratories, Inc. and H. Schoenstadt & Sons, Inc. move to quash service and to dismiss for lack of venue. Ryder Sound Services, Inc., Glen Glenn Sound Company, a corporation, Glen Glenn Sound Co., a partnership, and Cinema Research Corporation move to dismiss for lack of venue.

The presidents of these defendants aver in separate affidavits that their respective corporations are not incorporated in or authorized to do business in New York, have no office or agents here and transact no business here of any kind. Moreover, the presidents of General Film Laboratories, Inc. and Ryder Sound Services, Inc. aver that process was not served on anyone authorized to accept service for those corporations. Glen Glenn and Harry Eckles filed affidavits asserting that, while they conducted business as co-partners during a period of seven months in 1937 (ten years before the initiation of the alleged conspiracy), they did not and never have conducted any partnership under the name of Glen Glenn Sound Co.

These affidavits stand uncontroverted. The plaintiffs submitted only their attorney's affidavit in opposition to these six motions. This affidavit, after summarizing the allegations of the complaint, merely states:

> "In the moving affidavits it is averred that movants are not engaged in the Southern District of New York in the pursuit of their ordinary commercial activities and that, for that reason, they are neither 'found' nor transacting business in this District within the meaning of Sec. 12 of the Clayton Act (15 U. S. C. § 15 [sic]). For the reasons which will be urged in plaintiffs' memorandum of law, it is respectfully submitted that this premise is fallacious and that the motions to quash should, in all respects, be denied."

In the memorandum of law, it is asserted that the moving defendants' disclaimer of commercial activities within the Southern District of New York is "irrelevant" and that, "irrespective of the situs of their corporate residence or of their ordinary commercial activities, if movants through their co-defendants or their co-conspirators participated in the conspiracy alleged in the amended complaint, they were suable in the Southern District of New York."

[*Issue*]

The question thus presented is whether in a private anti-trust suit, the mere allegation of conspiracy makes an alleged co-conspirator, as such, a foreign corporation's "agent" for purposes of venue under Sec. 12

[1] 15 U. S. C. A. 22.

of the Clayton Act [2] in any district where such co-conspirator is amenable to suit and the conspiracy is alleged to have had an impact, even though such corporation concededly is not an "inhabitant" of, or otherwise "found" in, the district of suit and has not at any material time carried on there any commercial activity in pursuit of its corporate objectives.[3] For the reasons hereafter set forth, I think the question must be answered in the negative.

[*Dismissals—Transfers*]

On the uncontroverted evidence I find that, under Sec. 12 of the Clayton Act, venue as to each of the moving defendants is lacking in this district, and also that no valid service of process was effected on General Film Laboratories, Inc. or Ryder Sound Services, Inc., or Glen Glenn Sound Co., a partnership.

The action as to these three defendants will be ordered dismissed for lack of jurisdiction of the defendants and lack of venue.

The other movants as to venue have not challenged service of process. Accordingly, the action as against H. Schoenstadt & Sons, Inc. will be ordered transferred to the Northern District of Illinois; the action against Glen Glenn Sound Company, a corporation, and Cinema Research Corporation, will be ordered transferred to the Southern District of California.

[*Co-conspirator as Agent*]

Although, by enacting Sec. 12 of the Clayton Act, Congress substantially enlarged the former venue provisions of the Anti-trust laws as to corporations, it did not thereby "give plaintiffs free rein to haul defendants hither and yon at their caprice." [4] Congress has authorized prosecution by the Government of a criminal conspiracy in violation of the Anti-trust laws in any district where it was formed or effectuated or in which any overt act was performed. In civil actions, however, Congress has not given the Government similar latitude. The Government can bring parties residing outside the district into a civil action only if the Court shall determine that the ends of justice so require.[5] And it seems significant that Congress has made this procedure available only to the Government.[6] As former Chief Judge Knox of this court observed in *Hansen Packing Co. v. Armour & Co.*,[7] "the failure of Congress to make similar provisions for civil suits by private litigants implies an intent to withhold the privilege." Judge Knox rejected Hansen's contention that the mere allegation of conspiracy was sufficient to establish venue aganist a New Jersey corporation not shown by the plaintiff to have transacted business in this district.

Here, nevertheless, the plaintiffs contend that, since the decision in *U. S. v. Scophony, supra,* decided in 1948, "the rule that a conspiracy is to be likened to a copartnership in which each participant acts as the agent of the other has governed the application and interpretaion of Section 12 of the Clayton Act" and that, "it is now *the settled rule* in the 2nd, 4th, 5th and 9th Circuits that for the purpose of determining venue in an anti-trust conspiracy case, the situs of the acts of the conspirators and the place of impact of the conspiracy will control." (emphasis supplied) The only appellate court decision cited in support of this "rule" is *Giusti v. Pyrotechnic Industries* [8] by the Court of Appeals for the Ninth Circuit. The other five decisions cited are by District Courts in California,[9] New York,[10] Virginia [11] and Louisiana.[12]

Whatever may be true elsewhere, there is certainly no such "settled rule" in the Second Circuit. The contrary decision in *Hansen Packing Co. v. Armour, supra,* has not been overruled.

[2] 15 U. S. C. A. 22.

[3] See *U. S. v. Scophony Corp.* [1948-1949 TRADE CASES ¶ 62,238], 333 U. S. 795-812.

[4] *U. S. v. Nat. City Lines* [1948-1949 TRADE CASES ¶ 62,259], 334 U. S. 573-588.

[5] 15 U. S. C. A. 5.

[6] *Georgia v. Pennsylvania R. Co.* [1944-1945 TRADE CASES ¶ 57,344], 324 U. S. 439-467.

[7] S. D. N. Y. (1936) [1932-1939 TRADE CASES ¶ 55,127], 16 F. Supp. 784, 786-87, cited with approval in *Georgia v. Pennsylvania R. Co., supra.*

[8] (1946) [1946-1947 TRADE CASES ¶ 57,504], 156 F. 2d 351.

[9] *De Golia v. Twentieth Century-Fox Film Corp.* (N. D. Cal.) 140 F. Supp. 316; *Steiner v. Twentieth Century-Fox Film Corp.* (S. D. Cal.) 140 F. Supp. 906.

[10] *Bertha Building Corp. v. National Theatres Corp.* (E. D. N. Y.) [1956 TRADE CASES ¶ 68,308], 140 F. Supp. 909.

[11] *Ross-Bart Port Theatre v. Eagle Lion Films* (E. D. Va.), 140 F. Supp. 401.

[12] *Don George, Inc. v. Paramount Pictures* [1952 TRADE CASES ¶ 67,294] (W. D. La.), 111 F. Supp. 458.

[*Giusti Decision*]

The plaintiffs, in asserting that there is a "settled rule" in the Second Circuit, appear to rely on the decision in *Bertha Building Corp. v. National Theatres, supra.* The Court in that case reviewed the other four district court decisions referred to above and found them all to be in accord with what the Court called "the principle enunciated in the *Giusti* case . . . that venue is proper as to all conspirators in the district in which the impact of the conspiracy caused the damage to the plaintiff." [13] Those cases do indeed appear to be in accord with that view. But with the utmost deference, I cannot agree that the *Giusti* decision "enunciated" any such "principle" as to venue under Sec. 12 of the Clayton Act. The *Giusti* case was an action for treble damages brought in the Northern District of California against domestic and foreign corporations. Process against one of the latter, Triumph Explosives, Inc., was served on the Secretary of State of California. Triumph had withdrawn from the state prior to suit though earlier it had been qualified and had transacted business there. It appeared specially to challenge the service. It also moved separately to dismiss for lack of venue under Sec. 12 of the Clayton Act, on the ground that at the time of suit it was not "found" or "transacting business" in the California district. The District Court granted both motions and Giusti appealed.

The complaint alleged a conspiracy by the defendants to monopolize and fix prices in, the sale of fireworks, beginning in 1935 and continuing up to the commencement of suit in 1944.[14] Triumph conceded in its affidavits [15] and brief [16] that, prior to 1939 it had sold and shipped its products to dealers in California; in 1939 its Vice-President in charge of sales opened its office and warehouse in Oakland and thereafter transacted its business in California continuously until some unspecified date after the outbreak of World War II; in December, 1943 it filed a Certificate of Withdrawal from business in California for which, pursuant to California law, it had qualified in January, 1940. Under California law withdrawal was conditioned on the corporation's written consent to substituted service on the Secretary of State "in any action upon any liability or obligation incurred within this state prior to the filing of the Certificate of Withdrawal." The Circuit Court's opinion, except for the last paragraph, deals solely with whether the liability which Giusti sued on, met California's requirement for substituted service. The Court held it did. Although Triumph's concessions of qualification, actual presence and the regular transaction of business in the California district during four years of the alleged conspiracy's existence seem sufficient support for that holding, the Circuit Court rested it on a different ground. Noting and apparently accepting as true the allegation in the complaint that the conspirators initiated their restrictive agreements in 1935 and, in practical effect, had destroyed the plaintiff's business by the end of 1936 (before Triumph's admitted entrance into and transaction of business in the district), the Court said:

> "The California members of the conspiracy were agents of Triumph in the conspiracy's attempt to destroy appellant's business. Triumph was in California acting through such agents, just as it would have been if it had employed a group of agents there continuously to underbid on sales to [Giusti's] customers."

If the Court thereby enunciated any principle, that could only have related to the single subject the Court was then discussing, namely, the manner in which a foreign corporation might incur liability sufficient to support substituted service of process under California law in a suit brought in that state on such liability after withdrawal. The Court indeed declined to pass on the question of venue under Sec. 12 of the Clayton Act, although Triumph urged the point strongly in its brief. On the contrary, the Court held that question to be moot on the ground that, in its Certificate of Withdrawal, Triumph had expressly consented to be sued in California.

[*Bertha Building Case*]

Moreover, even in the *Bertha Building Corp.* case, the Court did not rely solely on the so-called *Giusti* "principle." There, the plaintiff, a California corporation which owned and operated motion picture theatres in Los Angeles, charged that National Theatres, a foreign corporation, conspired

[13] 140 F. Supp. at 913.
[14] See Transcript of Record on Appeal pp. 2-11.
[15] *Id.* p. 30, Bell affidavit; and pp. 31-38 Trempy affidavit.
[16] Brief for Appellee pp. 1, 2.

with others in and out of California to monopolize interstate trade in motion picture films throughout the United States and as a result, damaged the plaintiff's business in California. The claim concededly accrued there in 1935. The action in the Eastern District of New York was not commenced until 1951. This was prior to the effective date of the present four-year statute of limitations prescribed in Sec. 4B of the Clayton Act.[17] National, relying on California's three-year statute of limitations,[18] moved for judgment on the pleadings dismissing the complaint. The plaintiff contended the statute had been tolled because National was "out of the state when the cause of action accrue[d]" and had not returned.[19] The Court, after considering the four District Court decisions, which it said "reaffirmed" and were in accord with "the principle enunciated in the *Giusti* case," concluded that "on the basis of the allegation of the complaint, under Sec. 12 of the Clayton Act . . . the court sitting in California could have had jurisdiction over the defendant," and granted National's motion for judgment dismissing the complaint. The Court, however, did not let the matter rest there. It went further and found that National was both "parent and grandparent" of numerous subsidiaries in a "multi-corporate structure" whose managers actually "were present in California transacting business of the corporate structure and of direct interest to National." Accordingly, "as alternative grounds for dismissing the complaint as barred by the California statute of limitations," the Court found "as a matter of fact that within the interpretation given Sec. 12 of the Clayton Act . . . in *United States v. Scophony Corp.,* 333 U. S. 795 . . . and *Eastman Kodak Co. v. Southern Photo Materials Company,* 273 U. S. 359 . . . National Theatres was transacting business in California."

[*Scophony Decision*]

The *Scophony* decision certainly does not accord with the so-called *Giusti* "principle." In that action, brought in this district, the Government sued Scophony, a British corporation, together with several American corporations and others, to restrain an alleged conspiracy in violation of the Anti-trust laws. Scophony, whose principal office was in London, challenged venue on the ground that it did not "transact business" and was not "found" in the Southern District of New York. The District Court agreed and dismissed the suit. The Supreme Court reversed; not however on the ground that the mere allegation of conspiracy made Scophony's alleged co-conspirators here its agents for purposes of venue, a theory the Court did not mention, but because on the facts of record it found that Scophony, through two of its officials who were served here, had at all material times carried on in the Southern District of New York "a continuous course of business" in furtherance of a fundamental part of Scophony's corporate objectives. If in a civil anti-trust conspiracy case the situs of a foreign corporation's "ordinary commercial activities" is irrelevant to the issue of venue, as the plaintiffs contend, it is surprising that the Supreme Court gave it so much attention. Application of the plaintiffs' theory would have rendered unnecessary the Court's extensive and detailed examination of Scophony's corporate purposes and the activities of its officials here in furtherance thereof.

[*Eastman Ruling*]

In *Eastman* the Court had to decide whether the foreign defendant had "transacted business" in Georgia within the meaning of Sec. 12 of the Clayton Act. To reach decision the Court did not rely on the mere allegations of the complaint. On the contrary, on the evidence adduced at the District Court hearing, the Supreme Court found that Eastman, "in a continuous course of business, was engaged, not only in selling and shipping its goods to dealers within the Georgia district, but also in soliciting orders therein through its salesmen and promoting the demand for its goods through its demonstrators for the purpose of increasing its sales . . . ."[20]

[*Supreme Court*]

Finally, although the plaintiffs' contention has never been directly ruled on by the Supreme Court, it is contrary to the views only recently expressed in strong dicta in both the majority and dissenting opinions in *Bankers Life & Casualty Co. v.*

[17] 15 U. S. C. A. 15b.

[18] California Code of Civil Procedure § 338.1.

[19] *Id.* § 351.

[20] 273 U. S. at 374.

Holland.[21] In that case, it is true, the Supreme Court decided only that mandamus was not an appropriate remedy to review the order of a District Judge in Florida severing and transferring to Georgia a treble damage suit, as to one of the defendants who was a resident and State official of Georgia. Nevertheless the Court noted the petitioner's (plaintiff's) contention that the District Judge was wrong because, since conspiracy was charged, the Georgia defendant's alleged co-conspirators in Florida were his "agents" for purposes of venue under Sec. 4 of the Clayton Act. Concerning this, Justice Clark observed in the Court's opinion:

> "Congress by 15 U. S. C. § 15 placed definite limits on venue in treble damage actions. Certainly Congress realized in so doing that many such cases would not lie in one district as to all defendants, unless venue was waived. It must, therefore, have contemplated that such proceedings might be severed and transferred or filed in separate districts originally. Thus petitioner's theory has all the earmarks of a frivolous albeit ingenious attempt to expand the statute."

Justice Frankfurter dissented in an opinion in which Justices Jackson and Minton joined. In his view, the plaintiff's claim being "frivolous," the writ of certiorari should have been dismissed as improvidently granted. He said:

> "If we now had to decide whether a co-conspirator as such is an 'agent' for purposes of venue under 15 U. S. C. § 15, it cannot be doubted that we would have to conclude that the district judge was right in finding that the Georgia Commissioner could not be kept in the suit."

The Motions Respecting Depositions

These motions deal with questions of priority, limitation of examination and expenses.

Several defendants served notices to examine the plaintiffs in New York by Simon M. Lazarus and David M. Grutman who are respectively the president and vice-president of both plaintiff corporations. Subsequently the plaintiffs served notices to examine many of the defendants in New York at times earlier than those fixed for the examinations of the plaintiffs.

Nearly all of the defendants' officers whom the plaintiffs propose to examine reside and customarily perform all or most of their corporate functions at places outside of New York.

The defendants ask that the plaintiffs be required to defray the expense of bringing out-of-state officers to New York or in the alternative the expense of sending local counsel to attend the examinations, if the plaintiffs prefer to conduct them in the districts where such officers are stationed. The plaintiffs ask that they be not required to pay the defendants' expenses regardless of the place of examination, which, on that condition, the plaintiffs are willing to have the defendants select.

The plaintiffs further ask that the examination of the plaintiffs be restricted in the following respects: that at this time only Simon M. Lazarus be examined in New York; that such examination be conducted jointly by all the defendants who have served notices, and that the examination continue from day to day until completed; that David Grutman's examination be deferred until after completion of the Lazarus deposition and if then taken this be done in the first instance on written interrogatories "without prejudice" to subsequent oral examination in California if the defendants insist and agree to pay their own expenses therefor.

The motions are disposed of as follows. The defendants who first served notices to examine the plaintiffs will be granted priority as is customary. Each defendant is entitled to and accordingly may separately conduct its own examination of the plaintiffs. However, such examinations should be scheduled so as to follow one another with reasonable promptness. The Court expects that all counsel will follow this direction and schedule the examinations accordingly.

The examination of David Grutman will not be stayed. It is to be held pursuant to the notices served.

Most of the defendants seeking expenses have offices in New York to which their officers who are to be examined come regularly in the performance of their duties. There has been no showing of hardship on these defendants if their officers are required to come here for examination. Accordingly, whether the examinations are

[21] 346 U. S. 379 [1953 TRADE CASES ¶ 67,626].

conducted in New York or elsewhere as the parties may agree, each party will pay its own expenses.

Orders in accordance with this opinion may be submitted on notice.

[¶ 68,616] United States v. New Orleans Insurance Exchange.

In the United States District Court for the Eastern District of Louisiana, New Orleans Division. Civil Action No. 4292. Dated February 5, 1957.

Case No. 1182 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Group Boycott—Legality.—The by-laws of an association of insurance agents and brokers (selling fire, casualty, and surety insurance) which required the members of the association to boycott any stock company which plants through any except association agents in the New Orleans area, to boycott any stock company which sells directly to the public, to boycott mutual companies irrespective of how or by whom the insurance is sold, and to boycott nonmember agencies so that the facilities of companies planting exclusively through association outlets are denied such agents constituted violations of Sections 1 and 2 of the Sherman Act. The group boycott had the potential to, and actually did, unreasonably restrain and control interstate commerce in insurance in the New Orleans area. Where, as in the instant case, "it is shown that the group boycott imposes unreasonable restraints on interstate commerce in violation of Section 1 of the Sherman Act, a Section 2 violation is just a short step away, for most, if not all, unreasonable restraints have as their purpose the acquisition of at least a greater share of commerce than could otherwise be obtained in a free economy. Combinations indulging in group boycotts, then, must be put to proof to clear themselves of the predatory intent required for violation of Section 2 of the Act." In the instant case, there is no such proof, and the record "depicts a nascent, if not an accomplished, monopoly, nurtured by [a] group boycott."

See Combinations and Conspiracies, Vol. 1, ¶ 2005.533; Monopolies, Vol. 1, ¶ 2610.720.

Combinations and Conspiracies—Monopolies—Scope of Sherman Act—Applicability to Insurance Business Under McCarran-Ferguson Act.—In an action charging that the by-laws of an insurance exchange constitute a group boycott in violation of Sections 1 and 2 of the Sherman Act, the exchange's contention that the McCarran-Ferguson Act excludes the business of insurance from the operation of the Federal antitrust laws was rejected. Although the McCarran-Ferguson Act provides that the Sherman Act shall not apply to the business of insurance, the Act further provides that the Act shall not render the Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

See Combinations and Conspiracies, Vol. 1, ¶ 2263.

Combinations and Conspiracies—Monopolies—Scope of Sherman Act—Interstate Commerce—Insurance Business.—In an action charging that the by-laws of an insurance exchange constitute a group boycott in violation of Sections 1 and 2 of the Sherman Act, the exchange's contention that its members are not engaged in interstate commerce was rejected. The business of insurance, when conducted across state lines, is interstate commerce. Where, as in the instant case, "the challenged activity is at the local level, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

See Combinations and Conspiracies, Vol. 1, ¶ 2035.153.

Combinations and Conspiracies—Monopolies—Defenses—Motive and Intent.—Good intent is no defense under Section 1 of the Sherman Act except in non-per se violations

of the Act where unreasonable restraints are not shown. Where unreasonable restraints are shown, the requisite intent is inferred from the unlawful effects.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.205.

For the plaintiff: M. Hepburn Many, Edward R. Kenney, William H. Rowan, and Charles McAleer.

For the defendant: Henican, James & Cleveland; Philip E. James; Murray F. Cleveland; Carlos G. Spaht; Byron R. Kantrow; and Malcolm McCorquodale.

For a prior decision of the U. S. District Court, Eastern District of Louisiana, New Orleans Division, see 1955 Trade Cases ¶ 67,935.

[*Complaint*]

WRIGHT, District Judge [*In full text*]: The New Orleans Insurance Exchange, a private association of 130 insurance agencies [1] which control approximately three-fourths [2] of the fire, casualty and surety [3] insurance business in the New Orleans area,[4] is charged in these proceedings with violations of Sections 1 and 2 of the Sherman Act.[5] Specifically, the complaint charges that the Exchange and its members are engaging in an unlawful combination and conspiracy to restrain interstate commerce in insurance and to acquire a monopoly in its area of operations by maintaining a group boycott against all nonmember insurance agencies as well as against all insurance companies which do not plant exclusively through Exchange outlets or members.

[*Defenses*]

The defendant admits the boycott but denies that it unreasonably restrains trade or tends toward monopoly. It also denies that its members are engaged in interstate commerce. It asserts further that the McCarran Act [6] excludes the business of insurance from the operation of the federal antitrust laws.

[*Boycott*]

The group boycott is effected through a series of bylaws of the Exchange by which members thereof agree to boycott any stock company which plants through any except

[1] These independent agencies are part of what is called the American agency system, that is, they solicit insurance from the public and place it, at their election, with one or more of several companies represented by them. The agencies own what are called "expirations" on the policies handled by them. Expirations are the property right which inheres in having sold the existing policy and in knowing when it will expire, so that a renewal may be obtained. It is generally recognized in the trade that one who owns the expirations, generally speaking, controls renewals.

[2] The Exchange occupies a dominant position in the fire, casualty and surety insurance market in the New Orleans area. During the period 1951 through 1954, member agents wrote: (1) 65.1% of all multiple lines of insurance written by fire and casualty companies in the New Orleans area; (2) 71.6% of all lines of insurance written in the New Orleans area under the jurisdiction of the Exchange; (3) 81.3% of fire insurance written in the New Orleans area; (4) 67.4% of casualty insurance (excluding accident and health) in the New Orleans area; and (5) 98.1% of surety insurance in the New Orleans area. In addition, member agents represent over 90% of the stock fire and casualty companies in the United States which possess assets in excess of $50,000,000. The dollar volume of business written by Exchange members is substantial, amounting to approximately $25,000,000 to $30,000,000 in premiums annually.

[3] The complaint does not specifically cover contracts of surety although such contracts may be included in the term casualty insurance. In any event, no objection was made to the evidence concerning surety agreements when it was first offered and no prejudice is shown by the admission thereof. Rule 15(b), Fed. R. Civ. P.

[4] This area is composed of Orleans, Jefferson and St. Bernard Parishes.

[5] The relevant sections of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209, as amended) provide in part as follows:

"Sec. 1. (26 Stat. 209; 50 Stat. 693; 15 U. S. C. § 1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *

"Sec. 2. (26 Stat. 209; 15 U. S. C. § 2) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *

"Sec. 4. (26 Stat. 209; 15 U. S. C. § 4) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *"

[6] 15 U. S. C. § 1013(a) and (b).

Exchange agents in the New Orleans area,[7] to boycott any stock company which sells directly to the public,[8] to boycott mutual companies irrespective of how or by whom the insurance is sold,[9] and to boycott non-member agencies so that the facilities of companies planting exclusively through Exchange outlets are denied such agents.[10] These bylaws are rigidly enforced. All members are under obligation to police other members and to report violations. A member charged must make a full disclosure by presenting his books and records for examination by the Exchange, and any member found guilty of violation of bylaws is substantially fined or expelled from the Association. When a member is expelled from the Exchange, he is stripped of his representation of Exchange controlled companies and is thus required to operate outside the Exchange subject to the group boycott provided in the bylaws.

[*Effect of Boycott*]

The effect of the boycott, as shown by the evidence, is that practically all the major stock companies plant exclusively through Exchange outlets and deny their facilities to non-Exchange members, in spite of the fact that in other areas uncontrolled by similar boycott, the same insurance companies plant through agents representing all types of insurance companies, including mutuals. In fact, some of the stock companies whose method of operation is controlled by the boycott of the defendant Exchange sell directly to the public in uncontrolled areas. Moreover, by being denied the facilities of the large stock companies controlled by the Exchange, non-member agents operating in the area are relegated to handling risks which do not require the capacity of the controlled companies. Insurance companies such as mutuals and direct writers, who are not allowed to plant through Exchange outlets, are subjected to the group boycott and are thus excluded from the substantial market controlled by the Exchange. An additional effect of the group boycott is that part of the public which has placed its confidence concerning insurance matters with members of the Exchange is denied access to low cost insurance.

[*Test of Legality*]

The Government insists, with much support from the authorities, that the bylaws of the Exchange, rigorously enforced as they are, constitute a per se violation of the Sherman Act. In fact, this case is remarkably close in many of its aspects to *Fashion*

[7] The bylaws read as follows:

Article X, Section 1:

"Active Members shall not accept or retain the agency of any company, including Underwriters of same, which has or whose General Agent or Manager has agents within the jurisdiction of this Exchange who are not Active Members of the Exchange."

Article X, Section 2:

"Active Members shall not accept or retain the agency of any insurance company, including its parent corporation, all underwriting agencies of such company, members of a group or fleet of companies, and all companies owned, either in whole or in part, managed, controlled, directly or indirectly, or reinsured by such company, unless all agents within the jurisdiction of this Exchange, of such insurance companies, are members of this Exchange."

[8] The bylaw reads as follows:

Article X, Section 3:

"Active or Associate Members of this Exchange may not represent or place business with a company, not a member of this Exchange, whose State Agent, Special Agent, Manager or salaried representative solicits from or issues policies or bonds direct to the public within the jurisdiction of this Exchange or accepts such business from a non-member of this Exchange."

[9] The bylaw reads as follows:

Article IX, Section 6:

"It shall not be permissible for Members to place business within the jurisdiction of the Exchange with non-member agents or with any type of non-stock carriers unless and until the facilities of all members of the Exchange have been exhausted and an affidavit to that effect has been filed with the Secretary of the Exchange within ten days of the binding of the risk."

[10] The bylaws read as follows:

Article IX, Section 6 (See Note 9).

Article IX, Section 7:

"It is permissible for Active Members to accept business from Non-Member Agents and Brokers domiciled in the territorial jurisdiction of the Exchange, provided no commission or other valuable consideration is paid directly or indirectly on such business; and, provided further, that the member immediately notify the Secretary of the Exchange in writing, giving the name of the Non-Member, character and location of the risk, amount of insurance and premiums, and further pays to the Exchange, promptly, an amount equal to 10% of the net premiums involved, which said amount so paid, shall go towards the cost of keeping a record of such transactions."

Originators' Guild of America, Inc. v. Federal Trade Commission [1940-1943 Trade Cases ¶ 56,101], 312 U. S. 457, where the Court held that evidence on the question of reasonableness of the boycott there in suit was immaterial, that, without more, the purpose and object of the unlawful combination, its tendency toward monopoly and the coercion practiced upon a rival method of competition brought it within the prohibition of the Sherman Act.

In the *Fashion Guild* case, the defendants were designers, manufacturers and distributors of women's clothes. In order to control what they considered to be piracy of their clothing designs, the members of the Guild devised a plan whereby they refused to sell to retailers who purchased and sold garments which were unauthorized copies of designs of Guild members. The Supreme Court held that the combination was "well within the inhibition of the policies declared by the Sherman Act itself." [11] The language used by the Court in denouncing the vices of the Guild's scheme is so pertinent here that it bears repeating.[12] The Supreme Court has also indicated in *International Salt Co., Inc. v. United States*,[13] 332 U. S. 392 [1946-1947 Trade Cases ¶ 57,635], and *United States v. Columbia Steel Co.*,[14] 334 U. S. 495 [1948-1949 Trade Cases ¶ 62,260], that group boycotts are unreasonable per se and "clearly run afoul of Section 1" [15] of the Sherman Act.

But it is not necessary to decide this case on a per se basis. The rule of reason [16] dictates that this illegal combination must be destroyed. As shown above, the group boycott in suit not only had the potential unreasonably to coerce, restrain and control interstate commerce in insurance in the New Orleans area but it actually did. In fact, this defendant, through the dominant position of its membership, sits astride the stream of interstate commerce in insurance in the New Orleans area and directs its flow. It allows the large stock companies access to its outlets on condition that those companies participate in its group boycott of nonmember agencies. It refuses to allow any part of the 75 per cent of the insurance which it controls to move in the direction of mutuals or direct writers, and it relegates the numerically superior nonmember agencies to the discriminatory position of scrambling for the remaining 25% of the business while excluding them from placing it with the major stock companies controlled by the Exchange. Such unreasonable restraints are calculated to affect adversely the persons subjected to the discrimination, and this record confirms the calculation.

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[11] *Fashion Originators' Guild v. Federal Trade Commission, supra*, p. 465.

[12] In *Fashion Originators' Guild v. Federal Trade Commission, supra*, at pp. 465 and 466, the Court said:

"And among the many respects in which the Guild's plan runs contrary to the policy of the Sherman Act are these: it narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy (*Montague & Co. v. Lowry*, 193 U. S. 38, 45; *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 48-49); subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott (*Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U. S. 600, 609-611); takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs (*United States v. American Linseed Oil Co.*, 262 U. S. 371, 389); and has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs (*United States v. American Linseed Oil Co., supra*, at 389). In addition to all this, the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.' *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 242."

[13] In *International Salt Co. v. United States, supra*, at p. 396, the Court said:

"Not only is price-fixing unreasonable, *per se* (citing cases), but also it is unreasonable, *per se*, to foreclose competitors from any substantial market. *Fashion Originators Guild v. Federal Trade Commission*, 114 F. 2d 80, affirmed, 312 U. S. 457."

[14] In *United States v. Columbia Steel Co., supra*, at pp. 522, 523, the Court said:

"A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal *per se*. For example, where a complaint charges that the defendants have engaged in price fixing, or have concertedly refused to deal with nonmembers of an association, or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal *per se*. * * *"

[15] *The Times-Picayune Publishing Co. v. United States* [1953 TRADE CASES ¶ 67,494]. 345 U. S. 594, 625.

[16] See *Standard Oil Company v. United States*, 221 U. S. 1.

[*Unreasonable Restraint*]

In short, the Exchange practices are essentially the same, in purpose and effect, as those denounced as violative of the Sherman Act in *Fashion Guild, supra.* And here the evidence demonstrates that these practices not only tended to but actually did impose unreasonable restraints on interstate commerce. The Exchange's group boycott narrows the outlets or agents through which insurance companies can sell and the sources or companies through which agents can place insurance; it takes away the freedom of action of its own members by requiring them to participate in the boycott and to reveal to the Exchange the intimate details of their individual affairs to insure that they do; it suppresses competition from mutual and direct writer insurance companies as well as competition from nonmember agencies generally; and in addition to all this, the Exchange is in reality a private super-governmental agency which prescribes rules for the regulation and restraint of interstate commerce, provides extra-judicial tribunals for determination and punishment of violations, and thus trenches beyond the power of the national and state [17] legislatures, in addition to violating the Sherman Act.

[*Monopoly*]

Group boycotts and concerted refusals to deal flout the Sherman Act's command that competition rule the market place. Our economic faith is predicated on free competition uninhibited by group boycotts or other predatory practices. Not only must merchandise stand the cold test of competition, but services performed in connection with the sale thereof must be submitted to the same test, so that, in the last analyses, the public may have a free choice in spending its money, and businesses, willing and able to compete for that money, may have a free opportunity to do so. Therefore, any group boycott or concerted refusal to deal, if in fact not a per se violation of the Sherman Act, must, at the very least, be viewed with dark suspicion because of the commercial restraints and tendency toward monopoly inherent in such combinations. Where, as here, it is shown that the group boycott imposes unreasonable restraints on interstate commerce in violation of Section 1 of the Sherman Act, a Section 2 violation is just a short step away, for most, if not all, unreasonable restraints have as their purpose the acquisition of at least a greater share of commerce than could otherwise be obtained in a free economy. Combinations indulging in group boycotts, then, must be put to proof to clear themselves of the predatory intent required for violation of Section 2 of the Act. *Standard Oil Company v. United States, supra,* p. 75. Here such proof is wholly lacking. On the contrary, this record depicts a nascent, if not an accomplished, monopoly, nurtured by group boycott.

[*Defendant's Contentions*]

The Exchange makes the contention that its group boycott of nonmembers and uncooperative insurers does not deny them the right to approach the public and sell insurance outside the Exchange. That is true. But it is the agency who controls the insurance buyer and the placement of his insurance. Admittedly, the Exchange agencies control approximately 75 per cent of the concerned insurance purchased in the New Orleans area. That insurance is placed with companies chosen by the agencies and not by the assureds. Consequently, any company who is allowed to plant through Exchange agencies, even on an exclusive basis, is happy to accept the "invitation" since otherwise it would be denied access to three-fourths of the insurance business in the area. And the minute a company submits to Exchange coercion and control, nonmember agencies are denied access to that company for the placement of risks.

The result, therefore, is that not only are the mutuals and other companies operating outside the Exchange excluded from a substantial market by a group boycott effected through the use of the dominent position of the Exchange, but companies allowed to do business through the Exchange outlets are actually controlled in their method of doing business in that, in addition to being denied the right to deal directly with the public, they must participate in the Exchange boycott of nonmember agencies. Not only are nonmember agencies restricted in their operations by a group boycott effected through the use of the dominant position of the Exchange, but the member

[17] Louisiana has a comprehensive insurance code providing for the complete regulation of the insurance industry within the state. La. R. S. 22:1-22:1734.

agencies themselves are prisoners, sometimes unwilling prisoners, of their own rules, for they, too, are limited in their operations under pain of expulsion and boycott. It must be remembered that in suit here is a group boycott, participation in which is required of every Exchange member by its bylaws. While an individual agency may have the right to boycott another agency or an insurance company,[18] a concerted refusal to deal brings the combination within the condemnation of the Sherman Act. *Kiefer-Stewart Co. v. Seagram & Sons* [1950-1951 TRADE CASES ¶ 62,737], 340 U. S. 211; *American Medical Association v. United States* [1940-1943 TRADE CASES ¶ 56,254], 317 U. S. 519; *Paramount Famous Corp. v. United States,* 282 U. S. 30; *Eastern States Retail Lumber Dealers' Ass'n. v. United States,* 234 U. S. 600.

The Exchange also states that its reason for boycotting mutual insurance companies is that the mutuals are socialistic in character whereas its membership is dedicated to the American way of life. That argument sounds high and lofty but the truth is that not only are mutuals boycotted under the requirements of the bylaws, but any company, stock, mutual or otherwise, which does not plant exclusively with Exchange members is likewise discriminated against. Thus the touchstone for acceptance by the Exchange is not belief or disbelief in socialism but willingness to submit to the restraints imposed by the Exchange.

The Exchange also argues that the reason for the restrictive bylaws is to protect the American agency system. But good intent is no defense under Section One of the Act except in non per se violations where unreasonable restraints are not shown. *United States v. Columbia Steel Co., supra,* p. 522. Where, as here, unreasonable restraints are shown, the requisite intent is inferred from the unlawful effects. *The Times-Picayune Publishing Co. v. United States, supra,* p. 614; *United States v. Griffith* [1948-1949 TRADE CASES ¶ 62,246], 334 U. S. 100, 105, 108; *United States v. Patten,* 226 U. S. 525, 543.

The asseverations of good intent are also subject to considerable question. The evidence shows that mutual companies who are not direct writers also use the American agency system. In fact, all of the government's witnesses are mutual agents who are a part of the American agency system. Moreover, until 1950 there was an Exchange bylaw which applied the boycott against participating stock companies[19] using the American agency system, irrespective of their willingness to submit to Exchange control. Although the bylaw was repealed in 1950, the evidence shows that the boycott continues. It would seem, therefore, that the reason for the boycott of mutual as well as participating stock companies, as shown by the minutes of the meeting of the Exchange at which the boycott against participating stock companies was adopted, is, not the protection of the American agency system, but the prevention of a possible reduction in agency commissions caused by reduction in cost of insurance to the public.

[*Interstate Commerce*]

The defenses of the Exchange regarding interstate commerce and the McCarran Act may be quickly disposed of. In *United States v. Southeastern Underwriters Association* [1944-1945 TRADE CASES ¶ 57,253], 322 U. S. 533, the Court held that the business of insurance, when conducted aross state lines,[20] is interstate commerce. And even where, as here, the challenged activity is at the local level, "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Manufacturers Association* [1948-1949 TRADE CASES ¶ 62,390], 336 U. S. 460, 464; *United States v. Employing Plasterers*

[18] Compare *Lorain Journal v. United States* (1950-1951 TRADE CASES ¶ 62,957], 342 U. S. 143; *United States v. Colgate & Co.,* 250 U. S. 300.

[19] A participating stock company is like a mutual insurance company in that the policyholders participate in the profits of the company by receiving dividends, thereby reducing the net cost of the insurance.

[20] The record shows that 90% of the insurance companies concerned here are domiciled in states other than Louisiana. In *United States v. Southeastern Underwriters Association, supra,* at p. 537, the Court said:

"(T)he insurance business * * * include(s) not only the execution of insurance contracts but also negotiations and events prior to execution of the contracts and the innumerable transactions necessary to performance of the contracts. All of these alleged transactions * * * constituted a single continuous chain of events, many of which, * * * could possibly have been continued but for that part of them which moved back and forth across state lines."

Association of Chicago [1954 TRADE CASES ¶ 67,692], 347 U. S. 186.

[*McCarran Act*]

It is true that Section 3(a)[21] of the McCarran Act provides that the Sherman Act "shall not apply to the business of insurance or to acts in the conduct thereof." But Section 3(b)[22] of the same act provides: "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." The legislative history of Section 3(b) affirms what its language so plainly says.[23] *United States v. Insurance Board of Cleveland* [1956 TRADE CASES ¶ 68,460], 144 F. Supp. 684.

Decree for plaintiff in accord with Findings of Fact and Conclusions of Law this day rendered.

[¶ 68,617] United States v. International Boxing Guild, Boxing Guild of Ohio, Charles Johnston, William Daly, and Albert W. Del Monte.

In the United States District Court for the Northern District of Ohio, Eastern Division. Criminal No. 21823. Dated January 11, 1957.

Case No. 1268 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Boycott—Price Fixing—Professional Boxing.—An association of local professional boxing managers' guilds, one of its affiliated local guilds, and certain of their officers were granted judgments of acquittal in a Government action charging that they conspired to refuse to permit their boxers to participate in television studio boxing shows, to refuse to match their boxers with boxers managed by nonmembers, and to adopt a scale of minimum prices at which they would permit their boxers to participate in televised boxing shows. The court found that there was no conspiracy to unreasonably restrain interstate commerce; that the local guild invited all managers to become members of its guild; that there was no price fixing by the local guild; and that the defendants' actions were lawful and proper and were done for the purpose of preserving their work and the sport of boxing. Any interstate commerce affected by the defendants' actions was incidental, and any restraint on such commerce was so negligible as not to be unreasonable.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.533, 2011.181.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Trial—Motion for Judgment of Acquittal.—On a motion for a judgment of acquittal, the trial court must determine whether or not, upon the evidence, reasonable minds might reasonably conclude that guilt of the essential elements set forth in the indictment has been proved beyond a reasonable doubt.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8029.675.

For the plaintiff: Robert B. Hummel, Cleveland, Ohio.

For the defendants: Harry Gittleson, Brooklyn, N. Y., and Edwin Knachel and Richard C. Ogline, Cleveland, Ohio.

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[21] 15 U. S. C. § 1013(a).

[22] 15 U. S. C. § 1013(b).

[23] 91 Cong. Rec. 1486, Feb. 27, 1945. The Senate Judiciary Report on the bill reads:

"Section 4 (Section 3 of the final enactment) suspends the application of the Sherman Act and the Clayton Act to the business of insurance until January 1, 1948; and (b) provides that at no time are the prohibitions in the Sherman Act against any act of boycott, coercion, or intimidation suspended. These provisions of the Sherman Act remain in full force and effect."

Court's Opinion

[*Motion for Acquittal*]

CONNELL, District Judge [*In full text*]: Gentlemen, the motion made puts the immediate burden on the Court concerning which we will necessarily have much to say. It is made under Rule 29 "Motion for Acquittal" under "(a) Motion for judgment of acquittal" in which the rule reads as follows:

> "Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."

In the annotations under this which concerns us lawyers in particular is one to the effect that "a judge's function is exhausted when he determines that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within fair operation of reasonable mind.

> "In trial without a jury, a motion for judgment of acquittal at close of prosecution's case performs the same functions and is governed by the same considerations, as is a similar motion at a trial by jury."

And then the ultimate test we find in this language:

> "A trial judge, in passing on a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to right of jury to determine credibility, weigh evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

So what I am called upon to do here is to decide, as the judge, whether or not the case, as presented by the Government, agreeing that everything that has been said is true, would justify or uphold a conviction here. That is, whether or not, assuming that everything that is said is true, giving it the most favorable light that one can give it, whether or not they have made a sufficient case on which reasonable minds might reasonably conclude that guilt has been proved of the essential elements set forth in the indictment, beyond a reasonable doubt.

So much has been said that one has to cover this in a fashion which may not appear to be well organized, because you men finished up in somewhat of a hurry, and take me by some degree of surprise.

First of all, I am grateful to all counsel for the courtesy and expedition with which you have worked. We have been in the court room four days, and we put in a lot of time—you men in particular on your exhibits, beforehand, and on all of the divers agreements that we had to make by way of stipulations in order, under the new rules of procedure, to make trial before a court and jury as expeditious as is possible. For all that we are very grateful.

Having at some time in my life been in the position of both of you, both on the prosecution and on the defense, I can understand the intensity with which you have worked, the sincerity with which you have worked, and how happy men can be, in their work, because I presume we are all like fighters in the ring too—we love to win and hate to lose. As one who was on the prosecution side for some seven years, I think it would be fair to say that when one is in prosecution he always thinks he is right, and on defense one always hopes he is right, but one on defense can be much less sure because, as a rule, the facilities of prosecution are so much more all-embracing and effective than defense can ever muster —which has no direct application to the matters in front of us.

[*Availability of Fighters*]

Now, when Mr. Knachel just sought to make the point—I may have to cover this in a way not too well organized—that there was no showing that there were any fighters available between the dates involved, I feel as a lawyer, that he had in mind the various allegations that appear in the indictment under its final paragraph 14 called "jurisdiction and venue."

Under paragraph 14 the Government alleges as follows:

> "The combination and conspiracy alleged herein has been carried out in part within the Northern District of Ohio, Eastern Division, and within the jurisdiction of this court. During the period of time covered by this indictment and within the applicable period of the statute of limitations and within the Eastern Division of the Northern District of Ohio,

the defendants refused to provide boxers for the studio boxing shows telecast by WEWS."

Now, what Mr. Knachel was suggesting was the proposition that there had been no showing ever made that any fighters had been available, which is right. Nobody asked for any. He also used the expression with reference to the same thing that there was no showing that there were any fighters under contract available at the prices mentioned, which is also true.

[*Criminal Action*]

Now, then, Mr. Knachel also mentions one other little proposition, which is the fact that, as he says, the promoters of fights have been before the courts—that means the top promoters of the country—have been before the courts in civil actions, and the managers here in Ohio are before this court in a criminal action.

The point has been somewhat made before, that is, the question is asked,

> "Why should the Government in dealing with the promoters, who operate on such a big scale, nationally, just try it out in a civil way, wherein the best that could be done about it ultimately would be to enjoin them from a continuation of this misconduct, if it is misconduct, whereas before us in this court here today in the instant case an effort is made upon the part of the Government to obtain convictions against individuals, as a result of which they could be personally and, let's say, physically punished."

While Mr. Knachel raises the question, I must admit there isn't anything I can do about it; if there seems to be an injustice in it there still isn't anything that I know of that anybody can do about it. But let's get into the New York case, and the New York case, gentlemen, is the case which was decided January 31, 1955 on which, unquestionably, the Anti-Trust Division had the feeling that they now had authority to proceed against the boxing profession, the indictment before me being dated exactly a year later—January 10, 1956—that's exactly a year except for 20 days.

[*National Football League Case*]

Now, of course, up to that time there had been some other decisions affecting this question of sport. And, of course, the question of sport and all sports is an intriguing one to most men.

There had been a case called *U. S. v. National Football League* [1953 TRADE CASES ¶ 67,614], 116 Fed. Supp. 319, which both sides have cited to me.

On the question of monopolies the annotation says that the true test of legality under the Sherman Act of an agreement or regulation of trade is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition, which is one of the questions before us today, and then it goes on to say that the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint, and its effect, actual or probable.

Then it says in order to determine whether restraint is legal under the Sherman Act, history of restraint, evil believed to exist, reason for adopting the particular remedy, and purpose or end sought to be attained are all relevant facts, all of which is before us.

An agreement may constitute a restraint of trade, without being illegal under the Sherman Act, and, for a contract to be illegal, it must cause both a restraint of trade and an unreasonable restraint of trade, which is before us today.

Then it gets into the TV question, and the TV question is to a degree still novel in the law. "Provision of by-laws of the National Football League preventing telecasting of outside football games into home territories of other teams on days when other teams are playing at home provides for a legal restraint of trade not in violation of the Sherman Act," which likewise has direct application here.

This case says, in effect, that even though you have a contract which says there will be no television whatsoever when the home team is playing, that contract is not illegal because, it reasons it out, if televising of that game is permitted when the home team plays nobody will come to see the team play, and ultimately there won't be any team. What the football industry was trying to do here was keep itself from going out of business, and that question is directly before me in this boxing business.

> "The purposes of the Sherman Act certainly will not be served by prohibiting the defendant clubs, particularly the weaker clubs, from protecting their home gate

receipts from the disastrous financial effects of invading telecasts of outside games. The member clubs of the National Football League, like those of any professional athletic league, can exist only as long as the league exists. The league is truly a unique business enterprise, which is entitled to protect its very existence by agreeing to reasonable restrictions on its member clubs."

There you see the upper court saying, in effect,—well, people in the sporting industry may make rules and regulations for the conduct of their industry, sport, or profession, whatever it may be, such as are conducive toward their perpetuation and, in effect, they say, if something comes along which can endanger their very existence they have a right to fight against it, and if they do there is nothing unlawful about it.

[*Related Boxing Case*]

Now, the thing I think that precipitates all this—I may be wrong, and maybe I shouldn't say so—but I do think the thing —the case, rather, which causes a case like this to be filed here as of January 10, 1956, is this case decided in the Supreme Court the year before, and that case wasn't decided on the merits at all. Counsel on one side or the other has said here that a Federal Judge in New York City is now in the process of determining the case, and I believe somebody said that he took it under advisement five months ago, and that was the ultimate trial on what we, as lawyers, call the merits of the case. But the Supreme Court case and the Supreme Court decision had to do only with the court's ruling on the papers filed in the case, the procedure, the early procedure of the case, there having been an action filed, a civil action filed against all these people saying, in effect, "You are violating the Anti-Trust Laws" and a defensive action, a paper filed by the defendants, the promoters, saying, in effect, "Oh, the boxing business or profession or industry isn't subject to the Sherman Anti-Trust Act; we are not susceptible to prosecution; we are like football and baseball, you can't touch us because we are a sport," and the Supreme Court said no to that contention.

When it said, "No" I am not too sure that it said that boxing in and of itself does come within the purview of the Sherman Anti-Trust Act, because the volume of business involved here was so gigantic, and all of it was practically in interstate commerce, to a point where monopolizing and controlling championship bouts and the champions of all of the divisions of the United States in fighting—there being some ten divisions, I think—the Supreme Court really went on to say that it amounted to such a great volume, such a multiplicity of transactions, that it practically constituted an industry which, when it became monopolized, could involve a violation of the Sherman Act and, therefore, they said the lower court was wrong in having granted the defendants', meaning the defendant promoters, motion.

When you get into the volume of it, it was really a business and they say, among other things, that a boxing match is "a local affair"—that has been the language used in most of the cases—but that does not alone bar the application of the Sherman Act to a business based on the promotion of such matches, if the business is itself engaged in interstate commerce and the business imposes illegal restraints on interstate commerce.

Now, when you get into the case you find that this International Boxing Club of New York was a pretty big thing; that the individual defendants mentioned there, James D. Norris and Arthur M. Wirtz, those two individuals, along with the Madison Square Garden Corporation own 80 percent of the stock of International Boxing Club, so you are dealing with big business. The Government's complaint was that the promoters of these contests, meaning the men before that court—and this is only civil, understand—

"The Government's complaint alleges that promoters of professional championship boxing contests 'make a substantial utilization of the channels of interstate trade and commerce to:

"(a) negotiate contracts with boxers, advertising agencies, seconds, referees, judges, announcers, and other personnel living in states other than those in which the promoters reside' "—which wouldn't have much comparison with what is in front of us today—" 'arrange and maintain training quarters in states other than those in which the promoters reside' ", which doesn't resemble anything I have listened to here—" 'lease suitable arenas, and arrange other details for boxing contests, particularly when the contests are held in states other than those in which the promoters reside; sell tickets to contests across state lines; negotiate for the sale of and sell rights to make and distribute motion pictures of boxing contests to the

18,000 theaters in the United States;"—meaning, gentlemen, it was a gigantic business, these men who were charged civilly—

> "negotiate for the sale of and sell rights to broadcast and telecast boxing contests to homes through more than 3,000 radio stations and 100 television stations in the United States; and negotiate for the sale of and sell rights to telecast boxing contests to some 200 motion picture theaters in various states of the United States by large-screen television."

Some of us may have personal memory that some of our theaters—I believe it was the Hippodrome—had some of these big contests put on the wide screen and practically charged the same price of admission as if you went to New York to see the show. It was really big business that was involved here, which becomes authority for the littler business with which I am concerned here today.

Now then, getting down to the real monopoly:

> "The promoter's receipts from the sale of television, radio and motion picture rights to championship matches, according to the complaint, represent on the average over 25 percent of the promoter's total revenue and in some instances exceed the revenue derived from the sale of admission tickets."

Then they got into this business of the ex-champion working out a deal with all of the so-called competition:

> "The conspiracy, it is claimed, began in 1949 with an agreement among the defendants and Joe Louis, then heavyweight champion of the world, that Louis would resign his title, that he would procure exclusive rights to the services of the four leading title contenders in a series of elimination contests which would result in the recognition of a new heavyweight champion, that he would also obtain exclusive rights to broadcast, televise, and film these contests, and that he would assign all such exclusive rights to the defendants,"

meaning the promoters then in this civil trial. So the court wound up by saying it's big business. There was a lot of interstate activity there, there isn't any doubt that there was.

Farther along in here they go on to say 15,000,000 dollars in the course of time had come in as a result of all this big interstate business, and then go on in one instance to make the statement that in some fight, the Marciano-Walcott fight, it says, on May 15, 1953, the admissions brought in $253,000 and the motion picture $300,000. So you have got big business.

When they say that a boxing match is a local affair and does not alone bar application of the Sherman Act, I have the feeling that the court really wasn't saying that boxing as a sport necessarily comes under the Act. But I will not touch upon that further.

[*Instant Suit—Boxing Clubs*]

Let's get down to our instant case here. As I have said, it's a kind of intriguing situation. We started out sort of listening to a complaint that there were no more boxing clubs around. One of counsel said there used to be 15,000 in the country, and now there are only 3,000. Of course, as a mere sociological problem, as people moved into the suburbs and men got more education, and everybody went to high school, and everybody wants to go to college, I think it reached a point where, when any young man thought enough of his nose to put it into a book, that he thought too much of his nose to put it in the ring. I think the increase in general education had something to do with it, because, while it has for 2,000 years been a sport, one could, in fairness to all the great athletes one has known, many of whom are in this town today and may be among your best friends, with all due respect to them, it is about the most primitive of all the sports because, as has been pointed out, it does not include much teamwork, except that one has a manager to look after business details, and perhaps get in the ring; one has trainers to get one ready; and one has seconds in the ring to try and protect a fighter in the one minute they get between rounds.

[*Preservation of Boxing*]

I suppose fights used to be far more gruesome than they are today. Today fights will be stopped because someone is supposed to be cut. Millions of people looking at the fight can't see the cut on the television. There are many things about it with which the public today is dissatisfied. That is all very regrettable, and it may be a dying industry as has been said. The question is when it starts to die, and it has been dying, no question about it, how far do those who are part of it have a right to go to protect

and preserve their particular sport or profession. Can they do anything about it, or do they have to let it die?

[*Public Injury*]

We just heard the Supreme Court say it is perfectly all right for great football teams to shut off television under certain occasions so it doesn't hurt their chance to perpetuate themselves in their industry. That seems fair enough. You have to let the goose live if it is going to lay the egg, you know, that's the colloquial way of putting it, you have to let sports continue unless you want to eliminate them, and if you want to eliminate them you ought to do it by law. Whether the fights are run right or wrong is none of my concern here. I am concerned only with one phase of this: How much does it hurt the United States of America—nothing else. If somebody tries to influence someone to join, to get his initiation fees, that doesn't hurt the United States of America. If you meet someone at a fight and say, "Well, if you don't join we are not going to put our fighters against your fighters", that doesn't hurt the United States of America, in its interstate commerce.

I have looked at the minutes, and when I look at the minutes I can say again that if you think enough of your nose to put it in a book you won't put it in the ring, because the minutes to a great degree are hardly legible, and they are written by grown men who write like children, and they put down whether they got $2 dues from this fellow, or $3 from that fellow, until the more you look at it the more you say that when Eddie Knachel compares this $2 dues case and this $10 a round case with the $15,000,000 civil case in New York, the more you say he has got something to complain about as a matter of comparative justice or comparative injustice—but that's none of my concern. I have to rule on what the lawyers lay in front of me, and I always come back to this: was Uncle Sam hurt? Was the Government hurt, were the people of the United States hurt, and to what degree? Was Interstate Commerce unreasonably restrained?

[*Boxing Business*]

Well, it is said two situations arose in two cities, the first of which arose in the great city of New York. There television comes into play, a case of man against machine, the man went down to the prize fights—I shouldn't use the word "prize fights"—that refers to a fight for a prize where only the winner got any money, and when only the winner was paid they fought so hard the public didn't like it. So we put through a law and said there will be no more prize fights allowed because they fight too hard, we don't want them to fight that hard, now we will have boxing contests and boxing is a sport in which the art is to hit and not to be hit—that's the way to put it. That's the way they define it.

So suddenly television comes into play and the arenas which used to be filled with passengers became less filled.

Our Public Hall used to have 13,000 people looking at fights. The City used to get a percentage, the United States used to get its percentage, and now there is no percentage. Why? Because some advertiser can pay somebody to put it on, with the permission of the City, in a little hall where there are more employees being paid than there are fighters in the ring, and where the only customers are the customers of the advertisers, the people who get a complimentary ticket to come in to see it, whether it's for beer, or whatever it is, they can send tickets to their friends, and so we reach a point where fights are conducted in private without the public being present.

Now, we know as a mere matter of human psychology that when there are only a thousand people watching an American League Baseball game down in our stadium the team is apathetic and indifferent and listless. Why? There is no one to encourage them. If you have 80,000 there they fight for every strike and ball; they fight over every foul; they fight because they are encouraged. That's a significant element. That's a human element this eliminates, and in the elimination of the human element they have sought here to get it all down to a business basis. And suddenly the men who are in the fight business—no one can criticize them, because if we don't like it we should illegalize it, and if we permit it and have it as a sport, then it should have some protection even in a court house—those men who have managed these boys all these years and who supplied their training camp or place where they were trained, and who fed them in the weeks when they are not working, because they

only get in the ring once in a while—and the only man who ever wanted to get in the ring three times a week was our own Johnny Risko—you know most of them are satisfied with once a week or once a month or once a year, if they can live on it. When they get in there they wish to be encouraged, and under the new system there is no one there to encourage them. There are no gate receipts, and when the manager of that boy wants to figure out or ascertain the basis on which he can bargain for that boy's participation, he can no longer figure on what they colloquially call the gate. At Soldier's Field he knows it's 100,000. When Stribling fought down here it was 80,000. At our Arena I think it is 10 or 11,000, at our Public Hall it's something else—it's something else everywhere else—and a manager could figure, well, so many people will come in, we are going to charge them this much money, and he concluded with the proposition. "I want so much money for my fighter, if you don't pay you don't get the fighter." That has been the way the industry has been run since the industry began, and the industry is new here. The first American champion was John L. Sullivan in 1892. Up to then the English controlled it. It is comparatively new in the United States.

[*Creation of Guild*]

Now then, television comes along, sponsors come along and, peculiarly, in two different cities at almost the same time two men get an idea, and they have both been witnesses here. Mr. Spero locally got a notion, which started as an idea, he says, that it would be a good commercial venture. From what he said he had no more interest in the fighter than he had in the razor blade or beer which has been mentioned. It was just a commercial venture. The human element is completely separated from it because, as he says himself, he never had anything to do with the art or with the kids engaged in the art. Many of them are kids in the sense that they are just young boys trying out, and they are willing to take a chance on their noses for the joy of this sport.

So he and others start figuring out how they are going to get into this business, and then they figure it out to a point where the managers who were concerned with the business on a permanent basis, and who have a personal interest in the boys, they could see and sense not only in Cleveland, not only in Ohio, not only in New York but everywhere, that someone is about to take over control of their business and, naturally, they didn't like it. So they seek to organize. And that is true of Spero here and that is true in New York in so far as what happened there is concerned. There they have some great arenas, and they have the benefit of those great big promoters and their $15,000,000 industry, who are under civil injunctive proceedings, and when business gets that big then the proceeds get bigger. What happened then was that they formed what amounted to a club or League, the International Boxing Guild, and they said, in effect, "Now, if you want our fighters in this arena we are going to ask a minimum of so many dollars, and if you want them in that arena we are going to ask a minimum of so many more dollars." In other words, it was like a tradesman who says I am a pipefitter, steamfitter, cement mixer, bricklayer, asbestos worker, carpenter—such a tradesman says, "I want to work for $3.57½ an hour, which may be the prevailing rate" —these men say, "For a fighter I want this much in this arena because I know you are going to take in this much money from this source, that source, and the other source." Television knows what they are going to take in, and they also set a minimum.

They are also part of this agreement, I would take it. So the fellows that run this little Guild here, or the big Guild, in New York, they say, "We want this much for our fighter, gentlemen." He might get two fights a year, or three fights a year. He pays his manager one-third, so let's say he takes in $2100 at the St. Nicholas Arena in New York and pays $700 to his manager, and let's say a lot of expenses come out, and let's say he can net $1000 a fight and fight four or five times a year. Well, the plumber and bricklayer can laugh at him at the end of the year. No one is making too much money on that, but the question is: how does it hurt Uncle Sam? How does it hurt our Government, because anything that hurts the Government hurts every one of us, if it really hurts the Government. That's my question: does it or does it not unreasonably restrain interstate commerce and trade?

Now, a man named Arata comes in here. He did very well for an amateur. In his first year as a promoter he grossed nearly

a half million dollars, and he pays himself $20,000 that first year and pays off a mortgage of $15,000 that first year, some of the money went to the fighters—and what the profit was nobody says. He says he might have put a couple of hundred dollars in the bank. That immediately tells me, as one who used to be in prosecution, as it must have told all the gentlemen in prosecution in this court room, that he had some reason for not putting this money in the bank.

As a juror, which I am—I am twelve jurors this minute—you have to say to yourself, "I wonder why he was hiding it? Is this other fellow Lentz' partner? Did he merely handle it for him? Is he merely sitting there for him? Is it income tax evasion? What is it? Why should a man who took in nearly a half million dollars just put a half week's pay or a couple days' pay in the bank account during that whole year? Then on cross-examination the story comes out because one of the counsel apparently knows what has been going on in his town—and I am referring to Mr. Gittleson.

He asked about Lentz because Arata started talking about Lentz, because when Arata went to Johnston and complained of the $2900 figure for his new club as compared with the figure at St. Nick's Arena at $2100, the first thing Johnston said to him was, "Well, aren't you acting for Lentz?" And his answer was no. But by the time he finished I was very sure that he was. Lentz had a beautiful business. Just because he did something dishonest and was fined and punished, and disqualified from operation, was no reason he was going to stop making money. So his pal and friend, Arata, an employee of prior years and after years and today stepped into the breach, took the same lawyer, took the same building, went to the same landlord, took the same matchmaker who was the cornerstone and keystone or clearing house for fighters, Brenner or Brennan, whatever his name was—went out and got the same fighters that Lentz would have had if he wasn't disqualified, never missed a single match, and operated that way for a year.

I have before me the accusations of a man like Arata and Mr. Spero, who made a commercial venture out of a bunch of kids fighting for a net of less than $10 a night, and the indirect accusations of a gentleman named Kearns who did a lot of talking, but none in front of me, and none where he could be cross-examined by counsel for these defendants.

Yet, under the rules of evidence, one must listen to and hear it, and say, in effect, "Give it the best construction you can, give it the most favorable construction you can," even though you know as a strict matter of law the defendants had no chances to cross-examine the person out of whose mouth it is expected they will be convicted.

[*Conspiracy*]

Now then, how do we get a conspiracy out of all this? All the lawyers in this room well know that almost a basic conspiracy in this community for many years in criminal law has been an occasion when three or four men will get together and conspire to hold up a bank, and if one keeps the engine going in front of the bank so they can successfully escape, he is a conspirator. Anything he does can be charged against the men who go in to put guns on the people in the bank. If an employee inside the bank tells them where the money is before they go in, he is a conspirator. The conspiracy goes on until they have completed the robbery and everybody has made their complete escape, and if somebody in the process of escaping kills a policeman five miles from the bank, then each one of the co-conspirators, even though he was miles away, is equally guilty of the murder of the policeman. So we all have a pretty fair idea of what is a conspiracy, how far it goes, and to what degree one can use the declarations of one conspirator against another to prove the general conspiracy.

Now, what is the Government's theory here of fixing responsibility for conspiracy? Well, the real conspiracy from their viewpoint is—I say it with all due respect because I think these fine young men for the United States Government have done a very concentrated, intense, zealous job—but they say to me,

> "Why, New York was in a conspiracy to raise the prices, keep up the prices in that arena, and that's going out over the air, and Cleveland gets into the conspiracy because they joined the same society, have the same motives and the same intentions, the same desires. Therefore, everybody here in Cleveland, or in Ohio, who is in the League, or an officer of the League, is guilty of this crime that is going to be committed next Friday night at St. Nicholas

Arena in New York, all equally guilty, all participants, and whatever anybody says about it we can use against everybody else."

Now, maybe all of us watch those fights in St. Nicholas Arena. I will admit I do not watch many of them beyond the second round, but I watch them, and I can take judicial notice that St. Nick's Arena puts a fight on television very frequently and the show gets into my living room, so it is in interstate commerce.

If there is something dishonest about it it isn't taking place at my end of the television set, it is taking place in New York City, and it is going to take place this weekend, or whenever the next fight is. If anybody in the Anti-Trust Division in New York City really believes that is a violation, and that they are acting in restraint of interstate commerce and trade, they ought to call the F. B. I. and arrest everybody at that ringside, in that office, in that club, down to the least fellow selling tickets and sweeping out, and maybe they ought to pick up a few customers, because from what you claim, everybody there is acquiescing in, participating in, co-operating in, and enjoying the fruits of a serious violation of law against the United States Government. I say if it is going on, gentlemen, track it down to its source. Please do not by a series of inferences try to hold somebody out here, 500 miles away, responsible for what goes on there. How do they seek to hold them responsible? They say, "why, you have an Ohio Guild." Well, so they do. What is it for? To protect their boxers. To perpetuate their profession. Against whom? The very people who are so closely connected with this prosecution, one of whom has a civil lawsuit, which it was explained here, is based on this same set of facts although Mr. Carter, the sponsor, has already said the thing became "old hat," and he was going to bring it to a head, and stop it, and if my memory is right of what counsel said, Spero sued here for something like $450,000, in triple damages.

Here you have a situation where a sport is dying—and whether it ought to die or not isn't my question or my legal concern in the slightest—where a sport is dying and the men in it, with whatever capacities the good Lord gave them—none of them are engineers or scientists or college graduates —but with whatever capacity the Lord gave them, helping these boys, if they do help them, or to whatever degree they help them, or perhaps even helping them for whatever they get out of it, forming an association to keep themselves not just from dying by degrees but from being suddenly killed off through the introduction of a new channel of communication and a new personality who has enough acquaintance around a television station to get a contract. Knowing nothing about the industry, Spero then goes out and finds somebody in it who will cooperate with him and bring in boys to fight, until the league with which, that manager had been connected protests, and then they finally say, "Well, we will not let our fighters fight your fighters if you are going to do that; we will throw you out of the league if you are going to do that." And when they bring them in and throw them out, from which no legal appeal was taken, like we might throw out a bad lawyer or a bad doctor, then the fellow who is thrown out becomes a star witness in an anti-trust case. His say-so is expected to convince a jury beyond a reasonable doubt that the men who were trying to protect the industry ought to be in a Federal prison. That's really the legal effect of this whole thing.

[*Participation in Alleged Conspiracy*]

I cannot see wherein men in Ohio who joined the Ohio Guild were participating in the slightest to hold up any prices at St. Nick's Arena in New York. I don't think mere membership here makes them criminals to that extent there, or makes them guilty of any such offense to that extent because they joined the Ohio League. I don't think the fact that minimum prices were set up there is any offense at all. And I will say if that's wrong, this Department ought to go into New York and raise the question there, not here, and I cannot see under this evidence wherein men in Ohio could be fairly said to have conspired with the men in New York to either set up prices or keep them up, and the only theory upon which it is suggested to me that they did participate is that since they are in the fight business, they might have. But there is no showing here that one of them ever took a fighter into the arena in New York. There is no showing here that one of them ever wrote to that arena and said,

"I want to bring a boy in at $2100." There is no showing here anyone of them ever lifted a finger to cooperate in any such conspiracy, if it be a conspiracy, and if it is I say again, gentlemen, do something about it at the point where the crime is being committed. It certainly isn't being committed here. And when men but seek to preserve their profession, it isn't being committed there.

[*Expulsion of Members*]

Here they did expel members who were breaking their rules, just as many associations do. They were throwing them out. They were trying to protect themselves and preserve themselves. I don't know how else they could have done it. My question is: having done it this way, did they so offend the Government of the United States, did they so hurt the people of the United States by an unreasonable restraint on interstate commerce that they ought to be punished? That's my question.

[*Interstate Commerce*]

What crossed the state line? I suppose maybe some people listened to those studio fights on the other side of the line. We talked in private in chambers, one day we were together for hours trying to boil this down a little bit, and we talked about the fact that some people over there could be brought in to testify to say that they had heard many of the programs, and I suppose that's true. Now, granted that the Ohio Guild members obtained a charter from New York, to what degree could one say that Ohio's obtaining such a charter and participating in whatever degree it did, had any effect on restricting or restraining what went across the state line? That makes the whole point rather ridiculous. If it had even an infinitesimal effect it would have been merely incidental to their effort to protect and preserve themselves.

[*No Restraint of Trade*]

Not only would there have to be some volume, not only would there have to be enough to hurt the country, but it would have to unreasonably restrain trade to a point which would cause a court to say that it amounts to an illegal restraint of trade and, therefore, is an offense against the Government of the United States.

I can't see where the Government of the United States or the people of the United States have been hurt in the slightest by anything these people here in Ohio have done. I cannot go along with the theory that people in Ohio ought to go to jail for what people in New York do, and that is the legal effect of what is asked of me here. If Guild members in Ohio are in violation, then Guild members in many other states are in equal violation and don't know it. I do not think there is any conspiracy here, gentlemen, as conspiracies must be legally constituted. Nor can I see where there is any anywhere else. Sure, there was a membership. Sure, I, too, might be in four or five bar associations. But I am not responsible for what every member of the bar association does, even though I might agree with all other bar associations as to who should be expelled and why. If you have any kind of common national purpose, state-wide purpose, or international purpose, this doesn't mean when the other fellow does something which you think of as a crime that everybody in the society does it. Actually all that could fairly be said against this man here in Ohio and the Ohio society is that it got a charter from New York and told people not to fight their fighters except against members. Since they invited everybody to be a member, nobody could complain; and the only people that ever did complain were the ones thrown out for violating their rules. No one else has complained.

So I say to you gentlemen I do not find that there is here any unreasonable restraint on trade in interstate commerce passing between Ohio and Western Pennsylvania. I find absolutely no price fixing in Ohio, because the low prices that emanated from the 10-dollar-a-round ring from the studio here were fixed by the witnesses in the case for the Government, namely, Mr. Heath and some other manager and Mr. Spero himself with which defendants had nothing to do. All of that was a matter of arranging between each other. There was no arrangement of fixing prices here on the part of any defendant in this case. There may be a minimum price set in Clubs in New York, but that's for you gentlemen of the Government to determine where the Government has jurisdiction, and where the people over whom you have jurisdiction in

New York City are committing weekly what you allege to be a crime.

Actually, the more I heard of this, gentlemen, the more I found all the justice in the case on the side of the defendants, and that whatever injustice is in the case emanates from some of the witnesses who came in for the Government.

So I believe, gentlemen, that as in the football case, these men have a right to preserve this sport. I believe that any interstate commerce affected here would be but incidental, and that such restraint, if it exists, is so negligible as not to be unreasonable. I find no conspiracy to violate the laws of the United States on the part of any defendant here or in New York. I consider their actions as lawful and proper and as done merely for the purpose of preserving their work.

[Motion Granted]

So I grant the motion of acquittal as to all.

[¶ 68,618] Opinion of the Attorney General of the State of Texas.

Addressed to Jack N. Fant, County Attorney, El Paso, Texas, from John Ben Shepperd, Attorney General of Texas, by John Minton, Assistant. Opinion No. S-224. Dated December 31, 1956.

Texas Antitrust Laws

Combinations and Conspiracies Under State Laws—Labor Unions—Validity of Collective Bargaining Agreement—Subcontracting Restriction Concerning Wages and Job Classifications.—A provision of an agreement between general contractors and labor unions whereby the general contractors agreed not to sublet or contract any work to any subcontractor who does not or will not observe the minimum wage and job classification practices provided for in the agreement was held to be violative of (1) Article 7426, Texas Revised Civil Statutes, because the combination formed by the provision of the agreement constituted a "trust" to create restrictions in the businesses of the subcontractors and the contractors, (2) Article 7428 because the provision of the agreement constituted a conspiracy in restraint of trade by imposing a boycott on non-conforming subcontractors, and (3) Article 7428-1 because the provision of the agreement constituted a conspiracy in restraint of trade by denying persons the right to work because of non-membership in a labor union.

See Combinations and Conspiracies, Vol. 1, ¶ 2447, 2449.

Combinations and Conspiracies Under State Laws—Texas Antitrust Laws—Who May Enforce Laws.—The Attorney General of Texas or the District Attorney or County Attorney, under the direction of the Attorney General, has the duty to enforce the recovery of penalties which may be imposed for violations of Articles 7426 and 7428 (Texas Revised Civil Statutes) of the Texas antitrust laws. The County Attorney has the duty of enforcing the comparable penal provisions of the Texas antitrust laws. There seems to be no statute authorizing the Attorney General to prosecute criminal violations of the Texas antitrust laws.

See Combinations and Conspiracies, Vol. 1, ¶ 2423.

[Questions]

[In full text except for omissions indicated by asterisks]: You have requested the opinion of our office concerning the validity of a provision in an agreement between an association of trades councils and an association of general contractors which would attempt to bind any subcontractor to observe the minimum wages and wage classifications set out in the base contract. The contract provision reads as follows:

"The contractor agrees as a term and condition of employment that he will not sublet or contract out any building or construction work of any kind unless the sub-contractor to whom work is sub-let, or subcontracted to, shall observe as minimum conditions the wage and classification practices provided in this agreement."

The specific inquiry involves (1) whether such contract provision violates the applicable Texas antitrust statutes, Articles 7426 and 7428, and the Texas Right to Work Law,

Article 5207a, Vernon's Civil Statutes, and (2) whether the Attorney General or the County Attorney is authorized to prohibit the application of this clause and declare the contract void.

[*Labor Unions—Antitrust Laws*]

It should be pointed out in the beginning that labor unions are subject to the operation of the Texas antitrust laws, Article 5154 specifically providing that Article 5153, giving labor unions the right to induce or attempt to induce by peaceable and lawful means any person to accept certain employment or to refuse to enter any pursuit or quit or relinquish any particular employment or pursuit in which such person may then be engaged, shall not prohibit the application of the antitrust laws of the State. In the case of *Best Motor Lines v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local No. 745, et al.* [1950-1951 TRADE CASES ¶ 62,788] 150 Tex. 95, 237 S. W. 2d 589 (1951), Justice Smith made the following statement:

> "The Texas antitrust statutes are valid laws and all persons are subject thereto, and the courts have the power to enjoin acts and conduct in violation thereof. Labor unions are not excepted even though there exists a labor dispute and the picketing is peaceful."

There follows in the opinion a full discussion by Justice Smith of the many holdings of both the Texas and United States Supreme Courts upholding the application of the antitrust statutes to labor unions.

[*Unlawful Trust*]

The pertinent portions of Article 7426, Texas Revised Civil Statutes, are as follows:

> "A 'Trust' is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any or all of the following purposes:
>
> ". . . to create or carry out restrictions in the free pursuit of any business authorized or permitted by laws of this State."

It is our opinion that the combination formed by the above contract provision between the association of trades councils and the association of general contractors constitutes a "trust" under the wording of this statute in view of the scope and effect of the above quoted portion of the agreement entered into between these two parties. Under the terms of the contract the contractor agrees not to contract with a subcontractor who does not or will not observe as minimum conditions the minimum wage and job classification practices provided for in the base agreement between the trades councils and the general contractors. In this respect a restriction, conditional though it may be, is placed upon the business of the subcontractors who are not presently conforming to union standards and who are working with or doing business with the members of the association of general contractors.

The necessary result of this provision is to force the non-conforming subcontractor to pay higher wages and observe different wage classifications from those which he customarily operates under, thereby increasing the costs of his operations. The provision ultimately impels the hiring of union labor by the subcontractor and thereby constitutes another restriction on the subcontractor's business contrary to law. The provision further limits the non-conforming subcontractor's field of operation and the customers with whom he may deal. If the contractors observe the contract, then the non-union subcontractor cannot do business with any of the general contractors who are members of the association because of the terms of the contract. The contract amounts to a boycott by the trades council and the association of general contractors against a subcontractor in the area who does not conform to union practices. As a result the contractor's business is restricted within the contemplation of Article 7426, and since it is presumed that the parties intended the result of their actions, a violation of Article 7426 appears.

[*Unlawful Conspiracies*]

The pertinent sections of Article 7428 are as follows:

> "Either or any of the following acts shall constitute a conspiracy in restraint of trade:
>
> ". . .
>
> "3. Where any two or more persons, firms, corporations or associations of persons shall agree to boycott, or enter into any agreement or understanding to refuse to . . . use or work with any goods, wares, merchandise, articles or products of any other person, firm, corporation or association of persons; . . ."

It is our opinion that the above contract provision is violative of this provision of Article 7428, and that the alliance, agreement, or combination between the association of trades councils and the association of general contractors constitutes a conspiracy in restraint of trade under this article. Undoubtedly the parties are included under the first portion of Section 3 as being associations of persons and under the terms of the above provision they have agreed to boycott the non-conforming subcontractors, and have agreed to refuse to use their products or the products of their labor. It would make no difference that the subcontractor could free himself from the provisions of this contract by conforming to the union wage standards and job classification practices. The agreement entered into encompasses the forbidden purposes set out in the third section of Article 7428, thereby constituting a conspiracy in restraint of trade.

As stated above, the effect of this contract is to force subcontractors to hire union labor or to observe union standards and job classifications, but it is apparent that the ultimate purpose of the provision in the contract is to force a union labor requirement upon the subcontractors who are not parties to the agreement. Your attention is called to Article 7428-1, which is as follows:

> "Art. 7428-1. Agreements denying right to work because of union membership or non-membership.
>
> "It shall constitute a conspiracy in restraint of trade for any employer and any labor union or labor organization or other organization to enter into any agreement or combination whereby persons are denied the right to work for an employer because of membership or non-membership in such union, labor organization or other organization; or whereby such membership or non-membership is made a condition of employment or of continuation of employment by an employer."

This article specifically defines a conspiracy in restraint of trade as being an arrangement whereby persons are denied the right to work because of non-membership in a union. The effect of the above quoted agreement is to do exactly that. The Legislature has, in this statute, made explicit its intentions formerly evidenced by Article 7428, and specifically defines a conspiracy in restraint of trade as encompassing such agreements as the contract provision here under consideration.

[*Right To Bargain*]

Article 5207a reads as follows:

> "Art. 5207a. Right to bargain freely not to be denied; membership in labor union
>
> "Section 1. The inherent right of a person to work and bargain freely with his employer, individually or collectively, for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature.
>
> "Sec. 2. No person shall be denied employment on account of membership or non-membership in a labor union.
>
> "Sec. 3. Any contract which requires of [or] prescribes that employees or applicants for employment in order to work for an employer shall or shall not be or remain members of a labor union, shall be null and void and against public policy. The provisions of this Section shall not apply to any contract or contracts heretofore executed but shall apply to any renewal or extension of any existing contract and to any new agreement or contract executed after the effective date of this Act."

It is our opinion that this contract provision violates Section 1 of Article 5207a and, depending on its practical application, could violate the second and third provisions of Article 5207a. * * *

[*Enforcement of Laws*]

Turning now to your second question as to whether the Attorney General or a County Attorney may enforce the provisions of Articles 7426, 7428, and 5207a, V. C. S., we find that Article 5199, V. C. S., provides as follows:

> "Each person, company or corporation, who shall in any manner violate any provision of this chapter shall, for each offense committed, forfeit and pay the sum of one thousand dollars, which may be recovered in the name of the State of Texas, in any county where the offense was committed, or where the offender resides, or in Travis County; and it shall be the duty of the Attorney General, or the district or county attorney under the direction of the Attorney General, to sue for the recovery of the same."

Included in "any provision of this chapter" is Article 5207a. Thus the County Attorney would be authorized to enforce the penalty provisions of this chapter under the direction of the Attorney General. This authorization applies only to the penalty

provisions and would not seem to include other remedies.

Article 7436, V. C. S., provides for penalties which may be imposed for violations of Articles 7426 and 7428, and again, under this statute, the Attorney General or the District Attorney or County Attorney, under the direction of the Attorney General, has the duty to enforce the recovery of same.

Articles 7426 and 7428, V. C. S., have as companion statutes in the Penal Code Articles 1632 and 1634, V. P. C. Article 1635 of the Penal Code provides that a violation of these statutes is a felony and provides for imprisonment from two to ten years. Enforcement of these penal statutes would be according to the regular duties of the County Attorney, and Article 1636, V. P. C., provides that the Attorney General or the District or County Attorney may compel witnesses to testify in courts of inquiry. There seems to be no statute authorizing the Attorney General to prosecute criminal violations of antitrust statutes.

[*Authorization*]

In addition to answering your questions by this opinion, we would like to authorize you to bring action on such contracts under the above stated statutes, and would assure you of our full cooperation in such a suit.

Summary

A contract between an association of general contractors and an association of trades councils providing that the members of the contractor's association shall not subcontract work unless the subcontractor shall observe the minimum wage scales and work classifications provided in said contract, violates Section 1, Article 7426, V. C. S., Section 3, Article 7428, V. C. S., and Article 5207a, V. C. S., and either the Attorney General or the County Attorney, under the direction of the Attorney General, may sue to recover the penalties for violations of the above articles as provided in Articles 5199 and 7436, V. C. S.

[¶ 68,619] Lendonsol Amusement Corporation v. B. & Q. Associates, Inc., et al.

In the United States District Court for the District of Massachusetts. Civil Action No. 52-1246-A. Dated January 22, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Supplemental Complaint.—A trial court revoked its order allowing a plaintiff to file a supplemental complaint since the court did not intend to permit the plaintiff to better its position, from the standpoint of the statute of limitations, by filing a supplemental complaint rather than a new complaint. The trial court, when it allowed the filing of the supplemental complaint, was under the impression that the plaintiff would not assert that it was in a better position if allowed to file the supplemental complaint.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.100.

For the plaintiff: George S. Ryan, Boston, Mass.

For the defendants: Robert W. Meserve, Boston, Mass.

Memorandum and Order

[*Supplemental Complaint*]

ALDRICH, District Judge [*In full text*]: In September 1956 a hearing was held on plaintiff's motion to amend by filing a supplemental complaint under Rule 15(d). This motion was opposed by the defendants. One of their objections was that its allowance would better the plaintiff's position with relation to the statute of limitations. I was not then, and am not now, clear whether this apprehension is well-founded, but I felt that the matter was taken care of by a statement in plaintiff's brief to the effect that "no harm can come to the defendants [as a result of allowing the motion] . . . Any defense they may have can be set up in answer to the supplemental complaint." In my memorandum of September 12 allowing plaintiff's motion I referred to this language. It was my understanding of this language, and my intention in referring to it, that the plaintiff would not assert that it was in a better position, statute of limitation-wise, if I allowed the motion; in other words that the defendants could plead the statute of limitations just as effectively in their answer to the supplemental complaint as they could have pleaded it were a new complaint filed. This is the only sensible meaning that I can give to

the phrase "no harm can come to the defendants." It can hardly be said that an opportunity to plead something, which plea may not be successful because of changed circumstances, is a situation under which no harm can come to the pleader.

[*Misunderstanding*]

At the pretrial held December 18 counsel for some of the defendants informed me that he understood the plaintiff was contending that all it had meant by the quoted language was that the defendants were able to plead the statute of limitations, and not that the plea would have the same effect that it would have had were this a new complaint as distinguished from a supplemental one. I immediately asked the plaintiff whether defendants were correct in their understanding. The plaintiff replied that they were, and that it was making the contention that it was better off from the standpoint of the statute of limitations with the supplemental complaint than it would be with a new one. I thereupon stated that that had not been my understanding, that I had allowed the motion to amend as a result of a mistake and would reconsider it, and took a recess. Plaintiff did not, following the recess, accept my implied suggestion or state that it was in any way abandoning its contention.

I have never intended to permit the plaintiff to better its position from the standpoint of the statute of limitation by filing a supplemental complaint. I allowed the filing only as a matter of convenience, so that certain matters might perhaps be tried together to an extent, as stated in the memorandum, to be later determined. Since despite being warned on December 18, if not adequately advised on September 12, the plaintiff still persists in contending otherwise, and since under Rule 15(d) the court has power to impose terms, in view of plaintiff's non-acceptance of said terms, I hereby revoke the order allowing the filing of the supplemental complaint.

[*Order*]

The present order, in turn, involves the imposition of terms, so that no substantial harm will come to the plaintiff. If the plaintiff files a new complaint within 30 days, insofar as said complaint asserts causes of action contained in the supplemental complaint heretofore filed, it may to such extent be filed *nunc pro tunc*, as of September 12, 1956. I shall not, however, consolidate any new complaint with the present action for trial.

[¶ 68,620] Winfield Drug Stores, Inc. v. Needleman.

In the New York Supreme Court, New York County, Special Term, Part III. 137 N. Y. L. J., No. 22, page 7. Dated January 31, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Temporary Injunction—Sufficiency of Evidence.—A drug store's motion for a temporary injunction to restrain another drug store from selling products below their established fair trade prices was denied, where the defendant drug store denied that it sold products below their fair trade prices. Receipts evidencing such sales were not submitted, and the affidavits concerning such sales did not state that any of the affiants were customers of the plaintiff. Although the plaintiff alleged that the defendant was in direct competition with it, the locations of the parties could not be deemed to be in the immediate neighborhood.

See Fair Trade, Vol. 1, ¶ 3354.34.

[*Temporary Injunction*]

DINEEN, Justice [*In full text*]: Plaintiff moves for a temporary injunction to restrain the defendants from advertising, offering for sale and selling certain commodities in violation of the so-called Fair Trade Laws. Plaintiff conducts a retail pharmacy and alleges that defendants are in direct competition with it. Geographically the locations of the parties would not be deemed to be in the immediate neighborhood. Though the plaintiff claims that by reason of defendants' underselling the general public and customers of the plaintiff are induced to believe that products of certain manufacturers can be obtained at a lower price than generally advertised, the affidavits submitted to substantiate this

contention do not state that any of the affiants are customers of the plaintiff. In this connection it is to be noted that of the many affidavits submitted a fair inference could be drawn that such affiants are professional shoppers. Furthermore, no receipts for the purchases are submitted nor does the record contain any statement to the effect that receipts were requested and refused. The defendants deny the purchases, and since the relief requested would be tantamount to the final relief sought, the plaintiff has failed to make such a clear showing which would form the basis for the issuance of a temporary injunction. The motion is denied. Order signed.

[¶ 68,621] Curtis F. Paxton v. Desch Building Block Co., Inc. Curtis F. Paxton v. Desch Building Block Co., Inc.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action Nos. 19,952, 19,953. Filed November 1, 1956.

Clayton and Sherman Antitrust Acts

Combinations and Conspiracies—Exclusive Dealing—Lease Restrictions—Patents, Trade-Marks, and Secret Processes—Validity.—The contention that restrictions contained in an agreement providing for the lease of a machine for the manufacture of porous concrete pipe were illegal since they violated Section 1 of the Sherman Act and Section 3 of the Clayton Act was not established on a motion to dismiss actions based on the agreement. The court noted that since the record showed that patents, trade-marks, and secret processes were the subject of the agreement, the restrictions contained in the agreement might prove to be valid under the antitrust laws.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.100, 2013.900, 2013.950; Exclusive Dealing, Vol. 1, ¶ 4005.

For the plaintiff: Robert H. Jordan, Allentown, Pa.

For the defendant: Irving W. Coleman, Northampton, Pa.

Opinion

[*Motions to Dismiss*]

FRANCIS L. VAN DUSEN, District Judge [*In full text except for omissions indicated by asterisks*]: These actions are now before the court for disposition on motions of the defendant to dismiss and for judgment on the pleadings in both of plaintiff's cases, and on motion by plaintiff in the replevin action (Civil Action No. 19,953) to strike the counterclaim.

FACTS

[*Sale of Business*]

On March 12, 1953, Curtis F. Paxton,[1] plaintiff in this action,[2] entered into an agreement with Jerrold Oakley and J. Nevins McBride for the sale of his interest in a partnership conducted by him under the name of Walker Cement Products Company[3] at Little Ferry, New Jersey, excepting, in part, "the plant of the partnership situated at Lancaster, Pennsylvania, and all assets and property whatsoever connected therewith" (defendant's Exhibit B, paragraph 1). The plaintiff agreed not to compete with the purchasers for a period of five years (until March 12, 1958) "within any of the states of the United States except the State of Utah, and excepting that Curtis F. Paxton, one of the sellers may operate the Lancaster, Pennsylvania, plant of the sellers for the purpose only of manufacturing and selling the products of said plant to the Highway Department or any instrumentality of the State of Pennsylvania or

[1] Paxton, for the purposes of this action, is a citizen of the State of New Jersey.

[2] Paxton entered into the agreement of March 12, 1953, and the modification thereof on August 5, 1954, together with John C. Hanson, who is now deceased (see deposition of Curtis F. Paxton, page 3).

[3] The plaintiff also agreed by this instrument not to use the name "Poroswall" or "Walker Cement Products Company," and, in addition, that the sale of the partnership assets would include "any patents or trade-mark rights connected with said name and products of said company, including all rights to restrain others who may be using said name or manufacturing said products." See defendant's Exhibit B, paragraph 8.

for projects that may receive Federal or State aid."

Modifying this agreement on August 5, 1954, the Walker Cement Products Company, a corporation of the State of New Jersey formed by Oakley and McBride,[4] agreed:

". . . that for a period of five (5) years it will not set up or operate, directly or indirectly, a plant or installation in the State of Pennsylvania for the manufacture of porous concrete pipe, nor will it, directly or indirectly, sell, lease, furnish or install porous concrete pipe-making machinery to be used in said State for a like period of five (5) years."

[*Manufacturing Agreement*]

On December 8, 1954, the agreement under which the instant actions are brought was entered into by Paxton and the defendant, Desch Building Block Company, Inc. (hereinafter called "Desch"), a Pennsylvania corporation. By the terms of this agreement (hereinafter called the "Paxton-Desch agreement"), the parties covenanted that Paxton would lease and deliver to Desch a pipe machine for the manufacture of porous concrete pipe with slip joints for multiple production, together with a formula and process used in connection with the manufacture of the pipe. Such lease would be for a term of ten years and two months[5] and the total rent would be $75,000, with stated lump sums payable in advance[6] and quarterly payments of $1,000.[7] Paxton further granted Desch the exclusive[8] right to sell pipe manufactured on the pipe machine in an area called the "Territory,"[9] but limited such sales to the Highway Department or any instrumentality of the Commonwealth of Pennsylvania, or for projects that may receive federal or state aid. These limitations on sales within the territory were to be effective only until March 12, 1958 (see Sec. 9 of plaintiff's Exhibit A).[10]

[*State Court Action*]

The Walker Cement Products Company, under its new name, The Walker Poroswall Pipe Company,[11] brought suit against Paxton and Hanson[12] in the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C-1615-54, charging that Paxton had violated the terms of the March 12, 1953, agreement and the August 5, 1954, modification thereof (1) by entering into a business competitive to their business, (2) by selling porous concrete pipes to others than the Highway Department or any instrumentality of the State of Pennsylvania or projects that may receive federal or state aid, (3) by entering into leases for machinery for the manufacture of porous concrete pipe, and (4) by otherwise selling concrete pipe within and without the State of Pennsylvania other than in the State of Utah.[13]

On July 11, 1955, the suit was settled out of court by an agreement between Paxton, Hanson, and the Walker Poroswall Company (defendant's Exhibit 1), providing that the parties would share equally in all past and future profits and losses arising out of the Paxton-Desch agreement and that Pax-

[4] Oakley and McBride, in the agreement of 3/12/53, indicated that they were contemplating the formation of such a corporation. See paragraph 10 of defendant's Exhibit B.

[5] The lease was to be for a term of 10 years and 2 months up to 15 years and 2 months, depending on the rate at which Desch paid the quarter-annual rent. The lease was to start on February 1, 1955, and end between March 31, 1965, and March 31, 1970.

[6] The terms of payment are outlined in paragraph 3 of the Paxton-Desch agreement.

[7] In paragraph 3 of the Paxton-Desch agreement, Paxton also agreed that Desch should have the option and right to renew the lease under the same terms and conditions for an additional period of 10 years, with a rental for such period of $3,000. This renewal was to be automatic unless Desch served a written notice on Paxton at least one year prior to the termination date of the original lease that it would not renew the same.

[8] Paxton agreed that during the term of the agreement he would not sell porous concrete pipe in the "Territory."

[9] The "Territory" consisted of the Commonwealth of Pennsylvania, Department of Highways, Districts 3 and 4 (as constituted on December 8, 1954) and Monroe County, Carbon County, Northampton County, and Lehigh County. See map attached to stipulation filed 10/18/56.

[10] Further, paragraphs 10 and 13 of the Paxton-Desch agreement contemplated that Desch would have first refusal rights and an option to enter into an arrangement for the manufacture and sale of porous concrete pipe in two other territories of the Commonwealth of Pennsylvania, and that Paxton might contact Desch for the purpose of supplying porous concrete pipe for specific jobs in Bucks County, Pa.

[11] The change of name took place on October 15, 1954. See defendant's Exhibit A, paragraph 1.

[12] This suit was brought in the spring of 1955. See page 4 of deposition of Curtis F. Paxton.

[13] See deposition of Curtis F. Paxton, pages 28-9, for testimony as to the extent of these violations.

ton assigned to the parties' respective attorneys, Thomas L. Zimmerman and Floyd V. Amoresano, as agents for Paxton and the Walker Poroswall Pipe Company, all of his right, title and interest in the Paxton-Desch agreement.[14] The said agents were to have full power, on behalf of the parties, to enforce and carry out the terms and conditions of the latter agreement.[15]

[*Instant Actions*]

By letter of August 3, 1955, Desch claimed the commission of a fraud on itself by Paxton's failure to disclose the agreements of March 12, 1953, and August 5, 1954, at the time of the execution of the Paxton-Desch agreement. This letter claimed that such prior agreements rendered Paxton without legal capacity to make the representations that induced Desch to enter into the agreement, and purported to rescind the agreement.

Paxton, by his attorneys, Robert H. Jordan, Floyd V. Amoresano, and the Hon. Thomas L. Zimmerman, brought two actions: one in replevin,[16] No. 192, January Term 1956 (now Civil Action No. 19953), and the other in assumpsit,[17] No. 193, January Term 1956 (now Civil Action No. 19952) in the Court of Common Pleas of Lehigh County, Pennsylvania, on November 16, 1955. The defendant removed both actions to the instant Federal District Court and filed a counterclaim to both actions.

[*Applicable Law*]

The Paxton-Desch contract is governed by the law of New Jersey.[18]

* * *

[*Antitrust Defense*]

Also, the defendant raises these inapplicable grounds for his motions:

* * *

3. Defendant's contention that the agreement is illegal and unenforceable since it is a violation of Section 1 of the Sherman Anti-Trust Act (15 U. S. C. A. § 1) and Section 3 of the Clayton Anti-Trust Act (15 U. S. C. A. § 14) is not established by the record.[25] The defendant will have the

[14] In the settlement agreement Paxton also agreed for a period of 10 years not to enter, directly or indirectly, into any business competitive with the business conducted by Walker Poroswall Pipe Company. Further, Paxton agreed not to exercise any options that were in the Paxton-Desch agreement and thereby not to enter into any contract for the sale or lease of other machines than those that he had contracted for in such agreement.

[15] The settlement agreement in paragraph 1 stated that: "The said agents shall have full power on behalf of both the said Curtis F. Paxton, party of the second part and the Walker Poroswall Pipe Company, party of the first part to carry out the terms and conditions of said agreement, dated the 8th day of December 1954, that were undertaken to be carried out by the said Paxton. The said Zimmerman and Amoresano shall have full power in their name or in the name of the said Paxton to enforce the terms of the said agreement and to cause the Desch Building Block Company, Inc. or any of its subsidiaries to carry the terms of the said contract upon its or their part to be performed; to collect any monies that may be due under the said agreement; to sue for and to compromise any suits but at the expense of the said Paxton, party of the second part and the party of the first part. The said agents shall have full power from time to time to modify any of the terms of the said agreement dated the 8th day of December 1954."

[16] In the replevin action, plaintiff alleged a failure on the part of the defendant to make the quarter-annual payment of 7/15/55, defendant's repudiation of the contract, plaintiff's notice to defendant of the termination of the bailment, and defendant's refusal to return the property to plaintiff. Damages were alleged in the sum of $10,000, plus $10.00 per day for illegal retention of the property since 7/15/55.

[17] In the assumpsit action, plaintiff in his first count alleged non-payment of the first two quarterly rent payments due on 7/10/55 and 10/10/55, a repudiation of the contract by defendant and the refusal to make such payments despite demands for such made by the plaintiff, all of which showed a breach of contract by defendant. Damages are alleged in the sum of $60,000 with interest since 8/3/55 ($75,000 total rental minus $15,000 of payments already made).

In the second count, plaintiff alleged the order and acceptance of such order for a second pipe machine, plaintiff's payment of $2500 on the order, and defendant's subsequent repudiation of the order which caused damages to plaintiff of $72,500.

[18] Paragraph 19 of the Paxton-Desch agreement states in part: "This agreement shall be construed and interpreted under the laws of the State of New Jersey."

See footnote 67 of opinion dated 10/5/56 in *Lebeck v. William A. Jarvis et al.*, Civil Action No. 16395.

* * *

[25] Since the record shows that "patents, . . . trade marks, rights," and "secret formula or process" (see footnote 3, p. 2 above, and pp. 38-40 of deposition) are the subject of the agreement, the restrictions involved in this agreement may well prove to be valid under these sections of the anti-trust laws. *Cf.* Williston on Contracts (Rev. Ed.) § 1646; *Lawlor v. National Screen Service Corp.*, Nos. 11,818-11,831 (3rd Cir., opinion of 10/24/56) [1956 TRADE CASES ¶ 68,509]. There is no proof in the record of the allegation in defendant's brief that certain patents have expired.

opportunity to present any proof of this defense at the trial.[26]

For the reasons above-mentioned, the motions for dismissal of these actions will be denied, without prejudice to the defendant's right to make a motion to dismiss the replevin action at the pre-trial conference or the trial.

COUNTERCLAIM

In a replevin action, a counterclaim cannot be asserted. See Rule 1082, subparagraph (a), of the Pennsylvania Rules of Civil Procedure (12 P. S., Rules of Civil Procedure).[27] Therefore, defendant's counterclaim to Civil Action No. 19953 will be stricken.

[¶ 68,622] Baim & Blank, Inc. and Baim & Blank Television Service, Inc. v. Philco Corporation and Philco Distributors, Inc.

In the United States District Court for the Eastern District of New York. Civil Action No. 14083. Dated January 24, 1957.

Robinson-Patman Price Discrimination Act

Price Discrimination—Discrimination in Prices, Payments for Services, and Furnishing of Services—Sales by Different Sellers—Parent and Subsidiary Corporations.—A manufacturer and its wholly-owned distributing corporation did not unlawfully discriminate (in prices, in the making of payments for services rendered, or in the furnishing of services) against a retailer, which purchased the manufacturer's products from the manufacturer's distributing corporation, and in favor of a competing retailer which purchased the manufacturer's products directly from the manufacturer. The retailer claimed, in effect, that the manufacturer sold its products to the competing retailer under more favorable terms than those under which the distributing corporation sold the manufacturer's products to it, and that the manufacturer and its distributing corporation were a single entity or a common seller. The manufacturer controlled only its own prices and sales policy, and the distributing corporation had sole control of its prices and sales policy; therefore, there was no violation of the Robinson-Patman Act because the price and other related discriminations alleged by the retailer were not made by the same seller. The fact that the distributor was a wholly-owned subsidiary of the manufacturer, and that the officers of the distributor, with one exception, were also officers of the manufacturer, failed to demonstrate that the subsidiary was merely the alter ego of the parent.

See Price Discrimination, Vol. 1, ¶ 3505, 3522, 3524.

For the plaintiffs: J. Robert Ellner.

For the defendants: Donovan, Leisure, Newton & Irvine (Granville Whittlesey, Jr., of counsel).

For a prior opinion of the U. S. District Court, Eastern District of New York, see 1956 Trade Cases ¶ 68,453.

[*Motion to Dismiss*]

GALSTON, District Judge [*In full text*]: This is a motion by defendants for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A., for summary judgment to dismiss the first cause of action as against Philco Corporation, and so much of the first cause of action as to Philco Distributors, Inc. as relates to matters which occurred prior to September 1, 1950.

[*Discrimination Charged*]

The first cause of action alleges that from November 20, 1926 to July 3, 1952, plaintiff, Baim & Blank, Inc., operated a retail store in Brooklyn, selling radios, television sets and household appliances. The action has

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[26] For the strict construction of the summary judgment rule (which is applicable to these motions to dismiss—see F. R. Civ. P. 12(c)) in this Circuit, see *Levy v. Equitable Life Assurance Society*, 18 F. R. D. 164 (E. D. Pa. 1955), and cases there cited.

[27] It is noted that both parties agree that Pennsylvania law governs the disposition of this motion. See F. R. Civ. P. 64.

been discontinued as to plaintiff, Baim & Blank Television Service, Inc. It alleges further that defendant, Philco Corporation, is a Delaware corporation which manufactures or assembles "Philco" branded products; that defendant, Philco Distributors, Inc., a Delaware corporation, is a wholly owned subsidiary of Philco Corporation and the sole and exclusive distributor throughout the greater New York area of "Philco" branded products manufactured and assembled by its parent, and the "local instrumentality" for conducting the business of parent in the New York area; and that in this area, Philco Corporation "is found in the person of, and transacts business through its wholly owned subsidiaries and agents, Philco Distributors, Inc., and Philco International Corporation * * *." It also alleges that during the periods complained of, plaintiff and its competitor, Davega Stores Corporation, an organization of twenty-eight stores located in the greater New York area, were engaged in the business of selling, at retail, and servicing television sets, radios, refrigerators and other electrical appliances, including Philco branded products. It is then alleged that defendants have discriminated against plaintiff (1) by selling to Davega Stores Corporation at prices lower than those charged to and paid by plaintiff in violation of subsection (a) of the Robinson-Patman Act, 15 U. S. C. A. 13(a); (2) by making payments or granting credits to Davega in consideration for services or facilities furnished by Davega in connection with the sale of Philco products without offering to make such payments or credits available to plaintiff on proportionately equal terms, in violation of subsection (d) of the Robinson-Patman Act, 15 U. S. C. A. 13(d); and (3) by furnishing services or facilities in connection with the sale of Philco products without offering to make such advantages available to plaintiff on proportionately equal terms, in violation of subsection (e) of the Robinson-Patman Act, 15 U. S. C. A. 13(e). Plaintiff seeks treble damages for the alleged foregoing acts.

[*Conspiracy Charge*]

The second cause of action alleges that Philco, Philco Distributors, and Davega, some time prior to July 1, 1944, in violation of Sections 1 and 2 of the Sherman Act, 15 U. S. C. A. 1 & 2, combined and conspired to grant to Davega the status of "associate distributor" of Philco products in the New York area, which enabled Davega to purchase Philco products from the Philco distributing organization or directly from Philco at prices substantially below those available to all other "non-favored" retailers in the New York area, including plaintiff; and that as part of the said conspiracy, the "continuing arrangement" among the aforesaid corporations granted to Davega "certain competitive advantages which were not made available to plaintiffs," including the discriminations in price and terms of sale specifically alleged in the first cause of action.

[*Scope of Motion*]

The present motion is directed solely to the allegations of violations of the Robinson-Patman Act contained in the first cause of action. It is based on the pleadings and pre-trial testimony, in the form of depositions, taken by plaintiff of Jacob J. Harris, general manager of the New York Division of Philco Distributors, Harold Sheer, vice president and general manager of Philco Distributors, and John M. Otter, executive vice president of Philco.

[*Flow of Products*]

The action has to do with transactions occurring between September 15, 1947 and July 3, 1952, the parties having stipulated that transactions prior thereto are barred by the statute of limitations. The depositions referred to hereinabove, which are made a part of the motion papers, disclose that Philco Distributors purchased Philco products from Philco f. o. b. factory, paying the freight to Philco Distributors' Long Island City warehouse, at prices set by Philco in quantities determined by Philco Distributors. The depositions also disclose that plaintiff purchased all its Philco products from Philco Distributors at prices set by Philco Distributors. It had never purchased from Philco directly. Furthermore, though until September 1, 1950 Philco products were sold to Davega by Philco directly at prices set by Philco, from that date to and including July 3, 1952 Philco Distributors sold Philco products to Davega as well as to plaintiff at prices which Philco Distributors issued.

[*Sales by Different Sellers*]

It is defendants' contention that Philco controlled only its own prices and sales

policy, and that Philco Distributors had sole control of its prices and sales policy, and, therefore, that since the price and other related discriminations alleged in the complaint were not made by the same seller, there was no violation of the Robinson-Patman Act within the meaning of said statute.

The statute in question, in pertinent part, reads:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

[*Separate Entities*]

Plaintiff does not dispute that one cannot have a cause of action for violation under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. A. 13, unless one is an actual purchaser from the person charged with the discrimination. See *Klein v. Lionel Corp.*, 3rd Cir. [1956 TRADE CASES ¶ 68,485], 237 Fed. 2d 13. Moreover, in opposing the motion, plaintiff states that the facts as set forth in the moving affidavit are at this time not being disputed. It contends, however, that despite any surface appearance of separate price and sales policies of defendants, parent and subsidiary corporations, the depositions disclose that "in actual fact" the two defendants were a single entity. In effect, plaintiff's argument is that the depositions disclose the defendant Philco so dominated and regulated the policies of its wholly owned subsidiary, Philco Distributors, that the subsidiary is merely an instrumentality or alter ego of its parent, and that the court should deal with the situation by regarding Philco as the real party in interest and as if Philco Distributors did not exist as a separate legal entity.

My reading of the depositions leads me to the conclusion that so far as the depositions are concerned plaintiff's opposition to the motion is unsound, or rather unproved. On the contrary, it appears from these depositions that Philco determined the pricing and sales policies at which it sold its products directly to retail dealers, whereas the prices and practices of Philco Distributors were established not by the parent company, Philco, but on the contrary were fixed by Philco Distributors itself.

The depositions fail to disclose that in the sales by Philco Distributors to the plaintiff, and in the sales made by Philco Distributors to Davega before September 1, 1950, the two defendant corporations should be regarded as a single entity to the end that they constitute a "common seller," discriminating between their customers. Nor do the depositions sustain the contention of the plaintiff that the prices established by Philco Distributors to the plaintiff and to Davega, after September 1, 1950, were in fact prices determined by the parent Philco.

The fact that Philco Distributors was a wholly owned subsidiary of Philco, and that the officers of Philco Distributors, except for Harold Sheer, who was executive vice president in control of its sales operations, were also officers of Philco, fails to demonstrate that the subsidiary was merely the alter ego of the parent. With respect to other factors upon which plaintiff relies, they prove at most only that consultations took place between parent and subsidiary with the view that both companies were interested in having the subsidiary show a profit in its business operations. As appears from the depositions, however, there were no consultations between parent and subsidiary in respect to establishing pricing policies to compel the conclusion that the prices of both companies were controlled by Philco, or that they acted in legal effect as one seller.

[*Motion Granted*]

It is significant that the plaintiff offers nothing in opposition to the motion save that which is disclosed in the depositions, despite the fact that Rule 56(f) of the Rules of Civil Procedure gives opportunity to a party opposing the motion for summary judgment to apply for a continuance to permit affidavits to be obtained or depositions taken or discovery had to defeat the motion.

Accordingly defendants' motion is granted.

Settle order.

[¶ 68,623] **United States v. Dover Corporation, Oliver Iron & Steel Corporation, and Oliver Tyrone Corporation.**

In the United States District Court for the Western District of Tennessee, Western Division. Civil Action No. 2908. Filed February 12, 1957.

Case No. 1284 in the Antitrust Division of the Department of Justice.

Clayton and Sherman Antitrust Acts

Combinations and Conspiracies—Exclusive Dealing—Consent Decree—Practices Enjoined—Exclusive Dealing—Elevator Pumps.—A manufacturer of hydraulic elevators and a manufacturer of hydraulic elevator pumps were prohibited by a consent decree from entering into any agreement with each other not to sell pumps to any person or not to buy pumps from any person. The pump manufacturer was prohibited from (1) selling pumps upon the condition that the purchaser thereof will buy all or any portion of his pumps from such manufacturer, (2) selling pumps upon the condition that the purchaser thereof will not buy pumps from any other source, or (3) selling pumps to the elevator manufacturer which embody improvements, modifications, or additions unless such pumps are offered for sale to its other customers upon an equal and non-discriminatory basis. The elevator manufacturer was prohibited from hindering or restricting any person from purchasing pumps from the pump manufacturer and from hindering or restricting the pump manufacturer from selling pumps to any person.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.690; Exclusive Dealing, Vol. 1, ¶ 4009.100.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Vertical Integration.—A manufacturer of hydraulic elevator pumps was prohibited by a consent decree from selling or assigning to a manufacturer of hydraulic elevators any of its business, assets (including patents or patent rights), or goodwill relating to pumps, except upon such terms and conditions (other than dollar price) as may be approved by the Government.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.865.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Sale of Pumps.—A manufacturer of hydraulic elevator pumps was required to offer to sell and to sell its pumps, upon reasonable and non-discriminatory terms and conditions, to any person other than a specified manufacturer of hydraulic elevators. The consent decree provided that the failure by the manufacturer to deliver such pumps to any person making a request therefor shall constitute prima facie evidence of a violation of the decree. The manufacturer also was required to send a letter setting forth the substantive terms of the decree to each of its pump customers and to each person who has made written inquiry of the manufacturer concerning the purchase of pumps.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.50, 8421.

For the plaintiff: Victor R. Hansen, Assistant Attorney General, and W. D. Kilgore, Jr., Baddia J. Rashid, Charles F. B. McAleer, Harry N. Burgess, Charles L. Beckler, William P. Cassedy, and Charles H. McEnerney, Jr.

For the defendants: Clifton & Mack, Memphis, Tenn., by Clarence Clifton; and Curtis, Mallet-Prevost, Colt & Mosle, New York, N. Y., by Kenneth N. LaVine, for Dover Corporation. Lucius E. Burch, Jr., Memphis, Tenn., for Oliver Iron & Steel Corporation and Oliver Tyrone Corporation.

Final Judgment

MARION S. BOYD, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on the 11th day of June, 1956, and the defendants, by their attorneys, having appeared and filed their answers to such complaint and this Court having entered its Order herein dated 2/12/57 joining Oliver Tyrone Corporation as a party defendant herein and amending the caption of this cause, and plaintiff and said defendants having severally consented to the making and entry of this Final Judgment without trial or adjudication of any

issue of fact or law herein and without this Final Judgment's constituting any evidence of any wrongful act by the defendants or any of them or any admission in respect to any issue of fact or law;

Now, therefore, before any testimony has been taken and without trial or adjudication of any issue of fact or law herein and upon consent of the parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I

[*Clayton and Sherman Acts*]

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states claims upon which relief can be granted under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended, and under Section 3 of the Act of Congress of October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Dover shall mean defendant Dover Corporation, a Delaware Corporation;

(B) "Oliver" shall mean defendant Oliver Iron & Steel Corporation, a Pennsylvania Corporation, and defendant Oliver Tyrone Corporation, a Pennsylvania Corporation, and each of them;

(C) "Hydraulic elevators" shall mean any hoisting or lowering mechanism equipped with a car or platform which moves in guides in a substantially vertical direction and which serves two or more fixed levels, and in which the energy is applied by means of a liquid under pressure. In addition, for the purposes of this Judgment, the term hydraulic elevator shall also include service station and garage type lifts for automobiles or buses;

(D) "Pumps" shall mean hydraulic pumps, including component parts and accessories thereof, used or capable of use with hydraulic elevators;

(E) "Patents" shall mean any, some or all claims in the following United States Letters Patent which relate to pumps:

(1) Letters patent owned or controlled by defendant Oliver on the date of entry of this Final Judgment;

(2) Letters patent which may be granted on applications for Letters Patent which applications are on file in the United States Patent Office and owned or controlled by defendant Oliver on the date of entry of this Final Judgment;

(3) Divisions, continuations, reissues or extensions of the Letters Patent described above in clauses (1) and (2);

(F) "Person" shall mean any individual, partnership, firm, corporation or any other business or legal entity.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its officers, agents, servants, employees, subsidiaries, successors and assigns, and to those persons in active concert or participation with it who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

[*Termination of Agreement*]

The defendants and each of them are ordered and directed to terminate and cancel, within thirty (30) days from the date of entry of this Final Judgment, the Agreement, dated October 14, 1954, between Dover and Oliver, including all agreements amendatory or supplemental thereto, and the defendants and each of them are enjoined and restrained from entering into, adhering to, enforcing or claiming any rights under any contract, agreement, understanding, plan or program contrary to or inconsistent with the terms of this Final Judgment.

V

[*Agreements Not To Sell or Buy*]

The defendants and each of them are enjoined and restrained from, directly or indirectly, entering into, adhering to, enforcing or claiming any rights under any contract,

agreement, understanding, plan or program with each other:

(A) Not to sell pumps to any third person;

(B) Not to buy pumps from any third person.

VI

[*Sales Required*]

(A) So long as it engages in the business of manufacturing pumps defendant Oliver is ordered and directed unconditionally to offer to sell and to sell such pumps, upon reasonable and non-discriminatory terms and conditions to any person, other than Dover, making written request therefor. Failure by Oliver to deliver such pumps to such person within ninety (90) days of its receipt of such request, or such later date as may be specified in the request, shall constitute prima facie evidence of violation of this Final Judgment.

(B) Defendant Oliver is enjoined and restrained from:

(1) Selling, transferring or assigning to Dover any of its business, assets (including patents or patent rights) or goodwill, relating to pumps, except upon such terms and conditions, other than dollar price, as may be approved by the plaintiff herein;

(2) Selling or offering to sell pumps upon the condition or understanding that the purchaser thereof buy all or any portion of his pumps from Oliver;

(3) Selling or offering to sell pumps upon the condition or understanding that the purchaser thereof not buy pumps from any other source;

(4) Selling or offering to sell pumps to Dover embodying improvements, changes, alterations, modifications or additions unless such pumps are offered for sale to its other customers upon an equal and non-discriminatory basis.

VII

[*Restrictions on Purchases and Sales*]

Defendant Dover is enjoined and restrained from:

(A) Hindering, limiting or restricting any person from purchasing pumps from defendant Oliver; and

(B) Hindering, limiting or restricting Oliver from selling pumps to any person, provided, however, that in the event Oliver should hereafter cease selling pumps to Dover, nothing herein contained shall prevent Dover from lawfully enforcing any patent and/or other property rights it may then have in and to pumps.

VIII

[*Notice of Judgment*]

Defendant Oliver is ordered and directed, within sixty (60) days from the date of entry of this Final Judgment to send a letter setting forth the substantive terms of this Final Judgment to each of its pump customers and to each person who has made written inquiry of Oliver concerning the purchase of pumps.

IX

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted (1) access during the office hours of such defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant relating to any of the subject matters contained in this Final Judgment, and (2) subject to the reasonable convenience of such defendant and without restraint or interference from it to interview officers or employees of such defendant who may have counsel present, regarding any such matters. Upon such written request, each of the defendants shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment. No information obtained by the means provided in this Section IX shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with

this Final Judgment or as otherwise required by law.

X

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

[¶ 68,624] Barclay Home Products, Inc., et al. v. Federal Trade Commission.

In the United States Court of Appeals for the District of Columbia Circuit. No. 13305. Decided February 14, 1957.

Petition for Review of an Order of The Federal Trade Commission.

Federal Trade Commission Act

Unfair Practices—Misrepresentation—Filling Content of Pillows.—A Federal Trade Commission order prohibiting a manufacturer of pillows from misrepresenting the kinds and proportions of filling materials contained in its pillows was affirmed. The order was based upon the Commission's determination that the manufacturer's labels on the pillows did not meet the standards of accuracy under the Trade Practice Rules for the Feather and Down Products Industry. The manufacturer's contention that the Commission erred in accepting the results of tests conducted by its own expert witness, and in rejecting the results of tests conducted by the manufacturer's experts, was not decided by the reviewing court since the contention was not made before the Commission.

See Unfair Practices, Vol. 2, ¶ 5081.482; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.27.

For the petitioners: F. Murray Callahan, with whom Benjamin H. Dorsey was on the brief; and Ralph E. Becker.

For the respondent: A. L. Berman, Attorney, Federal Trade Commission, with whom Robert B. Dawkins, Assistant General Counsel, Federal Trade Commission, was on the brief; and Joseph B. Kennedy, Attorney, Federal Trade Commission.

Denying a petition to set aside a cease and desist order in FTC Dkt. 6275.

Before Bazelon, Fahy and Bastian, Circuit Judges.

[*Petition To Set Aside FTC Order*]

Per Curiam [*In full text*]: This petition, by a member of the Feather and Down Products Industry, seeks to set aside a Federal Trade Commission order [1] to cease and desist from engaging in certain unfair labelling practices. The order was based upon the Commission's determination that petitioner's labels, describing the kinds or types and proportions of filling materials contained in pillows, did not meet the standards of accuracy under the Trade Practice Rules for the Feather and Down Products Industry.[2]

In this court petitioner relies on grounds which stem from the Commission's acceptance of the results of tests conducted by its own expert witness and the rejection of those conducted by petitioner's experts.[3] These grounds were not urged before the Commission. We are, therefore, not bound to consider them now.[4]

We note our agreement, however, with the Court of Appeals for the Third and

[1] Issued under § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45.

[2] Promulgated by the Commission on April 26, 1951, 16 C. F. R. § 200 (Supp. 1955).

[3] These grounds are: "(1) that testimony of petitioners' experts had been totally disregarded because it was not styled in a manner made mandatory subsequent to its introduction: (2) that testimony of petitioners' experts had never been weighed; and (3) that rejection of testimony of petitioners' experts constituted an amendment to the Trade Practice Rules without notice to petitioners."

[4] *United States v. L. A. Tucker Truck Lines*, 344 U. S. 33, 36-37 (1952); *Democrat Printing Co. v. Federal Communications Comm'n*, 91 U. S. App. D. C. 72, 77-78, 202 F. 2d 298, 303-04 (1952).

Second Circuits[5] in sustaining the Commission's like evaluation of these tests in related cases involving other members of this industry.

[*Affirmed*]

The petition to set aside is denied, and the Commission's order is affirmed.

[¶ 68,625] Rogers-Kent, Incorporated v. General Electric Company.

In the Richland County Court, State of South Carolina. Filed December 5, 1956.

South Carolina Fair Trade Act

Fair Trade—Constitutionality of South Carolina Fair Trade Act—Nonsigner Provision—Act Passed Prior to Miller-Tydings and McGuire Acts—Due Process of Law, Equal Protection of the Laws, and Delegation of Legislative Power—United States and South Carolina Constitutions.—In a declaratory judgment action, the South Carolina Fair Trade Act was held invalid on the ground that the Act was void at the time of its enactment, which was prior to the passage of the Miller-Tydings and McGuire Acts, because it was in conflict with the Sherman Antitrust Act and therefore offended the "supremacy" and "commerce" clauses of the United States Constitution. Although the South Carolina Act no longer is in conflict with the Sherman Act by reason of the passage of the McGuire Act, the South Carolina Act remains invalid since it has not been reenacted since the passage of the McGuire Act. The removal of the constitutional objection to a statute which rendered it void does not by operation of law give it force and effect nor can it be made valid by a subsequent statute. The court found it unnecessary to pass upon the contention that the Act was reenacted by reason of its inclusion in the South Carolina Code because the legislature, in adopting the Code, declared it to be the only general statutory law of the State on January 8, 1952. The effective date of the Code, therefore, antedated the McGuire Act, which became law on July 14, 1952, and the inclusion of the Act in the Code does not impart validity to the Act.

The nonsigner provision of the South Carolina Act violates the due process clause of the South Carolina Constitution. The right of an owner of property to fix the price at which he will sell it is an inherent attribute of the property itself and a well recognized property right. Unless the property is affected with a public interest, the legislature is without authority to abridge this property right under its police power. The nonsigner provision denies equal protection of the laws in violation of the state's Constitution because it confers special privileges upon certain persons without a reasonable basis for classification. Furthermore, the Act's nonsigner provision confers an unlawful delegation of legislative power to private persons contrary to the South Carolina Constitution. It is a delegation to private individuals, not to a governmental agency, contrary to all established precedent, and the Act prescribes no standards and lays down no yard stick to be applied in the exercise of this unwarranted power.

See Fair Trade, Vol. 1, ¶ 3040.40, 3085.43, 3258.

For the plaintiff: I. S. Bernstein, Columbia, S. C.

For the defendant: Boyd, Bruton & Lumpkin, Columbia, S. C.

Order

[*Validity of Fair Trade Act*]

LEGARE BATES, Judge [*In full text*]: Plaintiff brings this action under the provisions of the Uniform Declaratory Judgments Act (Sections 10-2000 through 10-2014 of the 1952 Code) for the purpose of obtaining a construction of the South Carolina Fair Trade Act (Sections 66-91 through 66-95

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[5] *Northern Feather Works v. Federal Trade Comm'n*, and *Sumergrade v. Federal Trade Comm'n* [1956 TRADE CASES ¶ 68,366], 234 F. 2d 335 (3d Cir. 1956); *Buchwalter v. Federal Trade Comm'n, The L. Buchman Co. v. Federal Trade Comm'n, and Sanitary Feather & Down Co. v. Federal Trade Comm'n* [1956 TRADE CASES ¶ 68,425], 235 F. 2d 344 (2d Cir. 1956). *Contra: Burton-Dixie Corp. v. Federal Trade Comm'n* [1957 TRADE CASES ¶ 68,591], — F. 2d — (7th Cir., Jan. 10, 1957); *Lazar v. Federal Trade Comm'n* [1957 TRADE CASES ¶ 68,597], — F. 2d — (7th Cir., Jan. 10, 1957).

of the 1952 Code) and an adjustment respecting its validity and constitutionality. The Attorney General, although not a party, was served with a copy of the Complaint in accordance with Section 10-2008 and appeared on behalf of the State.

[*Plaintiff*]

The parties have entered into an agreed stipulation of facts, from which the following pertinent facts appear: the plaintiff is a South Carolina Corporation and has its principal place of business in Columbia, South Carolina. Plaintiff is engaged in the general retail mercantile business in both interstate and intrastate commerce. In the conduct of its business plaintiff issues patron cards to its customers upon application, in return for which it requires that the holder agree to make at least one purchase a year. Plaintiff has advertised, offered for sale and sold appliances bearing nationally famous brand names, including many appliances bearing the defendant's trademark, "General (GE) Electric." It has been Plaintiff's practice heretofore and it proposes to continue to allow customers holding cards to purchase appliances, including those bearing defendant's trademark, at prices below the minimum fair trade retail prices specified in agreements entered into between manufacturers of these products and other dealers in the state.

[*Defendant*]

The defendant, General Electric Co., is a foreign corporation and is duly qualified to transact business in the state of South Carolina. It is engaged, inter-alia, in the business of manufacturing and selling electrical products, including clocks, automatic blankets, vacuum cleaners, fans, heating pads, heaters and radios. All of said appliances bear defendant's trademark "General (GE) Electric" and are in fair and open competition in this state with many appliances of the same general class produced and sold by other manufacturers.

Defendant has expended and is expending large sums of money in promoting the sale of said appliances by advertising and in every other available way and has established a valuable reputation and good will for said appliances and for the trademark under which they are distributed and sold.

Pursuant to the Fair Trade Act of South Carolina, the defendant since July 1952 has entered into agreements with a substantial number of retail dealers under which the defendant has specified minimum retail resale prices for the aforesaid appliances, a copy of which it attached to the amended answer.

In addition to the appliances mentioned, the defendant manufactures and sell a multitude of other products in the appliance field and also manufatcures electric ranges, refrigerators, TV sets and other major appliances, all of which bear defendant's trademark "General (GE) Electric." Customarily these major appliances are not sold subject to fair trade agreements and the retail pricing of these items is left to the individual dealer guided by circumstances in his own trading area.

[*Nonsigner*]

The plaintiff has not entered into a fair trade agreement with the defendant agreeing not to advertise or sell the said appliances at less than the minimum prices stipulated by the defendant nor is it a party to any such agreement, and within the purview of the South Carolina Fair Trade Act, is a non-contracting i. e., non signing retailer.

[*Constitutionality*]

On or about January 3rd, 1955 and at regular intervals thereafter, the defendant notified plaintiff of the form of its fair trade agreement with other retail dealers and the minimum prices for the appliances specified by the defendant under said agreements. Since that date the plaintiff has sold, and advertised and proposes to continue to advertise and sell said appliances bearing defendant's trademark at prices less than those specified in said agreements. Plaintiff contends that it has the legal right to do so for reason that the South Carolina Fair Trade Act is invalid and unconstitutional and brings this action under the Declaratory Judgments Act to obtain an adjudication respecting the validity and constitutionality of the Act.

This is the second time that this question has been before this court. In *Rogers-Kent v. Westinghouse, et al.* [1955 TRADE CASES ¶ 68,084], involving substantially the same issues, I held the Fair Trade Act of this state to be invalid and unconstitutional in a lengthy opinion setting forth my views. Inasmuch as the defendant's appeal to the

Supreme Court was abandoned before an adjudication could be had on the merits in that case, I deem it necessary to restate the views therein expressed by me.

The principal grounds upon which the plaintiff challenges the validity and constitutionality of the Fair Trade Act are the same as those advanced in the *Westinghouse* case and may be summarized as follows:

(1) The South Carolina act was void in its inception because it was inconsistent with the Sherman Anti-Trust Act and the Constitution of the United States at the time of its passage; and the passage of permissive federal legislation could not impart validity to the State act without a subsequent re-enactment by the General Assembly.

(2) The act violates Article 1, Section 5 of the South Carolina Constitution, the "due process" and "equal protection" clauses.

(3) The act confers an unlawful delegation of legislative power to private individuals contrary to Article 3, Section 1 of the State Constitution.

[*Conflict with Sherman Act*]

In support of its first ground plaintiff relies primarily upon the authority of *Grayson-Robinson Stores, Inc. v. Oneida* [1953 TRADE CASES ¶ 67,442], 209 Ga. 613, 75 S. E. 2d 161, which held invalid the identical Georgia statute on this ground. I am impressed with the sound reasoning and unassailable logic of that decision and I have concluded that it applies with equal force to our own statute. The Fair Trade Act of this State was approved on April 23, 1937, and like the Georgia Act, was void *ab initio,* in that it was in conflict with the Sherman Anti-Trust Act, 26 Stat. 209, 15 U. S. C. A., Section 1, at the time of its enactment and thus offended the supremacy clause, Article 6, Clause 2, and the commerce clause, Article 1, Section 8, of the United States Constitution. Under the provisions of the Sherman Anti-Trust Act as originally passed, interstate resale price fixing and price maintenance agreements were prohibited as being in restraint of trade and therefore illegal per se. In *Kiefer-Stewart Co. v. Seagram* [1950-1951 TRADE CASES ¶ 62,737], 340 U. S. 211, 95 L. Ed. 219, 71 S. Ct. 259, the Supreme Court of the United States stated:

"Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate commerce is illegal per se."

Other decisions to the same effect are *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U. S. 373, 31 S. Ct., 376, 55 L. Ed. 502; *United States v. Socony Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,031], 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129.

On August 17, 1938, after the effective date of our Fair Trade Act, Congress passed the Miller-Tydings Act as an amendment to the Sherman Act, which provides that "nothing herein contained shall render illegal contracts or agreements prescribing minimum prices for resale of a commodity . . . when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law or public policy in effect in any state . . ." In 1951 the Supreme Court of the United States in *Schwegmann Bros. v. Calvert* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384, 71 S. Ct. 745, 95 L. Ed. 1035, held that this amendment excepted only "contracts or agreements" prescribing minimum prices, and could not be made applicable to persons who had signed no contract or agreement, who were in effect "nonsigners" as the plaintiff herein.

[*Reenactment Necessary*]

In order to remove the barrier to effective enforcement of resale price agreements under State Fair Trade Acts, Congress on July 14, 1952 passed the McGuire Act, 66 Stat. 632, 15 U. S. C. A., Section 45, which attempted to exempt from the operation of the Sherman Act the nonsigner clause identical to our own, and thus to make the Fair Trade Act applicable to all dealers or retailers whether they had signed contracts or not. Although conceding that the Fair Trade Act of this state no longer offends the Sherman Act by reason of the McGuire Amendment, plaintiff contends nevertheless, that the act in this state, not having been re-enacted since the passage of the McGuire Act, remains invalid. I am in accord with the decision of the Georgia Supreme Court on this point in the *Grayson* case, *supra,* which reached the following conclusion:

"So we accordingly agree that the provisions of Georgia's Fair Trade Act are not prohibited by the Sherman Act as

amended by the Miller-Tydings Act and by the McGuire Act; but we do not agree with the contention that Georgia's act became valid without re-enactment, after the Sherman Act was thus amended. Since Georgia's Fair Trade Act was contrary to and inconsistent with the terms of the Sherman Act before it was amended by the Miller-Tydings Act and the McGuire Act, it offended the supremecy clause as well as the commerce clause of the Federal Constitution . . . The time with reference to which the constitutionality of an act is to be determined is the date of its passage by the enacting body; . . . and if it is unconstitutional then it is forever void. *Christian v. Moreland,* 203 Ga. 20, 45 S. E. 2d 201."

The principle thus invoked is amply supported by the authorities, including the earlier case in this state of *Atkinson v. Southern Express,* 94 S. C. 444, 78 S. E. 516, which involved the validity of the statute prohibiting the transportation of alcoholic liquors from place to place within this state and the bringing in of liquors from out of state. This act was held to be in conflict with the commerce clause of the United States Constitution and hence unconstitutional at the time of its enactment. Thereafter Congress passed the Webb Act divesting liquors of their interstate character and thus removed the constitutional barrier to the original dispensary statute. The question now presented was whether or not the statute became operative without re-enactment after the passage of the Webb Act. Our Supreme Court held that it did not and the clear language of that opinion is equally applicable to the act under consideration:

"The removal of the constitutional objections to a statute that rendered it null and void, does not by operation of law give it force and effect, nor can it be made valid by a subsequent statute."

I find it unnecessary to pass upon the Attorney General's contention that the Fair Trade Act was re-enacted by reason of its inclusion in the 1952 Code, for the reason that the Legislature, in adopting the Code, declared it to be "the only general statutory law of the State on the 8th day of January, 1952." The effective date of the Code thus antedated the McGuire Act which became law on July 14, 1952, and the inclusion of the act in the Code does not impart validity to it.

I must therefore conclude that the plaintiff's first ground is well taken and that the Fair Trade Act of this State is not a valid law. In view of the additional serious constitutional questions raised by the plaintiff, however, I prefer not to rest my decision on this ground solely, but will consider fully plaintiff's additional objections to the constitutionality of the statute under our State Constitution.

[*Nonsigner Provision*]

The plaintiff's remaining grounds of objection are directed primarily to Section 66-94, which embodies the clause familiarly known as the "nonsigner" clause as follows:

"Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract containing either of the provisions mentioned in Section 66-93, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

Under the wording of the foregoing section, any price arrangement entered into between a producer on the one hand and a retailer on the other is binding upon all other retailers selling the particular commodity involved. Plaintiff has not entered into a fair trade contract with the defendant General Electric, and contends that the enforcement of the nonsigner clause will deprive it of its property and its liberty to contract without due process of law, in violation of Article 1, Section 5 of the State Constitution.

[*State's Police Power—Due Process*]

The right of an owner of property to fix the price at which he will sell it is an inherent attribute of the property itself and a well recognized property right. *Tyson v. Banton,* 273 U. S. 418, 47 S. Ct. 426, 71 L. Ed. 718; *Charles Wolff Packing Co. v. Court of Industrial Relations,* 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103; *Williams v. Standard Oil Co.,* 278 U. S. 435, 49 S. Ct. 115, 73 L. Ed. 287; *New State Ice Co. v. Leibman,* 285 U. S. 262, 52 S. Ct. 371, 76 L. Ed. 747. Only in those situations respecting public health, safety, morals and public welfare, where the state's police power may properly be invoked, or where a business is "affected with a public interest," is a departure from this rule sanctioned. In *Gasque v. Nates,* 191 S. C. 271, 2 S. E. 2d 36, our Supreme Court

recognized that "to be valid as a legislative exercise of police power, the legislation must be clearly demanded for public safety, health, peace, morals or general welfare. 11 Am. Jur. 1171; *West Coast Hotel Co. v. Parrish,* 300 U. S. 379."

The Act before me is in essence a price fixing act, conferring upon private individuals the right to enter into price fixing arrangements which are obligatory upon non-assenters, and which follow the commodity down through the channels of trade to the ultimate consumer. *Schwegmann Bros. v. Calvert, supra; Cox v. General Electric* (Ga.) [1955 Trade Cases ¶ 67,934]; 85 S. E. 2d 514; *Miles Laboratory v. Eckerd,* (Fla.) [1954 Trade Cases ¶ 67,700] 73 So. 2d 680. The non-contracting party is required to sell at not less than a stipulated price not merely by reason of the contract; he is compelled to do so by the Act. In order to justify the granting of such extraordinary power to private individuals, the situation must be such as to call for the exercise of the police power of the state. In this respect I can see no distinction between price fixing by legislative mandate, as the act permits, and legislative price fixing itself.

I find nothing in the Act limiting or restricting its application to those businesses or trades affected with a public interest or to the sale of commodities which the state may reasonably regulate under its police power. The Act is all inclusive, bringing in all commodities and all industries alike without exception and without regard to their relationship to the public welfare. The only requisite for invoking this act is that the commodity bear a "trade-mark, brand or name of the producer, distributor or owner" and which is "in fair and open competition with commodities of the same general class produced by others." The commodities produced by General Electric and which are sold under its trade-mark, as enumerated in the stipulation of facts, clearly bear no relationship to the public health, safety, morals and public welfare and the regulation of the price at which they are to be sold cannot be justified as a proper exercise of the police power of the state.

The Supreme Court of Georgia in *Cox v. General Electric, supra,* in holding the Fair Trade Act unconstitutional after its reenactment, penetrated to the very core of the constitutional objections in the following statement:

> "The right to contract and for the seller and purchaser to agree upon a price is a property right protected by the due process clause of our constitution, and unless it is a business affected with a public interest the General Assembly is without authority to abridge that right."

The plaintiff is a legal corporation engaged in a lawful business. It seeks to bestow upon its members who have card privileges the right to purchase its commodities, including some of the items bearing the trade-mark of the defendant General Electric, at prices below the minimum resale prices, and thus to pass on to them the economies effected through the efficiency of its operations. I can perceive of no sound reason why it should not be permitted to do so in free and open competition. Manifestly the public receives the benefits of its operations and its interests are best served thereby. The whole spirit and purpose of our constitution is to protect the liberties and property rights of our citizens. The act would impair and virtually destroy the right of the plaintiff to the free use and enjoyment of its property. It permits private individuals to make their price restrictions obligatory upon those who have refused to consent thereto, and is clearly arbitrary and confiscatory in violation of due process.

Among the recent decisions in other states declaring the Fair Trade Act unconstitutional on this and other grounds are *Cox v. General Electric* (Ga.) *supra; Miles Laboratory v. Eckerd* (Fla.) *supra; Union Carbide v. White River* (Ark.) [1955 Trade Cases ¶ 67,953], 275 S. W. 2d 455; *McGraw Electric Co. v. Lewis & Smith Drug Co.* (Neb.) [1955 Trade Cases ¶ 67,954], 68 N. W. 2d 608; *Shakespeare v. Sporting Goods Co.* [1952 Trade Cases ¶ 67,303], 334 Mich. 109, 54 N. W. 2d 268. *General Electric Co. v. Wahle* (Ore.) [1956 Trade Cases ¶ 68,333] 296 P. 2d 635; *Benrus Watch Co. Inc. v. Kirsch* [1956 Trade Cases ¶ 68,319], 92 S. E. 2d 384; *Olin Mathieson Corp. v. Francis* (Colorado) [1956 Trade Cases ¶ 68,463] not yet reported.

The defendants advance the argument that a retailer, although a nonsigner, voluntarily acquires a commodity with knowledge of its trade-mark and resale price restrictions and such voluntary acquisition and

knowledge imports consent to the price limitation. The fallacy in this contention lies in the fact that the retailer has clearly demonstrated his rejection of the price restriction by his refusal to enter into a resale price agreement. In *Schwegmann v. Calvert, supra,* the opinion of Justice Douglas effectively demolishes this fiction wherein he states:

"They can fix minimum prices pursuant to their contract with impunity. When they seek however to impose price fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different. That is not price fixing by contract or agreement; that is price fixing by compulsion. That is not following the path of consensual agreement; that is resort to coercion.

* * *

"Contracts or agreements convey the idea of a cooperative arrangement, not a program whereby recalcitrants are dragged in by the heels and compelled to submit to the price fixing."

The views herein expressed find strong support in many decisions of our Supreme Court respecting due process. In the well reasoned opinion in *Gasque v. Nates, supra,* the Court held that the act limiting the hours of labor in certain types of mercantile establishments violated due process in that it was an undue interference with liberty of contract of both employer and employee and was not a proper exercise of the police power of the State. The opinion quotes with approval from *Adair v. U. S.,* 208 U. S. 161, 28 S. Ct. 280:

"In all such particulars the employer and the employee have equality of right and any legislation that disturbs equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

The holding in that case would impel a similar conclusion respecting the statute under consideration.

In *McCoy v. Town of York,* 193 S. C. 390, 8 S. E. 2d 905, the Court had before it the validity of the town ordinance making it unlawful to deliver petroleum products to any gasoline station by trucks having capacity of more than 1250 gallons, which was apparently designed as a safety measure under the police power of the municipality. In holding the ordinance void at the suit of a filling station operator in the town, the Court declared:

"The appellant has the constitutional right of engaging in a lawful business and a constitutional right under license from the city to engage in the filling station business. Under the guise of public welfare this ordinance is passed in which the inevitable and evidently intended effect is to prevent the legitimate use by appellant of his equipment in the usual and ordinary manner."

Equally appropriate is the language of Judge Sease in *Willis v. Town of Woodruff,* 200 S. C. 266, 20 S. E. 2d 699, involving the validity of the town ordinance which conditioned the granting of a building permit to the plaintiff upon approval of his neighbors. The opinion states:

"The ordinance involved in the case at bar in [is] both unreasonable and discriminatory, for it attempts to confer upon a private citizen who may be so fortunate as to own a house power of the most arbitrary character over the property of his neighbors.

"For these reasons we do not hesitate to condemn the ordinance as unconstitutional and void."

And in *Henderson v. City of Greenwood,* 172 S. C. 16, 172 S. E. 689, the Court quoted with approval from 6 R. C. L. 196 the rule respecting the deprivation of property under the due process clause, which finds equal application herein:

"The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Its capacity for enjoyment or adaptability to some uses are essential characteristics and attributes without which property cannot be conceived. Hence a law is considered as being a deprivation of property within the meaning of this constitutional guaranty if it deprives an owner of one of its essential attributes, or destroys its value, or restricts or interrupts its common, necessary or profitable use, or hampers the owner in the application of it to the purpose of trade, or imposes conditions upon the right to hold or use it, and thereby seriously impairs its value."

[*Equal Protection of the Laws*]

The plaintiff further assails the act as denying the equal protection of the laws and as conferring special privileges upon a select few without a reasonable basis for classification. In *Gasque v. Nates, supra,* the Court recognized that the legislature has

the power in passing a law to make a classification of its citizens, but "such classification cannot be made arbitrarily but must rest upon some difference which bears a reasonable and just relation to the act in which the classification was proposed." That case quotes with approval from *Colgate v. Harvey,* 296 U. S. 404, 56 S. Ct. 256, to the following effect: "The classification in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences as distinguished from irrelevant and artificial ones."

The act before me classifies the producer, owner or distributor of a commodity with a trade-mark separately from the one without a trade-mark. I can perceive no rational basis for thus classifying trade-mark owners separately from other sellers of goods. Under the express terms of the act, any producer, owner or distributor may acquire unlimited price fixing powers by the mere expedient of placing a trade-mark, brand or name on his product and selling it in fair and open competition with commodities of the same general class. A producer may place an entirely new product on the market and thereby exercise an unrestricted right to control its price through the channels of trade into the hands of the ultimate consumer. The seller who chooses not to place a distinctive mark or name on his product, as he may lawfully do, is denied the right to fix the price of the commodity. No sound reason has been advanced for permitting a seller with a trade-mark to thus exercise arbitrarily a power denied to others, contrary to the letter and spirit of our constitution. The distinction, if any exists, is artificial and irrelevant.

The defendants urge, however, that the act has for its purpose the protection of the property right of the trade-mark owner in his good will and that this affords a rational basis for classifying trade-mark owners separately from other sellers of goods. I can find nothing in the statute evincing this to be its purpose. There is no mention of "good will" in the act nor is there any requirement that a trade-mark or trade name enjoy a past or prospective good will, or that it shall have acquired a public reputation, as a condition precedent to the exercise of the price fixing powers conferred. The statute permits the owner to control the resale price of a commodity after he has sold the same to another, and thus accords a hitherto unknown property right to a trade-mark, the function of which has always been simply to designate the goods as the product of a particular manufacturer or producer and to prevent confusion as to their origin. *Shakespeare v. Sporting Goods Co.* [1952 TRADE CASES ¶ 67,303], 334 Mich. 109, 54 NW 2d 268; *Sunbeam v. Wentling* (CA 3) [1950-1951 TRADE CASES ¶ 62,935] 192 F. 2d 7. Certainly it cannot be contended in this proceeding that the plaintiff has infringed upon the trade-mark rights of the defendant by selling below minimum prices.

Nor is there any reasonable basis for the suggestion that the good will of a producer is adversely affected by a sale below its minimum prices, nor conversely, that it may be enhanced by an artificially controlled price. Good will is an intangible asset which a producer may acquire through his reputation for fair dealing and the excellence of his product. I am unable to see any direct relationship between good will and the maintenance of a fixed retail price. It is axiomatic that an excessive price will discourage and eliminate purchasers and perhaps decrease the value of good will, whereas a popular price will result in wider distribution of a commodity and satisfied customers and aid in its enhancement. The sales of the plaintiff below the minimum prices stipulated by the defendant General Electric do not in my mind impinge upon the defendant's rights in its trade-mark, nor detract from its good will. The fallacy in defendant's position may be readily seen in the fact that the only commodities sold subject to a fair trade schedule are its smaller appliances as enumerated in the stipulation of facts; and even as to these, its contract allows the defendant to remove any product from its price schedule at any time. None of defendant's major appliances, which bear the same trade-mark, are sold subject to a fair trade schedule. This is clearly an admission by defendant that its good will is not harmed by its sales without regard to a minimum price schedule. The defendant's contention is patently unsound and unrealistic and must be rejected.

Other discriminatory features of the act may be noted which strengthen my conviction that it offends the equal protection clause. The act permits a producer and a retailer, by entering into a resale price agreement, to accomplish indirectly what

the dealers as a group may not accomplish directly. If all of the retailers selling a particular commodity were to combine and conspire to set the resale price of an article, their activities would violate the anti-trust laws as "horizontal" price fixing; nevertheless, the same result is sanctioned by making mandatory upon all dealers in a commodity the resale price fixed by agreement of a producer and only one of their number. If the activities of the group as a whole are to be condemned, I fail to understand how two individuals may validly accomplish the same result with impunity. The exercise of this power clearly constitutes a denial of the equal protection of the laws and is a grant of special privileges to the select few within the constitutional prohibition.

Another inherent evil in the statute is its lack of proper safeguards against an arbitrary enforcement. Under its terms a violation is actionable "at the suit of any person damaged thereby." Enforcement is not vested in a governmental or other responsible body. Thus, private persons—producers, distributors or even competing retailers—are given absolute discretion as to enforcing the fixed resale price of an article against one refusing to consent thereto. The power to enforce necessarily carries with it the power to refrain from enforcement. At the mere whim or caprice of a private individual, any one particular retailer may be selected for legal action, while the selling activities of others are ignored, if not condoned outrightly. The exercise of a power of such an arbitrary character by private individuals over the liberties and property rights of others is repugnant to the basic constitutional guarantees of our citizens.

[*Delegation of Legislative Power*]

Plaintiff's third ground of attack is that the act confers an unlawful delegation of legislative power to private individuals to fix prices, contrary to Article 3, Section 1 of the State Constitution, which vests the legislative power in the General Assembly. By legislative leave a producer and a retailer may enter into a contract fixing the resale price of a commodity, the effect of which is to bind all other dealers and retailers in that commodity, even though they may have choosen not to consent thereto. The price as thus fixed by private contract is accorded the force of law under the act and those who refuse to abide by it may be prosecuted at the whim of the individuals establishing it. This constitutes a delegation to private individuals of legislative power of the most extreme character.

There is no precedent in our law for the delegation of legislative authority to private individuals so as to affect the property rights of others. The Legislature may properly delegate, to a governmental agency only, authority to prescribe rules and regulations for the complete operation and enforcement of a law within its expressed general purpose. *Davis v. Guery* 209 S. C. 41, 39 SE 2d 117. Even in such event there must be a standard or yard stick to guide the administrative agency. The rule was thus recently stated by our Supreme Court in *South Carolina Highway Department v. Harvin,* 86 SE 2d 466:

> "However, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with much degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration."

As a delegation of legislative power the act must necessarily fail for two reasons: (1) It is a delegation to private individuals, not to a governmental agency, contrary to all established precedent; (2) the act prescribes no standards and lays down no yard stick to be applied in the exercise of this unwarranted power. The price may be fixed in the absolute and uncontrolled discretion of a producer. It may be fixed arbitrarily, capriciously or unwisely without regard to the interests of the public. Under our system of free enterprise, the safeguard against arbitrary price fixing has always been free competition among producers, a safeguard which the act would eliminate. I therefore do not hesitate to declare the act unconstitutional on this ground as well.

[*Basis of Ruling*]

In reaching the conclusion that the statute under consideration is invalid and unconstitutional, I have not been unmindful of the general principle of constitutional law so frequently reiterated by the Supreme Court that every presumption is to be in-

dulged in favor of constitutionality of a statute. Neither have I been unmindful of the fact that the highest courts of numerous states and the United States Supreme Court have upheld the validity of similiar Fair Trade Acts, particularly in the years following the depression. But I have been most strongly impressed with the recent decisions of the highest courts of several states which have declared the act to be unconstitutional. *Cox v. General Electric* (Ga.) *supra; Miles Laboratory v. Eckerd,* (Fla.), *supra; Union Carbide v. White River,* (Ark.), *supra; McGraw Electric Co. v. Lewis & Smith Drug Co.,* (Neb.), *supra; Shakespeare v. Sporting Goods Co.,* (Mich.), *supra; Grayson-Robinson Stores v. Oneida* (Ga.), *supra; General Electric Co. v. Wahle* (Ore.), *supra; Benrus Watch Co., Inc. v. Kirsch supra; Olin Mathieson Corp. v. Francis* (Colorado) not yet reported. The sound reasoning of these decisions have influenced the conclusions I have expressed herein respecting the validity and constitutionality of the act. I have also noted with interest that the Attorney General's National Committee to study the Anti-trust laws, in a report dated March 31, 1955, concluded that the fair trade laws are incompatible with our free enterprise system and recommended the repeal of both the Miller-Tydings and the McGuire Amendments.

[*Motion To Strike*]

In view of my conclusions herein, I consider it unnecessary to pass upon the plaintiff's motion to strike the defendant's counterclaim and demand for injunctive relief as having been improperly asserted.

[*Nonsigner Clause*]

My conclusions respecting the constitutionality of the Fair Trade Act have been confined primarily to Section 66-94, the nonsigner clause. I do not find it necessary at this time to pass upon the constitutionality of the remaining sections under our State Constitution, since I have concluded that the entire Act was void *ab initio*.

[*Ruling*]

For the reasons herein expressed it is ordered, adjudged and decreed that the Fair Trade Act of the State of South Carolina be and the same is hereby declared invalid and Section 66-94 thereof be and the same is hereby declared null and void and unconstitutional under the State Constitution of 1895, and it is so ordered.

[¶ 68,626] Baim & Blank, Inc. and Baim & Blank Television Service, Inc. v. Philco Distributors, Inc. and Philco Corporation.

In the United States District Court for the Eastern District of New York. Civil No. 14083. Dated February 4, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Depositions—Compilation of Data.—Where defendants were taking the deposition of the sole surviving officer of a plaintiff corporation to establish that the books of the corporation did not fully reflect its business transactions, the defendants asked the officer whether certain purported sales were reflected in the corporate books. The plaintiff objected on the grounds that the books speak for themselves, that the books have been inspected and copied by the defendants, and that the officer should not be required to compile this data. The objection was overruled, and the officer was required to examine the books and compile the data required to furnish the information sought.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.775.

For the plaintiffs: J. Robert Ellner, Rockville Centre, N. Y.

For the defendants: Donovan, Leisure, Newton & Irvine, New York, N. Y.

For prior opinions of the U. S. District Court, Eastern District of New York, see 1957 Trade Cases ¶ 68,622 and 1956 Trade Cases ¶ 68,453.

Memorandum

BRUCHHAUSEN. District Judge [*In full text*]: Plaintiffs are suing for treble damages under the Robinson-Patman Act, claiming that price fixing between defendants and other retailers forced them out of business.

[*Depositions*]

Defendants are attempting to establish that the books of the plaintiffs do not fully reflect their business transactions. In the course of taking the depositions of William Blank, sole surviving officer of plaintiff corporations, pursuant to Rule 26 of the Federal Rules of Civil Procedure, he was asked whether certain purported sales were reflected in the corporate books. The plaintiffs thereupon raised the objection that the books speak for themselves, that they have been inspected and copied by the defendants, and that the witness should not be required to compile this data, especially since he is not familiar with bookkeeping and never dealt with the books when the corporation was active.

Had not the trial been imminent, the defendants undoubtedly would have sought this information by interrogatories under Rule 33 of the Federal Rules.

[*Compilation of Data*]

It has been held that compilation of data, though burdensome, is proper where the information sought is proper and the records are those ordinarily kept in the course of business, or where the interrogated party would have to compile such information in its own preparation for trial. *RCA Manufacturing Co. v. Decca Records, Inc.*, S. D. N. Y., 1 F. R. D. 433; *United States v. E. I. Du Pont De Nemours & Co.*, N. D. Ill. [1952 TRADE CASES ¶ 67,348], 13 F. R. D. 98; *United States v. American Locomotive Co.*, D. C. Ind., 6 F. R. D. 35.

The purpose of the deposition-discovery procedure is not only for the ascertainment of facts, but also to determine what the adverse party contends they are, and what purpose they will serve, so that the issues may be narrowed, the trial simplified, and time and expense conserved. It has also been held that inquiry, either by deposition or interrogatory, into facts within the discoverer's own knowledge, and of which he already has information, are proper. *Benevento v. A. & P. Food Stores, Inc.*, E. D. N. Y., 26 F. Supp. 424; *Nakken Patents Corp. v. Rabinowitz*, E. D. N. Y., 1 F. R. D. 90; *Moore's Federal Practice*, 2nd Ed., Sec. 26.21, 33.13.

[*Sole Surviving Officer*]

These are regular corporate books which will probably be collated for trial, and the testimony indicates that they have already been examined. The said William Blank is the sole surviving officer whose testimony can bind the corporation.

[*Voluntary Production*]

Usually this difficulty is not presented during the taking of depositions under Rule 26, for at that time inquiry is made of the existence of documents and they are subsequently sought for inspection under Rule 34 and formal interrogatories concerning them are served under Rule 33. Apparently this was obviated by the voluntary production and inspection of the books.

[*Deposition-Discovery Practice*]

Rule 33 has been amended to state that interrogatories may relate to any matters which can be inquired into under Rule 26 (b). It has been held that interrogatories may be as broad as depositions. *Kingsway Press, Inc. v. Farrell Publishing Corp.*, S. D. N. Y., 30 F. Supp. 775. The converse of this proposition is implicit. There is some rapport between Rules 26, 33 and 34 of the Federal Rules of Civil Procedure, all of which pertain to the deposition-discovery practice. The latter two rules refer to the former. A party demanding copies of documents in answer to specific interrogatories will not be compelled to move anew for discovery under Rule 34 when his original application justified such production. *Alfred Pearson & Co. (Pty.) Ltd. v. Hayes*, S. D. N. Y., 9 F. R. D. 210.

[*Ruling*]

Under the circumstances, the questions concerning the contents of the books are deemed to be in the same category as interrogatories. The plaintiffs are required to examine the books and compile the data required to furnish the information sought. The plaintiffs should be afforded a reasonable opportunity to do this and the length of time allowed therefor should be stipulated or specified in the order to be entered herein. Meanwhile the trial should be deferred.

The defendants' application is granted.

[¶ 68,627] United States Gypsum Company v. National Gypsum Company, et al.

In the Supreme Court of the United States. October Term, 1956. No. 11. Dated February 25, 1957.

On Appeal from the United States District Court for the District of Columbia.

Case No. 548 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Injunctive Decree—Illegality of Patent Licenses—Right To Recover Royalties Under Licenses—Right To Recover for Use of Patents—Right To Recover for Infringement.—A trial court which had found that a company's patent licensing agreements, containing resale price fixing provisions, were illegal and which had entered a decree prohibiting the performance of the agreements by the company and its licensees under such agreements erroneously modified its decree to require the company to dismiss suits which it had brought against its co-defendant licensees to recover compensation for the use of its patents or damages for patent infringement during the period of time that the co-defendant licensees used its patents without paying any royalties. Although the trial court was correct in ruling that the company could not sue its co-defendant licensees to recover royalties payable under the illegal patent licensing agreements, the court erred in ruling that, as a matter of law, the company could not recover compensation or damages for the use of its patents.

The trial court erroneously concluded that recovery on such legal theories was barred because the company had engaged in "fresh" patent misuse, because the "old" misuse adjudicated in the original antitrust proceeding had continued unpurged, and because the "old" misuse itself was sufficient to bar the infringement claim. The company's attempt to recover royalties under the illegal licensing agreements did not constitute a new misuse of the patents, the evidence did not establish that the "old" misuse continued unpurged, and the "old" misuse did not bar the infringement claim.

See Combinations and Conspiracies, Vol. 1, ¶ 2013; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8229.625, 8233.325, 8233.400; Private Enforcement and Procedure, Vol. 2, ¶ 9041.450, 9043.05.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Injunctive Decrees—Modification—Jurisdiction of Trial Court—Dispute Among Defendants.—A trial court which had entered a decree in a Government antitrust action had jurisdiction to entertain a petition by certain of the defendants in the action to modify the decree so as to prohibit another defendant in the action from prosecuting suits to recover from such defendants compensation and damages for the use of its patents. A provision of the decree reserving to the court jurisdiction to make such modifications of the decree as may be appropriate to carry out and enforce the provisions of the decree provided an adequate basis for the exercise of the court's jurisdiction. The question whether the defendant was barred from recovery in such suits by reason of the abuse of its patent rights was sufficiently related to the rationale of the decree to bring it within the reserved jurisdiction provision of the decree. Patent misuse was the essence of the original antitrust litigation, and its continuance or renewal was therefore an issue peculiarly within the province of the court, whose determination would avoid multiple litigation and possibly conflicting decisions on that issue among the courts in which the defendant had brought suit.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.325, 8233.475.

For the appellant: Bruce Bromley, New York, N. Y.; Cranston Spray and Robert C. Keck, Chicago, Ill.; and Hugh Lynch. Jr., Washington, D. C.

For the appellees: Elmer Finck, Buffalo, N. Y.; Samuel I. Rosenman, Seymour D. Lewis, and Malcolm A. Hoffmann, New York, N. Y.; and Seymour Krieger, Washington, D. C.

Reversing and remanding decisions of the U. S. District Court, District of Columbia, 1955 Trade Cases ¶ 68,112, 1954 Trade Cases ¶ 67,813. For prior opinions of the Court, see 1950-1951 Trade Cases ¶ 62,578, 62,853; 1946-1947 Trade Cases ¶ 57,473. For prior opinions of the U. S. Supreme Court, see 1950-1951 Trade Cases ¶ 62,632, 62,729; 1948-1949 Trade Cases ¶ 62,226.

[*Nature of Appeal*]

Mr. Justice Harlan delivered the opinion of the Court [*In full text*]:

United States Gypsum Company appeals from a decree of a three-judge court of the United States District Court for the District of Columbia, entered December 9, 1954. This decree modified a final decree of that court, entered May 15, 1951, against Gypsum, the appellees National Gypsum Company and Certain-teed Products Corporation, and others, in a civil antitrust proceeding instituted by the Government in 1940.[1] The modification was a provision ordering Gypsum to dismiss with prejudice four suits which it had brought in three different federal district courts against National, Certain-teed, and two other co-defendants in the antitrust proceeding, to recover compensation or damages for the *pendente lite* use of certain of its patents during the period February 1, 1948, to May 15, 1951.[2]

[*Antitrust Suit*]

At the outset some mention of the prolonged antitrust proceeding is required to put the present post-decree controversy in context. In that proceeding the Government charged Gypsum, National, Certain-teed, and a number of other corporate and individual defendants with conspiracy to restrain and monopolize interstate commerce in gypsum board and other gypsum products in violation of §§ 1, 2 and 3 of the Sherman Act.[3] The crux of the Government's charges was the alleged illegality of Gypsum's system of industry-wide uniform patent licensing agreements containing clauses giving Gypsum the right to fix prices on gypsum board and products. In 1946, at the close of the Government's case, the District Court dismissed the complaint.[4] On appeal this Court, on March 8, 1948, reversed and remanded the case for further proceedings.[5] Thereafter the District Court, with one dissent,[6] interpreting this Court's decision to mean that Gypsum's multiple uniform price fixing patent licenses were illegal *per se* under the antitrust laws, granted the Government's motion for summary judgment, accepting as true the defendant's proffer of proof. On November 7, 1949, the District Court entered a decree which, among other things, adjudged Gypsum's patent licensing agreements illegal, null and void, enjoined the performance of such agreements, provided for limited compulsory nonexclusive licensing of Gypsum's patents on a reasonable royalty basis, and reserved jurisdiction over the case and parties for certain purposes. On appeals by both the Government and Gypsum, this Court, in 1950, dismissed Gypsum's appeal,[7] affirmed the summary judgment below,[8] and held the Government entitled to broader relief in certain respects, remanding the case for that purpose.[9] Meanwhile, in noting probable jurisdiction on the Government's appeal, this Court enjoined the defendants from carrying out the price fixing provisions of their current license agreements, and from entering into any agreements or engaging in concerted action in restraint of trade.[10] This preliminary injunction, entered May 29, 1950, remained in force until the new final decree of the District Court was entered on May 15, 1951.[11]

[1] Throughout this opinion United States Gypsum Company will be referred to as "Gypsum," National Gypsum Company as "National," and Certain-teed Products Corporation as "Certain-teed."

[2] The suits against National and Certain-teed were brought in the Northern District of Iowa. The other two suits were brought in the District of New Jersey, against Newark Plaster Company, and in the Southern District of New York, against Ebsary Gypsum Company. These latter suits have been settled and are not before us.

[3] 26 Stat. 209 (1890), as amended, 15 U. S. C. §§ 1-3.

[4] 67 F. Supp. 397 [1946-1947 TRADE CASES ¶ 57,473].

[5] 333 U. S. 364 [1948-1949 TRADE CASES ¶ 62,226].

[6] The opinion of the court, and the dissenting opinion of the late Judge Stephens, are not officially reported. They appear at pp. 137-140, 478, of the record on this appeal.

[7] 339 U. S. 959 [1950-1951 TRADE CASES ¶ 62,632].

[8] 339 U. S. 960.

[9] 340 U. S. 76 [1950-1951 TRADE CASES ¶ 62,729].

[10] 339 U. S. 960.

[11] The significance of these various holdings as it bears upon the issues in the present controversy is dealt with later. *Infra*, pp. 10-16.

[*Suits to Recover for Use of Patents*]

After this Court's 1948 reversal of the District Court's original order of dismissal, National, Certain-teed, and Gypsum's other co-defendant licensees ceased paying royalties under their license agreements.[12] Following the May 15, 1951, decree, National and Certain-teed, as authorized by Article VI of that decree, entered into new license agreements, effective May 15, for the future use of Gypsum's patents, such licenses containing no price fixing clauses; the royalty rate was the same as under the old licenses, except that the licensee's returns on unpatented gypsum products did not enter into its measure. The new licenses were without prejudice to Gypsum's claim for compensation for the use of the patents during the period February 1, 1948, to May 15, 1951. The respondents not having paid for that period, Gypsum, in 1953, brought suit against them in the Iowa federal court. The complaints in these suits asserted three separate grounds for recovery: (a) the royalty provisions of the old license agreements (Counts I and II); (b) *quantum meruit* for the reasonable value of the use of the patents (Counts III and IV);[13] and (c) damages for patent infringement (Count V).

[*Modification of Decree*]

Thereafter, National and Certain-teed, claiming that the institution of the Iowa actions violated the 1951 decree, and that in any event Gypsum was barred from recovery by reason of unpurged misuse of the patents involved, petitioned the antitrust court to enjoin further prosecution of the actions.[14] The Government also filed a separate petition to enjoin Gypsum from maintaining any action based on the illegal license agreements, but took no position on Gypsum's right to recover for the period in question on the grounds of *quantum meruit* or patent infringement.[15] Gypsum's answers to these petitions in substance alleged that the District Court was without jurisdiction to grant the relief sought by the petitioners, and put in issue all of the allegations on which the right to relief was predicated.

The District Court decided that it had jurisdiction to grant relief (one judge dissenting), and, after hearing the parties through briefs and oral argument, but without taking any evidence beyond that already of record in the antitrust proceeding, concluded that the 1951 decree should be modified so as to enjoin the prosecution of Gypsum's suits.[16] The court held that prosecution of Counts I and II, which declared upon the illegal license agreements, could not be maintained under the terms of the 1951 decree. Although finding that the other three Counts were not barred by that decree, it further held that the suits should be prohibited in their entirety because of Gypsum's unpurged misuse of its patents.[17] There followed the modifying decree of December 9, 1954,[18] from which this appeal was taken. We noted probable jurisdiction. 350 U. S. 946. For the reasons given hereafter we conclude that, except as it related to the two causes of action based on the illegal license agreements (Counts I and II), this proscriptive modification of the 1951 decree was not justified by the record before the District Court.

[12] In the case of National and Certain-teed the default period began with the February 1, 1948 royalties, due March 20, 1948.

[13] The lower court, regarding Count III as declaring upon a contract implied in law, described that Count as being for "indebitatus assumpsit." The appellant says it was for "quantum meruit." As nothing here turns on the characterization, we shall refer to both Counts III and IV as "the quantum meruit" Counts.

[14] The Iowa court, upon motions by National and Certain-teed, stayed all proceedings in the two actions pending the determination of the antitrust court [count] now under review.

[15] The Government takes the same position in this Court.

[16] 124 F. Supp. 573 [1954 TRADE CASES ¶ 67,813]. Judge Cole dissented on the jurisdictional ground. 124 F. Supp. 598 [1954 TRADE CASES ¶ 67,813]. On December 9, 1954, the District Court denied reconsideration, Record, p. 1136; and on June 30, 1955, it denied Gypsum's motion for a new trial. 134 F. Supp. 69 [1955 TRADE CASES ¶ 68,112].

[17] The court also held that Count III should be barred because it was "but a left-handed, indirect method for recovering such royalties." The court did not elaborate on this, but since it held that this Count was not "expressly or impliedly" covered by the 1951 decree we think this additional ground requires no separate discussion.

[18] The operative part of the decree reads as follows: "Defendant United States Gypsum Company is hereby ordered and directed to discontinue and to dismiss, with prejudice to United States Gypsum Company, its pending actions as follows: against National Gypsum Company, in the United States District Court for the Northern District of Iowa; against Certain-teed Products Corporation, in the same District Court . . . ."

I.

[*Reserved Jurisdiction Clause*]

Preliminary, we conclude that three aspects of the lower court's holding must be upheld. First, we think that Article X of the 1951 decree, reserving to the antitrust court jurisdiction, upon application of "any of the parties" to the decree, to make such "directions" and "modifications" as may be appropriate to the "carrying out" and "enforcement" of the decree, provided a fully adequate basis for the jurisdiction exercised below.[19] *United States v. Swift & Co.* [1932-1939 TRADE CASES ¶ 55-005], 286 U. S. 106, 114; *Missouri-Kansas Pipe Line Co. v. United States* [1940-1943 TRADE CASES ¶ 56,103], 312 U. S. 502. See also *Chrysler Corp. v. United States* [1940-1943 TRADE CASES ¶ 56,214], 316 U. S. 556. Gypsum argues that insofar as the relief granted below was rested upon patent misuse, instead of a construction of the 1951 decree which was the basis of enjoining the prosecution of Counts I and II of Gypsum's suits, the lower court's decision involved a determination of a collateral private controversy between this group of antitrust defendants, rather than a "carrying out" or "enforcement" of the terms of that decree. But we think that whether Gypsum was barred from recovery in these suits by reason of the abuse of its patent rights was a problem sufficiently related to the rationale of the 1951 decree to bring it within the reserved jurisdiction clause. This is especially so because patent misuse was the essence of the old antitrust litigation, and its continuance or renewal were thus issues peculiarly within the province of the antitrust court, whose determination would avoid multiple litigation and possibly conflicting decisions on that issue among the courts in which Gypsum had brought suit.

[*Suits Based on Licenses*]

Likewise we conclude that there is no basis for disturbing the District Court's determinations that prosecution of Counts I and II, based on the old license agreements, was not permissible under the 1951 decree,[20] but that its terms did not reach the *quantum meruit* and infringement Counts.[21]

[*Issue*]

The outcome of this appeal then turns on whether the District Court was right in holding as a matter of law that Gypsum was barred from any kind of recovery for the *pendente lite* use of its patents because of their unpurged misuse. It is now, of course, familiar law that the courts will not aid a patent owner who has misused his patents to recover any of their emoluments accruing during the period of misuse or thereafter until the effects of such misuse have been dissipated, or "purged" as the conventional saying goes. *Morton Salt Co. v. G. S. Suppiger Co.* [1940-1943 TRADE CASES ¶ 56,176], 314 U. S. 488; *B. B. Chemical Co. v. Ellis* [1940-1943 TRADE CASES ¶ 56,177], 314 U. S. 495; *Edward Katzinger Co. v. Chicago Metallic Mfg. Co.* [1946-1947 TRADE CASES ¶ 57,524], 329 U. S. 394; *MacGregor v. Westinghouse Electric & Mfg. Co.* [1946-1947 TRADE CASES ¶ 57,525], 329 U. S. 402; *Mercoid Corp. v. Minneapolis Honeywell Regulator Co.* [1944-1945 TRADE CASES ¶ 57,202], 320 U. S. 680. The rule is an extension of the equitable doctrine of "unclean hands" to the patent field. In terms of this case this means that Gypsum may not recover from these appellees for their use of its patents between February 1, 1948 and May 15, 1951, if Gypsum has been guilty of misuse of the patents since 1948, or if the original misuse found in the antitrust litigation remained unpurged. This issue, of course, involves

[19] Article X reads: "Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this decree, or any other person, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this decree, and (2) for the enforcement of compliance therewith."

[20] Article IV of the 1951 decree had adjudicated as to all defendants that these license agreements were "unlawful under the antitrust laws of the United States and illegal, null and void." Article V enjoined the defendants from "performing" such agreements. *Cf. Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227. It might be well to add that the 1951 decree would similarly prevent the use of these illegal agreements as defenses by co-defendants National and Certain-teed against the *quantum meruit* and infringement Counts of Gypsum's suits.

[21] As appears, *infra*, p. 16, the Government at one time had sought to bar all such claims for recovery on the patents, but later in effect abandoned that request for relief.

essentially a question of fact. And since the record is barren of any facts with respect to the situation existing in the gypsum industry since 1941, we think that the District Court erred in holding purely as a matter of law that an unpurged misuse had been shown.

II.

[*Trial Court Rulings*]

Putting aside the two contract Counts, the enjoining of which we have held was sufficiently supported by the court's finding that they could not be maintained under the terms of the 1951 decree, there are three aspects to the lower court's holding as to the remaining Counts. First, the court held those Counts barred because Gypsum had engaged in "fresh" patent misuse—misuse unrelated to the original antitrust litigation. Secondly, it was held that since the "old" misuse adjudicated in the antitrust proceeding had continued unpurged, recovery must in any case be barred.[22] And finally, the court held that irrespective of purge, the "old" misuse itself was sufficient to bar the patent infringement Count. We discuss each of these holdings in turn.

A.

[*New Patent Misuse*]

The "fresh" misuse found by the lower court was simply the fact of the inclusion of Counts I and II in the 1953 suits. These Counts sought recovery of royalties under the illegal licensing agreements. Such inclusion, the court held, was a renewed attempt to enforce these illegal agreements, and as such should be regarded as a new misuse of the patents which barred recovery under the other Counts as well.[23] We do not agree.

The five Counts in Gypsum's complaints were merely alternative legal theories for reaching a single end, namely, recovery for the *pendente lite* use of Gypsum's patents. Had the complaints declared only upon the *quantum meruit* and infringement Counts the mere bringing of the suits could then hardly have been regarded as fresh misuse, even though recovery might be defeated by showing some independent unpurged misuse of the patents involved. For as the lower court recognized, such recovery by way of *quantum meruit* or damages for infringement was not "expressly or impliedly" touched by the terms of the 1951 decree. Gypsum explains the inclusion of the two contract Counts as precautionary pleading to fend against the possibility that the defendants, if sued only for *quantum meruit* and infringement, might set up the license agreements in defense.[24] Such alternative pleading is expressly sanctioned by the Federal Rules of Civil Procedure, Rule 8, and, even though that defense has turned out to be untenable in light of the lower court's findings, we think that it distorts the doctrine of patent misuse to hold that recourse to this method of pleading here vitiated the other Counts of the complaints.[25]

Moreover, in view of what transpired before the antitrust court in the hearings relating to the settlement of the 1949 decree, we are by no means satisfied that Gypsum was not entitled to a bona fide guess, at least as a matter of alternative pleading, that the decree would not be interpreted as barring the collection of these interim royalties. At those hearings counsel for one of the defendants, Celotex, without remonstrance by either of these respondents, stated:

> "In order that United States Gypsum will have no misunderstanding of my position, I want them to know that my suggestion [that the decree should declare the licenses 'illegal, null and void'] is in no sense based on any hope or desire on my part to get out of any license fees during any interim period, and if we can agree . . . as far as my client is concerned, we are willing to let the royalty rate [of the new compulsory licenses], whatever it is, agreed upon apply back to the time when we ceased paying royalties. I just want to make it clear to all that we are not attempting by this declaration of illegality of them to find some way of avoiding the license fees which during this [litigation] none of us have paid."

Further, both the Government and the other co-defendants at that time seem to

[22] Counts I and II were also held barred on these grounds.

[23] We assume that if the inclusion of Counts I and II constituted a "fresh" patent misuse, the fact that they were not asserted until 1953 would make no difference in their effectiveness to bar recovery for the 1948-1951 period.

[24] National had in fact pleaded that defense in the suit against it. But see n. 20, *supra*.

[25] In view of this conclusion it is unnecessary to deal with the contention that the lower court's holding also violated 35 U. S. C. § 271(d).

have regarded the "illegal, null and void" provisions of the decree as simply the equivalent of "cancellation" of the licenses. In view of the narrow adjudication of violation by this Court, *infra*, p. 12, we cannot say that Gypsum could not have reasonably entertained the belief that the price fixing provisions of the license agreements would ultimately be held separable from the basic undertaking to pay royalties. Indeed, the new licenses, authorized by the decree, which omitted the price fixing clauses, carried the same royalty rate on products made under the patents.

We conclude that in the circumstances present here it was error to regard the inclusion of the contract Counts as constituting a "fresh" patent misuse on Gypsum's part.

B.

[*Unpurged Patent Misuse*]

We come next to the holding that the "old" misuse, found in the antitrust proceeding, continued unpurged through the 1948-1951 period. And here we are met immediately by the fact that the record before the antitrust court is completely bare of any facts relating to this period, or indeed any period after 1941. For the Government's proof in the antitrust case, presented from 1940 to 1944, concerned the gypsum industry prior to and until 1941, and no further evidence has ever been introduced into any of these litigations. We thus know literally nothing about the state of the gypsum industry between 1948, when this Court, on evidence not extending beyond 1941, first held that there had been an antitrust violation, and 1951. How, then, can we assume that this earlier violation, adjudicated for the first time in 1948, continued thereafter?

[*Nature and Extent of Violation*]

The answer to this question depends on the nature and extent of that violation. According to Gypsum, the only illegality ever adjudicated was the fixing of prices on gypsum materials under the industry-wide uniform price fixing clauses of patent licenses which were found to have been the product of concerted action between Gypsum and its co-defendants. In other words, Gypsum, relying on the 1949 decree, which followed this Court's first decision, and its underlying findings,[26] argues that the maintenance of uniform patent licenses with price fixing clauses was the only patent misuse ever found. It then points out that it offered to prove below that price fixing in the industry stopped in 1941, and that the licenses were rescinded in 1948. Add to this the fact that the 1949 decree, and again this Court's 1950 interlocutory decree, enjoined Gypsum from enforcing these licenses, and, says Gypsum, the inference arises that the only patent misuse ever adjudicated had ceased by 1948 —an inference at least sufficient to allow the issue to go to trial on the facts.

According to appellees National and Certainteed, however, the adjudication of misuse in the antitrust proceeding was much broader, encompassing the regimentation of the entire gypsum industry, the restraint of commerce in unpatented gypsum products, the elimination of jobbers, and the standardization of trade practices throughout the industry. This broad view of the character of the antitrust violation rests upon this Court's 1950 decision, which held the 1949 decree too narrow and allowed the Government the broader relief embodied in the 1951 decree.[27] Appellees argue that the fact that this Court felt it necessary to broaden the 1949 decree involved by necessity an adjudication of broad patent misuse, misuse not prohibited by the 1949 decree and therefore left unpurged by it. In other words, the argument runs, the broadening of the decree by this Court necessarily involved a holding that Gypsum was guilty of violations not proscribed by the original decree, violations which existed unpurged during part or all of the 1948-1951 period, since they were first adjudicated by this Court in 1950 and presumptively continued until 1951, when they were finally dealt with by the 1951 decree.

Appellees' argument is ingenious, but incorrect. The course of decisions in the antitrust litigation clearly shows that the only misuse ever *adjudicated* was that arising from the uniform price fixing provisions of the license agreements. In the original

[26] See n. 6, *supra*.

[27] 340 U. S. 76 [1950-1951 TRADE CASES ¶ 62,729]. This relief included the extension of the injunctive provisions to the entire United States (instead of merely the East) and to all gypsum products (instead of only gypsum board), compulsory licensing for an indefinite period (instead of for only 90 days), such licensing to include after-acquired (instead of only existing) patents.

suit the only undisputed issue of fact was that Gypsum had given its competitors uniform patent licenses containing a price fixing clause. The Government also charged Gypsum with a variety of other abuses, including price fixing on unpatented articles, elimination of jobbers, and standardization of trade practices. All of these charges were put in issue by Gypsum. On the appeal from the original dismissal of the proceedings, this Court held that the uniform price fixing licenses constituted a *per se* antitrust violation, and also that the Government's evidence as to the other matters constituted a *prima facie* case of additional violation.[28] On remand, the District Court, instead of going into a factual trial of these other matters, granted summary judgment on the price fixing violation. This left all of the other matters still at issue. They continued to remain at issue after the ensuing appeals to this Court, for in affirming the summary judgment[29] and broadening the 1949 decree,[30] this Court made it clear it was proceeding solely on the basis of the narrow antitrust violation found by the District Court:[31]

> "We agree with a statement made by counsel for the Government in argument below that as a 'matter of formulating the decree' many facts offered to be proven would have effect upon the conclusion of a court as to the decree's terms. However, we read the preliminary statement of the District Court . . . as an adjudication of violation of the Sherman Act by the action in concert of the defendants through the fixed-price licenses, accepting as true the underlying facts in defendants' proof by proffer. The trial judges understood the summary judgment to be, as Judge Stephens said, 'limited to that one undisputed question.' Judge Garrett and Judge Jackson agreed. That conclusion entitled the Government only to relief based on that finding and the proffered facts. On that basis we dismissed United States Gypsum's appeal from the decree, and on that basis we examine the Government's objection to the decree.
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> "[A decree] is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. . . .
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> ". . . We turn them to the Government's proposals for modification of the decree on the assumption that only a violation through concerted industry license agreements has been proven, but recognizing, as is conceded by defendants, that relief, to be effective, must go beyond the narrow limits of the proven violation." 340 U. S., at 87-89, 90.[32]

Thus we see that the only patent misuse that has ever been established in this long-drawn-out litigation is concerted price fixing under the former patent licenses, and that the 1950 holding of this Court was not an adjudication of other violations but only an application of the well known principle that relief in antitrust cases may range beyond the narrow area of proven violations. Nothing, therefore, in the broadening of the decree supports the inference that the acts prohibited therein and left open in the 1949 decree continued in the *pendente lite* period or, in fact, had ever taken place. Perhaps Gypsum did engage in broad regimentation of the industry, as charged in the Government's 1940 complaint, and perhaps such misuse or its effects continued through 1951. But there is nothing in this record to show that any such hypothesis is true, and no part of it has ever been proved. The question is one of fact, and Gypsum is entitled to go to trial on it.

[*Unresolved Factual Question*]

Nor is it enough to sustain the judgment below to say, as appellees do, that the conceded "old" misuse, consisting of industry-wide price fixing through uniform patent licenses, should be presumed to have continued unpurged into the 1948-1951 period. The record shows, without dispute so far, that for seven years before the beginning of the 1948-1951 period Gypsum had not engaged in price fixing, and that for two of

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[28] 333 U. S. 364 [1948-1949 TRADE CASES ¶ 62,226].

[29] 339 U. S. 960.

[30] 340 U. S. 76 [1950-1951 TRADE CASES ¶ 62,729].

[31] As we have seen, *supra*, pp. 2-3, the Court dismissed Gypsum's appeal from the 1949 decree. 339 U. S. 959 [1950-1951 TRADE CASES ¶ 62,632].

[32] That this Court's expansion of the 1949 decree did not involve a corresponding holding of broader violation is illustrated by what was done with respect to the geographical area covered by the decree. The Government's complaint charged Gypsum with violation only in the *eastern* part of the United States. There was never any claim, much less proof, that Gypsum engaged in any improper activities in the *West*. Yet the Court granted the Government's prayer that the 1949 decree be broadened to cover the whole United States. This was done not because it was alleged or proved that Gypsum had done anything illegal in the West, but simply on the theory that effective relief required that the decree be broader than the "proven violation."

those three years price fixing had been under injunction. These factors raised a sufficient inference of purge prior to the critical period to entitle Gypsum to go to trial on the point and to prevent the court from granting what in effect was summary judgment. *Cf. United States v. Oregon State Medical Society* [1952 TRADE CASES ¶ 67,264], 343 U. S. 326. Nor do we think this conclusion is overcome by the lower court's findings that the "five acts" of purge offered by Gypsum were not sufficient to establish purge. We express no opinion upon the merits of these findings, for their sufficiency can hardly be judged in isolation from the facts as to competitive conditions in the gypsum industry during the 1941-1951 period, on which the record is silent. And other alleged antitrust violations are not now available to appellees as acts of misuse, for as to them Gypsum has not yet had its day in court.

We conclude, therefore, that the judgment below cannot be supported on the basis of the claimed unpurged "old" misuse.

C.

[*"Old" Misuse—Infringement Count*]

We pass lastly to the lower court's holding that the "old" misuse, without regard to purge, barred the infringement Count of Gypsum's suits. In effect this holding was that, because "of the practical and legal situation," proscription of this Count should be added by relation back, as it were, to the relief already accorded by the 1951 decree. Admittedly such relief was neither obtained nor sought by the Government in either the 1949 or 1951 decree proceedings. To be sure one of the prayers for relief in the Government's antitrust complaint in 1940 had been that the defendants should be enjoined from bringing any action for infringement of any of the patents involved or from attempting to collect in any way royalties or fees for their use until all misuse had been abandoned and its consequences dissipated. In the subsequent 1949 and 1951 decree and appellate proceedings, however, this item of proposed relief was never adverted to, much less pressed upon the courts. And even in the 1953-1954 modification proceedings, and now, the Government does not contend that Gypsum is precluded from maintaining the infringement Count. The conclusion seems inescapable that the Government's original request for such relief was in effect withdrawn. In this state of affairs we think this relief should not have been added to the decree in 1954, in the absence of proof of intervening circumstances indicating its need in the public interest. *Cf. Hughes v. United States* [1952 TRADE CASES ¶ 67,213], 342 U. S. 353. There was no such proof, and without it the proscription of the infringement Count amounted to the imposition of an unwarranted penalty on Gypsum.

[*Hartford Empire Cases*]

Nor do we think that anything in the *Hartford-Empire* cases, 323 U. S. 386, 324 U. S. 570 [1944-1945 TRADE CASES ¶ 57,319], to which the lower court attached much weight, justifies what was done here. The basic difference between *Hartford* and this case is that in *Hartford* the injunction against infringement suits on Hartford's misused patents was part of the *original* relief granted the Government, whereas here that relief was added, without the taking of any evidence as to justifying intervening circumstances, some five years after the original decree was entered in the District Court, and three years after its enlargement pursuant to the 1950 decision of this Court,[33] which made no mention of this type of relief.

Moreover, the factors justifying such relief in *Hartford* were quite different from those involved here, in that the litigated findings of fact as to Hartford's violation of the antitrust laws were much broader than anything found here. See *supra*, p. 12. Beyond this, in *Hartford* only infringement suits against nondefendants were enjoined, and not, as here, suits against co-defendants; and despite the breadth of Hartford's violations, this Court held that Hartford was entitled to *quantum meruit* compensation for the *pendente lite* use of its patents unless *further* violations of the antitrust laws during that period were shown. No such violations on Gypsum's part were shown or claimed by the Government or appellees, except for the inclusion of the contract Counts in Gypsum's suits, a contention which has already been met. And although the Court in *Hartford* struck down royalty-free compulsory licensing as part of the

[33] 340 U. S. 76 [1950-1951 TRADE CASES ¶ 62,729].

relief, the District Court here in effect held these appellees entitled to three years' free use of Gypsum's patents. We thus find no parallel between this case and *Hartford.*[34]

[*Summary of Rulings*]

Our conclusions then are these: The enjoining of Counts I and II of Gypsum's Iowa suits was proper, and upon remand the District Court may, by appropriate modification of the decree of May 15, 1951, or otherwise, require Gypsum to discontinue and dismiss such Counts with prejudice. The enjoining of Counts III, IV and V of those suits was not justified upon this record, and as to them the case should be remanded to the District Court for the taking of evidence upon the issues of misuse and purge as they may relate to the period since February 1, 1948. We think it appropriate that these issues should be tried and disposed of by the antitrust court rather than the Iowa court, both because of reasons already given, *supra,* pp. 5-6, and because of the antitrust court's familiarity with what has occurred in these protracted litigations.[35] However, should the antitrust court conclude that Gypsum is not barred from recovery on Counts III, IV or V by reason of unpurged patent misuse, we think that the trial and disposition of all other issues, including any defense of patent invalidity, should then take place in the District Courts in which the two suits are pending. There is no reason why the three-judge court should be burdened with such issues.

[*Reversed and Remanded*]

Accordingly, we reverse the judgment below and remand the case to the District Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. JUSTICE CLARK took no part in the consideration or decision of this case.

[Dissenting Opinion]

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

I would affirm the judgment of the United States District Court.

[*Scope of Dissent*]

For many years appellees used patents belonging to the appellant, United States Gypsum Company, under certain license agreements. On March 8, 1948, this Court decided that on the record before it these license agreements constituted a conspiracy between Gypsum and its licensees to violate the Sherman Act. 333 U. S. 364 [1948-1949 TRADE CASES ¶ 62,226]. Appellees then ceased paying royalties under their license agreement until May 15, 1951, on which date the United States District Court rendered a final decree holding the license agreements null and void. On this latter date new patent licenses were obtained from Gypsum which did not contain the illegal provisions and were not part of a conspiracy to violate the Sherman Act. This is a suit to make appellees pay for the use of Gypsum's patents during the period of February 1, 1948, to May 1951. Gypsum seeks payment in five separate counts. Counts one and two assert claims under the old outlawed license agreements. I agree with the Court's holding that Gypsum cannot recover on these counts. I also agree that the patent misuse rule which bars recovery "is an extension of the equitable doctrine of 'unclean hands' to the patent field." I disagree with the Court's holding that Gypsum is not barred from attempting to recover for the use of its patents during the period on the other three counts of "quantum meruit," "indebitatus assumpsit," and "infringement."

[*Misuse Doctrine Weakened*]

In declining to permit Gypsum to recover under the license agreements the Court

[34] National makes a further contention as to the *quantum meruit* Counts. It argues that these Counts in any event were properly proscribed because they related to an illegal transaction. But the rule on which National relies applies only where the *quantum meruit* claim declares upon an implied agreement which, had it been reduced to an express contract, would itself have been illegal; that is, a contract where the kind of consideration moving between the parties is wholly against public policy, as, for example, a contract to commit murder. The implied contract here was not of that character, for certainly an express contract simply for reasonable compensation for the use of Gypsum's patents would not have been illegal.

[35] We recognize that the composition of the three-judge court has completely changed since the main antitrust case was tried. Even so, the present court has acquired an intimate knowledge of the record.

here necessarily does so on the ground that the licenses were a part of an unlawful conspiracy to violate the Sherman Act. That conspiracy existed as long as the illegal agreements remained in existence.[1] And the agreements could and did continue to exist whether or not their inseparable parts,[2] such as the price-fixing provisions, were enforced from time to time. Any attempt to enforce directly or indirectly any part of the illegal agreements shows that the agreements and the conspiracy were still in existence. The present holding clearly indicates their continuing existence during this period in question. The majority appears to recognize the coexistence of the license agreements and the conspiracy when it bars a recovery for the use of the patents so long as the suits are for "royalties" under the contracts. But under the Court's holding persons who misuse their patents hereafter, and who could not, under our prior cases, recover compensation for patent use because of their illegal agreements, may now, in some instances, be able to recover full compensation by labeling their causes of action "indebitatus assumpsit" or "quantum meruit." To permit a Sherman Act conspirator to recover for patent use under any label from a co-conspirator where the licensing agreement for that patent was held void as an integral part of the conspiracy runs counter to the doctrine of "unclean hands." That doctrine rests basically on the idea that the law leaves wrong-doers where it finds them. The Court does not do so here. Appellant and appellees have been found guilty of an unlawful conspiracy to violate the Sherman Act. Gypsum's patents were an essential part of that conspiracy. But by giving its lawsuits appropriate labels it has obtained an opportunity to seek compensation for the use of tools it supplied to violate the law. I agree with the District Court that to allow recovery on these differently labeled counts "is but a left-handed, indirect method for recovering the royalties provided in the illegal license agreements." As I see it this permits "a licensor to be protected on an illegal contract merely because he chose one remedy rather than another on the same substantive issue." *Edward Katzinger Co. v. Chicago Metallic Mfg. Co.* [1946-1947 TRADE CASES ¶ 57,524], 329 U. S. 394, 399-400. I think the Court's holding seriously weakens the patent misuse doctrine and thereby makes enforcement of the Sherman Act far more difficult.[3]

[¶ 68,628] William Radovich v. National Football League, Bert Bell, J. Rufus Klawans, et al.

In the Supreme Court of the United States. October Term, 1956. No. 94. Dated February 25, 1957.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Sherman Antitrust Act

Combinations and Conspiracies—Construction of Sherman Act—Interstate Commerce—Applicability of Sherman Act to Professional Football.—The business of professional football, as conducted by a football league and its member clubs on a multistate basis, including the interstate transmission of games over radio and television, is subject to the provisions of the Sherman Act. A professional football player's complaint alleging that he was denied employment in organized professional football by an illegal conspiracy between a football league and its member clubs to monopolize commerce in professional football was held to state a cause of action within coverage of the antitrust laws. The *Federal Baseball Club* and *Toolson* cases, in which professional baseball was held to be

[1] "It is the 'contract, combination . . . or conspiracy in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other." *United States v. Socony-Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,031], 310 U. S. 150, 225, n. 59.

[2] *MacGregor v. Westinghouse Electric & Mfg. Co.* [1946-1947 TRADE CASES ¶ 57,525], 329 U. S. 402, 407.

[3] Some of the cases in which courts have utilized the doctrine to break up illegal combinations and practices are *Morton Salt Co. v. G. S. Suppiger Co.* [1940-1943 TRADE CASES ¶ 56,176], 314 U. S. 488; *B. B. Chemical Co. v. Ellis* [1940-1943 TRADE CASES ¶ 56,177], 314 U. S. 495; *United States v. National Lead Co.* [1946-1947 TRADE CASES ¶ 57,575], 332 U. S. 319; *Hartford-Empire Co. v. United States* [1944-1945 TRADE CASES ¶ 57,319], 324 U. S. 570.

immune from the application of the Sherman Act, are not controlling as to professional football since those decisions are specifically limited to the business of professional baseball. The orderly way to eliminate any error in, or discrimination caused by, the baseball decisions is by legislation and not by court decision.

See Combinations and Conspiracies, Vol. 1, ¶ 2035.153.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments To State Cause of Action—Interstate Commerce.—A professional football player's complaint alleging that he was denied employment in the business of professional football by a conspiracy between a football league and its member clubs was held to state a cause of action under the Sherman Act. The allegations concerning interstate commerce were held to be sufficient. In addition to the standard allegations, the complaint specifically alleged that radio and television transmission is a significant and integral part of the defendants' business, even to the extent of being the difference between a profit and a loss. Proof that the amount of commerce affected was substantial can be established at the trial.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.600.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments To State Cause of Action—General Requirements—Injury to Public.—A professional football player's complaint alleging that he was denied employment in the business of professional football by a conspiracy between a football league and its member clubs was held to state a cause of action under the Sherman Act. While the complaint might have been more precise in its allegations concerning the purpose and effect of the conspiracy, the court ruled that it was not prepared to say that nothing can be extracted from the complaint that falls under the Sherman Act. The player's claim need only be tested under the Sherman Act's general prohibition against unreasonable restraints of trade and meet the requirement that he has thereby suffered injury. Congress has determined that such prohibited activities are injurious to the public and provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. The antitrust laws protect the victims of the forbidden practices as well as the public. The court will not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.170, 9009.475.

For the petitioner: Maxwell Keith and Joseph L. Alioto, San Francisco, Cal., and Elwood S. Kendrick, Los Angeles, Cal.

For the respondents: Marshall E. Leahy and John F. O'Dea, San Francisco, Cal., and Bernard I. Nordlinger, Washington, D. C.

Reversing a decision of the U. S. Court of Appeals, Ninth Circuit, 1956 Trade Cases ¶ 68,303.

[*Summary of Case and Rulings*]

MR. JUSTICE CLARK delivered the opinion of the Court [*In full text*].

This action for treble damages and injunctive relief, brought under § 4 of the Clayton Act,[1] tests the application of the antitrust laws to the business of professional football. Petitioner Radovich, an all-pro guard formerly with the Detroit Lions, contends that the respondents[2] entered into a conspiracy to monopolize and control or-

[1] 38 Stat. 731, 15 U. S. C. § 15, reads as follows:

"Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Injunctive relief is provided for by 38 Stat. 737, 15 U. S. C. § 26.

[2] The respondents include the National Football League; its 10 member clubs at the time the complaint was filed: Boston Yanks, New York Giants, Philadelphia Eagles, Los Angeles Rams, Pittsburgh Steelers, Washington Redskins, Chicago Bears, Chicago Cardinals, Detroit Lions, and Green Bay Packers; the now defunct Pacific Coast League; the San Francisco Clippers, a member of the Pacific Coast League; Bert Bell, Commissioner of the National Football League; and J. Rufus Klawans, Commissioner of the Pacific Coast League.

ganized professional football in the United States, in violation of §§ 1 and 2 of the Sherman Act;[3] that part of the conspiracy was to destroy the All-America Conference, a competitive professional football league in which Radovich once played; and that pursuant to agreement, respondents boycotted Radovich and prevented him from becoming a player-coach in the Pacific Coast League. Petitioner alleges that respondents' illegal conduct damaged him in the sum of $35,000, to be trebled as provided by the Act. The trial court, on respondents' motion, dismissed the cause for lack of jurisdiction and failure to state a claim on which relief could be granted. The Court of Appeals affirmed [1956 TRADE CASES ¶ 68,303], 231 F. 2d 620, on the basis of *Federal Baseball Club v. National League*, 259 U. S. 200 (1922), and *Toolson v. New York Yankees, Inc.* [1953 TRADE CASES ¶ 67,602], 346 U. S. 356 (1953), applying the baseball rule to all "team sports." It further found that even if such application was erroneous and that *United States v. International Boxing Club* [1955 TRADE CASES ¶ 67,941], 348 U. S. 236 (1955), applied, Radovich had not grounded his claim on conduct of respondents which was "calculated to prejudice the public or unreasonably restrain interstate commerce." 231 F. 2d, at 623. We granted certiorari, 352 U. S. 818, in order to clarify the application of the *Toolson* doctrine and determine whether the business of football comes within the scope of the Sherman Act. For the reasons hereafter stated we conclude that *Toolson* and *Federal Baseball* do not control; that the respondents' activities as alleged are within the coverage of the antitrust laws; and that the complaint states a cause of action thereunder.

I.

[*Complaint*]

Since the complaint was dismissed its allegations must be taken by us as true. It is, therefore, important for us to consider what Radovich alleged. Concisely the complaint states that:

1. Radovich began his professional football career in 1938 when he signed with the Detroit Lions, a National League club. After four seasons of play he entered the Navy, returning to the Lions for the 1945 season. In 1946 he asked for a transfer to a National League club in Los Angeles because of the illness of his father. The Lions refused the transfer and Radovich broke his player contract by signing with and playing the 1946 and 1947 seasons for the Los Angeles Dons, a member of the All-America Conference.[4] In 1948 the San Francisco Clippers, a member of the Pacific Coast League which was affiliated with but not a competitor of the National League, offered to employ Radovich as a player-coach. However, the National League advised that Radovich was black-listed and any affiliated club signing him would suffer severe penalties. The Clippers then refused to sign him in any position. This black-listing effectively prevented his employment in organized professional football in the United States.

2. The black-listing was the result of a conspiracy among the respondents to monopolize commerce in professional football among the States. The purpose of the conspiracy was to "control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States" in violation of §§ 1 and 2 of the Sherman Act. It was part of the conspiracy to boycott the All-America Conference and its players with a view to its destruction and thus strengthen the monopolistic position of the National Football League.

3. As part of its football business, the respondent league and its member teams schedule football games in various metropolitan centers, including New York, Chicago, Philadelphia, and Los Angeles. Each team uses a standard player contract which prohibits a player from signing with another club without the consent of the club holding the player's contract. These contracts are enforced by agreement of the clubs to black-list any player violating them and to

[3] 26 Stat. 209, 15 U. S. C. § 1, reads in pertinent part:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal. . . ."

26 Stat. 209, 15 U. S. C. § 2, reads in pertinent part:

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor. . . ."

[4] This Conference operated from 1946 through 1949 at which time it was disbanded.

visit severe penalties on recalcitrant member clubs. As a further "part of the business of professional football itself" and "directly tied in and connected" with its football exhibitions is the transmission of the games over radio and television into nearly every State of the Union. This is accomplished by contracts which produce a "significant portion of the gross receipts" and without which "the business of operating a professional football club would not be profitable." The playing of the exhibitions themselves "is essential to the interstate transmission by broadcasting and television" and the actions of the respondents against Radovich were necessarily related to these interstate activities.

In the light of these allegations respondents raise two issues: They say the business of organized professional football was not intended by Congress to be included within the scope of the antitrust laws; and, if wrong in this contention, that the complaint does not state a cause of action upon which relief can be granted.

II.

[*Application of Antitrust to Football*]

Respondents' contention, boiled down, is that agreements similar to those complained of here, which have for many years been used in organized baseball, have been held by this Court to be outside the scope of the antitrust laws.[5] They point to *Federal Baseball* and *Toolson, supra,* both involving the business of professional baseball, asserting that professional football has embraced the same techniques which existed in baseball at the time of the former decision.[6] They contend that *stare decisis* compels the same result here. True, the umbrella under which respondents hope to stand is not so large as that contended for in *United States v. International Boxing Club, supra,* nor in *United States v. Shubert* [1955 Trade Cases ¶ 67,942], 348 U. S. 222 (1955). There we were asked to extend *Federal Baseball* to boxing and the theater. Here respondents say that the contracts and sanctions which baseball and football find it necessary to impose have no counterpart in other businesses and that, therefore, they alone are outside the ambit of the Sherman Act. In *Toolson* we continued to hold the umbrella over baseball that was placed there some 31 years earlier by *Federal Baseball.* The Court did this because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity. Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to make no change.[7] All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years.

[*Baseball Decisions Limited*]

The Court was careful to restrict *Toolson's* coverage to baseball, following the judgment of *Federal Baseball* only so far as it "determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." 346 U. S., at 357. The Court reiterated this in *United States v. Shubert, supra,* at 230, where is said, "In short, *Toolson* was a narrow application of the rule of *stare decisis.*" And again, in *International Boxing Club,* it added, "*Toolson* neither overruled *Federal Baseball* nor necessarily reaffirmed all that was said in *Federal Baseball. . . . Toolson* is not authority for exempting other businesses merely because of the circumstance that they are also based on the performance of local exhibitions." 348 U. S., at 242. Furthermore, in discussing the impact of the *Federal Baseball* decision, the Court made the observation that that decision "could not be relied upon as a basis of exemption for other segments of the entertainment business, athletic or otherwise. . . . The controlling consideration in *Federal Baseball* . . . was . . . the degree of interstate activity involved in the particular business under review." *Id.,* at 242-243. It seems

[5] No contention is made that the business of professional football has any specific exemption from the antitrust laws.

[6] Since this action was dismissed on the pleadings, there has been no factual determination establishing the claimed similarity between the businesses of baseball and football.

[7] Congress did consider the extension of the baseball rule to other sports. In 1951 four separate bills were introduced to exempt organized professional sports from the antitrust laws. None of them were enacted. See H. R. 4229, 4230, 4231, and S. 1526, 82d Cong., 1st Sess. (1951).

that this language would have made it clear that the Court intended to isolate these cases by limiting them to baseball, but since *Toolson* and *Federal Baseball* are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, *i. e.*, the business of organized professional baseball. As long as the Congress continues to acquiesce we should adhere to—but not extend—the interpretation of the Act made in those cases. We did not extend them to boxing or the theater because we believed that the volume of interstate business in each—the rationale of *Federal Baseball*—was such that both activities were within the Act. Likewise, the volume of interstate business involved in organized professional football places it within the provisions of the Act.

[*Legislative Repudiation*]

If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses,[8] that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication. We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action. Of course, the doctrine of *Toolson* and *Federal Baseball* must yield to any congressional action and continues only at its sufferance. This is not a new approach. See *Davis v. Department of Labor*, 317 U. S. 249, 255 (1942);[9] compare *Rutkin v. United States*, 343 U. S. 130 (1952).

III.

[*Interstate Commerce*]

We now turn to the sufficiency of the complaint. At the outset the allegations of the nature and extent of interstate commerce seem to be sufficient. In addition to the standard allegations, a specific claim is made that radio and television transmission is a significant, integral part of the respondents' business, even to the extent of being the difference between a profit and a loss. Unlike *International Boxing*, the complaint alleges no definite percentage in this regard. However, the amount must be substantial and can easily be brought out in the proof. If substantial, as alleged, it alone is sufficient to meet the commerce requirements of the Act. See *International Boxing, supra*, at 241.

[*Technical Objections*]

Likewise, we find the technical objections to the pleading without merit. The test as to sufficiency laid down by Mr. Justice Holmes in *Hart v. B. F. Keith Vaudeville Exchange*, 262 U. S. 271, 274 (1923), is whether "the claim is wholly frivolous." While the complaint might have been more precise in its allegations concerning the purpose and effect of the conspiracy, "we are not prepared to say that nothing can be extracted from this bill that falls under the act of Congress . . . ." *Id.*, at 274. See also *United States v. Employing Plasters Assn.* [1954 Trade Cases ¶ 67,692], 347 U. S. 186 (1954).

Petitioner's claim need only be "tested under the Sherman Act's general prohibition on unreasonable restraints of trade," *Times-Picayune Publishing Co. v. United States* [1953 Trade Cases ¶ 67,494], 345 U. S. 594, 614 (1953), and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public[10] and has provided sanctions allowing private enforcement of the antitrust

[8] Consideration of basic differences, if any, between the baseball and football businesses, such as the football draft system, use of league affiliations, training facilities and techniques, etc., is not necessary to this decision.

[9] The concurring opinion uses this language: "Such a desirable end cannot now be achieved merely by judicial repudiation of the *Jensen* doctrine." 317 U. S., at 259.

[10] In *Apex Hosiery Co. v. Leader* [1940-1943 TRADE CASES ¶ 56,039], 310 U. S. 469 (1940), this Court said: "The end sought was the prevention of restraints to free competition in business and commercial transactions which tended

laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* [1948-1949 TRADE CASES ¶ 62,251], 334 U. S. 219, 236 (1948). Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of § 5 of the Clayton Act.[11] *Emich Motors Corp. v. General Motors Corp.* [1950-1951 TRADE CASES ¶ 62,778], 340 U. S. 558 (1951). In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.

Respondents' remaining contentions we believe to be lacking in merit.

[*Reversed*]

We think that Radovich is entitled to an opportunity to prove his charges. Of course, we express no opinion as to whether or not respondents have, in fact, violated the antitrust laws, leaving that determination to the trial court after all the facts are in.

Reversed.

[Dissenting Opinions]

MR. JUSTICE FRANKFURTER, dissenting.

The difficult problem in this case derives for me not out of the Sherman Law but in relation to the appropriate compulsion of *stare decisis.* It does not derive from the Sherman Law because the most conscientious probing of the text and the interstices of the Sherman Law fails to disclose that Congress, whose will we are enforcing, excluded baseball—the conditions under which that sport is carried on—from the scope of the Sherman Law but included football. I say this, fully aware that the Sherman Law's applicability turns on the particular circumstances of activities pursued in trade and commerce among the several States. But whether the conduct of an enterprise is within or without the limits of the Sherman Law is, after all, a question for judicial determination, and conscious as I am of my limited competence in matters athletic, I have yet to hear of any consideration that led this Court to hold that "the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws," *Toolson v. New York Yankees* [1953 TRADE CASES ¶ 67,602], 346 U. S. 356, 357, that is not equally applicable to football.

But considerations pertaining to *stare decisis* do raise a serious question for me. That principle is a vital ingredient of law, for it "embodies an important social policy." *Helvering v. Hallock,* 309 U. S. 106, 119. It would disregard the principle for a judge stubbornly to persist in his views on a particular issue after the contrary had become part of the tissue of the law. Until then, full respect for *stare decisis* does not require a judge to forego his own convictions promptly after his brethren have rejected them.

The considerations that governed me two years ago in *United States v. International Boxing Club* [1955 TRADE CASES ¶ 67,941], 348 U. S. 236, have not lost their force by reason of the authority that time gives to a single decision. And so I am confronted with the *Toolson* case, *supra,* which guides me to find the present situation within its scope, and the *Boxing* case, *supra,* which, while it looks the other way, left *Toolson* as a living authority. Respect for the doctrine of *stare decisis* does not yet require me to disrespect the views I expressed in the *Boxing* case.

I would affirm.

MR. JUSTICE HARLAN, with whom MR. JUSTICE BRENNAN joins, dissenting.

What was foreshadowed by *United States v. International Boxing Club* [1955 TRADE CASES ¶ 67,941], 348 U. S. 236, has now come to pass. The Court, in holding that professional football is subject to the antitrust laws, now says in effect that profes-

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to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, *all of which had come to be regarded as a special form of public injury.*" (Emphasis supplied.) *Id.,* at 493. In *Standard Sanitary Mfg. Co. v. United States,* 226 U. S. 20 (1912), speaking of the antitrust laws, the Court said: "*The law is its own measure of right and wrong,* of what it permits, or forbids, and *the judgment of the courts cannot be set up against it* in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results." (Emphasis supplied.) *Id.,* at 49.

[11] 38 Stat. 731, 15 U. S. C. § 16, declares that a final judgment against a defendant in proceedings by the Government for violation of the antitrust laws may be introduced by a private litigant in a subsequent treble damage action and establishes *prima facie* a violation of the antitrust laws.

sional baseball is *sui generis* so far as those laws are concerned, and that therefore *Federal Baseball Club v. National League,* 259 U. S. 200, and *Toolson v. New York Yankees, Inc.* [1953 TRADE CASES ¶ 67,602], 346 U. S. 356, do not control football by reason of *stare decisis.* Since I am unable to distinguish football from baseball under the rationale of *Federal Baseball* and *Toolson,* and can find no basis for attributing to Congress a purpose to put baseball in a class by itself, I would adhere to the rule of *stare decisis* and affirm the judgment below.

If the situation resulting from the baseball decisions is to be changed, I think it far better to leave it to be dealt with by Congress than for this Court to becloud the situation further, either by making untenable distinctions between baseball and other professional sports, or by discriminatory fiat in favor of baseball.

[¶ 68,629] **Federal Trade Commission v. National Lead Company, et al.**

In the Supreme Court of the United States. October Term, 1956. No. 63. Dated February 25, 1957.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Federal Trade Commission Act

Unfair Practices—Conspiracy to Fix Prices—Zone Delivered Pricing System—Validity of Federal Trade Commission Order Prohibiting Individual Use of System.—Where the Federal Trade Commission found that manufacturers of lead pigments had conspired to adopt and use a zone delivered pricing system in their sale of lead pigments in violation of the Federal Trade Commission Act, the Commission had the power to prohibit the manufacturers from individually adopting the same or a similar system of pricing for the purpose or with the effect of "matching" the prices of competitors.

Under the Federal Trade Commission Act, the Commission is empowered to prevent the use of unfair methods of competition. Also, the Commission is clothed with wide discretion in determining the type of order that is necessary to terminate unfair practices. In the instant case, the remedy selected by the Commission had a reasonable relation to the unlawful practices found to exist. The simplicity of operation of the pricing system lends itself to unlawful manipulation; the system had been used in the industry for almost a quarter of a century; and the originator and chief beneficiary of the system had been previously adjudged a violator of the antitrust laws. The Commission correctly determined that it was necessary to include some restraint in its order against the individual use of the system by the manufacturers in order to prevent a continuance of the unfair competitive practices found to exist. Under the circumstances in the case, it would not have been sufficient merely to prohibit the manufacturers from conspiring to adopt the system.

The order did not prohibit independent delivered zone pricing *per se,* and it did not prohibit the practice of the absorption of actual freight in order to foster competition. Section 2(b) of the Clayton Act, as amended, which permits a seller in good faith to meet the lower price of a competitor, is read into every Commission order. Furthermore, the order was temporary since the Commission expressed its intention to eliminate the individual prohibition when competition in the industry is restored, and delivered zone pricing violates the order only when (1) there are identical prices with competitors (2) resulting from zone delivered pricing.

See Unfair Practices, Vol. 2, ¶ 5035.56; FTC Enforcement and Procedure, Vol. 2, ¶ 8621.

For the petitioner: J. Lee Rankin, Solicitor General; Victor R. Hansen and Charles H. Weston, Department of Justice; Earl W. Kintner, General Counsel, Federal Trade Commission; and Robert B. Dawkins, Assistant General Counsel, Federal Trade Commission.

For the respondents: Eugene Z. Du Bose, New York, N. Y., for National Lead Co.; Thomas J. McDowell, Cleveland, Ohio, for Sherwin-Williams Co.; Nathan S. Blumberg,

Chicago, Ill., for Eagle-Picher Co.; and James D. Ewing, John B. Henrich, Jr., Richard Serviss, Robert A. Sturges, John T. Van Keuls, and J. Kenneth Campbell, of counsel.

Reversing a decision of the U. S. Court of Appeals, Seventh Circuit, 1955 Trade Cases ¶ 68,211, in FTC Dkt. 5253.

[*Issue*]

MR. JUSTICE CLARK delivered the opinion of the Court [*In full text*].

The sole question involved in this proceeding under § 5 of the Federal Trade Commission Act[1] concerns the power of the Commission in framing an order pursuant to its finding that respondents had conspired to adopt and use a zone delivered pricing system in their sale of lead pigments.[2] In its general cease and desist order prohibiting concert of action among respondents in the further use of such system, the Commission inserted a provision directing each respondent individually to cease and desist from adopting the same or a similar system of pricing for the purpose or with the effect of "matching" the prices of competitors. The respondents assert that this is beyond the power of the Commission, and the Court of Appeals agreed, [1955 TRADE CASES ¶ 68,211] 227 F. 2d 825, striking that provision from the Commission's order. We granted certiorari, 351 U. S. 961, because of the importance of the question in the administration of the Act. We restore the stricken provision of the Commission order, permitting it to stand with the interpretations placed upon it in this opinion.

I.

[*FTC Findings*]

The original proceeding under § 5 of the Act was commenced in 1944. The order was entered on a second amended complaint filed in 1946. After protracted hearings, the Commission entered its findings which the Court of Appeals has held to be supported by substantial evidence. The findings material here are as follows:

The pricing practice of the industry as to the sale of white lead in oil prior to 1933 is not shown in the record. However, National Lead had as early as 1910 sold this pigment on the basis of territorial differentials involving free freight to specified towns. The differentials added to the base price were generally uniform for some 589 cities listed in National Lead's pricing system in 1933. The charge to purchasers outside the listed cities was the base price plus actual freight to the nearest listed city. In the sales of dry white lead and lead oxides it appears that by the sales practice prior to 1933 there was a uniform delivered price in the case of the white lead, while the purchasers of lead oxides paid the freight charge in addition to the base price.

Beginning in July 1933, the industry held a series of meetings in Chicago for the ostensible purpose of drafting a code of fair competition to govern it under the National Industrial Recovery Act. These meetings resulted in an understanding and agreement among those attending, including respondents, to sell lead pigments "on the basis of flat delivered prices to customers within designated zones, with uniform differentials applicable as between such zones . . . .". 49 F. T. C. 840. Four zoning systems were established covering the various lead pigments. As an example, the system for white lead in oil and "keg" products consisted of 12 geographical zones, one known as a par zone. The remaining zones in this system were known as premium zones, the price in each being determined by adding a set premium to the par zone price. These premiums varied from $.125 per cwt. in two of the zones to a high of $1 per cwt. in the premium zone covering the State of New Mexico.[3] The zones were highly artificial and zone boundaries led to bizarre results

[1] 38 Stat. 719, as amended, 15 U. S. C. § 45.

[2] The three principal lead pigments are dry white lead, white lead in oil, and the lead oxides, red lead and litharge. Dry white lead is a fine white powder used as a pigment in paints. White lead in oil is white lead with linseed oil added and is sold for use as the basic ingredient in exterior house paint. Lead oxides and litharge are sold to electric storage battery manufacturers as the basic raw material for battery plates. Red lead is also the basic ingredient in red lead paint commonly used as a protective coating for iron and steel structures.

[3] The par zone includes a number of northeastern and midwestern States. However, some cities located within these States are excluded from the par zone. On the other hand, the San Francisco area is a par zone, as is the City of St. Louis, though both are located in States not included in par zone areas. For a detailed discussion and maps of the operation of the zone pricing system, see the findings, 49 F. T. C. 840-870.

at times, with purchasers located near the plants of respondents being charged higher prices than those located at a distance from the plants. The industry, including respondents, not only agreed to sell at the same zone delivered prices in identical geographical zones but also adopted uniform discounts, terms of sale, and differentials with respect to certain of their products. A further agreement was to sell white lead in oil on the basis of consignment contracts.

The Commission stated that "nowhere in the code, nor in any preliminary draft of a code produced at the meetings of any of the committees, is there any reference to the use of zones or to territorial differences in the prices of lead pigments, or to the use of agency or consignment contracts or arrangements in the sale of white lead-in-oil." *Id.*, at 839. The Commission added that "with certain exceptions, the respondents have followed the pricing practices and have adhered to the terms and conditions for the sale of lead pigments agreed upon in 1933 and 1934 as herein found from 1934 to the present time." *Id.*, at 849. The respondents admit that they are bound by these findings and we see no reason to disturb them.

II.

[*FTC Order and Opinion*]

The Commission entered an order prohibiting respondents from entering into or carrying out any "planned common course of action," agreement, or conspiracy to sell at prices determined pursuant to a "zone delivered price system," or any other system resulting in identical prices at the points of sale. The order also included a provision, to which respondents strenuously object, directing each of them to cease and desist from

> "quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systemically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." *Id.*, at 873-874.

The Commission, in an accompanying opinion, stated that in all cases where it found violations of the law, "it is the Commission's duty to determine to the best of its ability the remedy necessary to suppress such activity and to take every precaution to preclude its revival." *Id.*, at 884. In this case, the opinion pointed out, the respondents cooperatively revised the pricing practices in the industry by establishing a "uniform zone pricing system." Detailed discussions were carried on which resulted not only in an agreement, but "maps showing the boundaries of the zones to be observed . . . were distributed" by the individual respondents. *Id.*, at 884. Each respondent has "since that time . . . followed the pricing system and adhered to the zone boundaries so discussed and shown on these maps." *Ibid.* Discussing the complaint, the Commission in its opinion further noted that charges were included against each respondent as to its individual use of and adherence to the zone system of selling " 'for the purpose and with the effect of enabling the respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competion between and among themselves.' . . . It was the adherence by each of them to this system of pricing that made the combination work. . . . Unless and until each of the respondents is prohibited from so adhering to the system and from so using the zones, the evils springing from the combination, one of which is to eliminate price competition, may well continue indefinitely. Unless the respondents, representing practically the entire economic power in the industry, are deprived of the device which made their combination effective, an order merely prohibiting the combination may well be a useless gesture." *Id.*, at 884-885.

In its view, the Commission added, the "prohibition is necessary, not because it is unlawful in all circumstances for an individual seller, acting independently, to sell its products on a delivered price basis in specified territories, but to make the order fully effective against the trade restraining conspiracy in which each of the respondents [defendants] participated." *Id.*, at 884. When and if competition is restored and the individual prohibition is no longer necessary, the Commission expressed its intention, upon application, to vacate the latter provision of its order.

III.

[*Scope of Order*]

At the beginning we must understand the limits of the contested portion of the order.

First, it is temporary. Though its life expectancy is not definite, it is clear that the Commission was creating a breathing spell during which independent pricing might be established without the hang-over of the long-existing pattern of collusion. *Second,* the order is directed solely at the use of a zone delivered pricing system[4] and no other. This system is a pricing method based on geographic divisions or zones, the boundaries of which are entirely drawn by the seller. His delivered price is the same throughout a particular geographic zone so drawn up by him. Customarily the delivered price is different between zones, though as here, widely separated zones, geographically, might have the same delivered price. It is well to mention here that while this Court has passed upon the validity of basing point systems of sales, *Corn Products Refining Co. v. Federal Trade Commission* [1944-1945 Trade Cases ¶ 57,363], 324 U. S. 726 (1945), it has not decided the validity of the zone pricing plan used here. *Third,* zone delivered pricing *per se* is not banned by the order. The Commission might have made the order more specific by entering a flat prohibition of the use for a definite period of the device found to be "the very cornerstone of the . . . conspiracy," *i. e.,* zone pricing. See *Hartford-Empire Co. v. United States* [1944-1945 Trade Cases ¶ 57,319], 323 U. S. 386, 428 (1945), where the corporate defendants were enjoined from "forming or joining any such trade association" for a period of five years. But the Commission chose the more flexible sanction, *i. e.,* the limited use of zone delivered pricing. However, it concluded that the future use should be temporarily restricted for the protection of the public. And so, delivered zone pricing violates the order only when two conditions are present: (1) identical prices with competitors (2) resulting from zone delivered pricing. Considering these conditions with the mechanics of the zone plan, we see that the only way prices can be systematically identical is for the zones of competitors to be so drawn as to be in whole or in part identical and for zone prices to be the same in those zones which coincide or overlap.[5]

[*Meeting Competition*]

Respondents contend that the cease and desist order, as written, excludes the benefits of § 2(b) of the Clayton Act.[6] While § 2(b) "does not concern itself with pricing systems . . . [but] only [with] the seller's 'lower' price and [with] that only to the extent that it is made 'in good faith to meet an equally low price of a competitor,'" *Federal Trade Commission v. A. E. Staley Mfg. Co.* [1944-1945 Trade Cases ¶ 57,364], 324 U. S. 746, 753 (1945), this section is read into every Commission order. *Federal Trade Commission v. Ruberoid Co.* [1952 Trade Cases ¶ 67,279], 343 U. S. 470, 476 (1952). Since § 2(b) must, therefore, be read into this order, the respondents are afforded all of the benefits of that section.

IV.

[*Individual Use of Zone Pricing*]

It is the contention of respondents that the contested paragraph of the order effectively bans the noncollusive, individual use of zone pricing, a lawful, competitive sales method, and is therefore beyond the authority of the Commission. Respondents further assert that even if the Commission had such authority its exercise here was entirely improper, unnecessary, and would, in fact, hamper competition in the industry. They stress that the complaint did not include a charge that the individual use of zone pricing was unlawful; that it came into the case after the Trial Examiner had filed his recommended decision and order; and that respondents were denied the opportunity of rebutting the charge by evidence showing zone pricing to be "a logical, economical, and competitive method of doing business." The insertion of the objectionable paragraph, they contend, violates due process in that they had no opportunity to defend. Since § 2(b) is read into every Commission order and since it would allow respondents to rebut the charge, their contention is completely answered and we shall not deal with it further.

[*Fair Hearing*]

It goes without saying that the requirements of a fair hearing include notice of

[4] Our discussion of the zone delivered pricing system should in no way be construed as our approval of its use. We do not reach that question.

[5] At oral argument, counsel for the Federal Trade Commission was requested by the Court to submit a statement on behalf of the Commission setting forth its view as to the scope of the disputed paragraph of the cease and desist order. In response, the Commission supplied its interpretation which coincides with that set out here.

[6] 49 Stat. 1526, 15 U. S. C. § 13(b).

the claims of the opposing party and an opportunity to meet them. *Morgan v. United States,* 304 U. S. 1 (1938). The record indicates that the respondents were afforded those safeguards. The emphasis that there was no charge, no evidence, no finding to support the inclusion of the objectionable provision in the order is misplaced. Its insertion was nothing more than a mode of implementation, selected by the Commission, to enforce its findings of violations of the Act. Moreover, the record is replete with evidence that counsel supporting the complaint would seek the use of such a method of enforcement. As far back as in early 1947, while the case was before the Examiner, the issue concerning the effect of the zone pricing system used by respondents was before the Commission on motions to dismiss. Admittedly Count II of the complaint dealt with the use of the zone system itself. The Commission overruled the motions to dismiss, adopting the view of counsel supporting the complaint that its allegations were directed against the effects of the alleged system or method, *i. e.,* the zone pricing plan, and "not against individual instances" of discrimination in pricing. Furthermore, in May 1948, almost five years before the decree was entered, counsel supporting the complaint filed written exceptions to the recommended decision of the Examiner on the ground, among others, that it did not include a provision similar to the one objected to here. If respondents thought rebuttal evidence necessary, the record is bare of any effort on their part to offer it. Nor was any request made to reopen the case for that purpose after it reached the Commission.

[*FTC's Power*]

We pass on to respondents' major contention questioning the power of the Commission. As the Court has said many times before, the Commission may exercise only the powers granted it by the Act. *Federal Trade Commission v. Western Meat Co.,* 272 U. S. 554, 559 (1926). The relevant sections empower the Commission to prevent the use of unfair methods of competition and authorize it, after finding an unfair method present, to enter an order requiring the offender "to cease and desist" from using such unfair method.

The Court has held that the Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist. In *Jacob Siegel Co. v. Federal Trade Commission* [1946-1947 TRADE CASES ¶ 57,451], 327 U. S. 608 (1946), the Court named the Commission "the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.* at 612-613. Thereafter, in *Federal Trade Commission v. Cement Institute* [1948-1949 TRADE CASES ¶ 62,237], 333 U. S. 683, 726 (1948), the Court pointed out that the Congress, in passing the Act, "felt that courts needed the assistance of men trained to combat monopolistic practices in the framing of judicial decrees in antitrust litigation." In the light of this, the Court reasoned, it should not "lightly modify" the orders of the Commission. Again, in *Federal Trade Commission v. Ruberoid Co., supra,* at 473, we said that "if the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." We pointed out there that Congress had placed the primary responsibility for fashioning orders upon the Commission. These cases narrow the issue to the question: Does the remedy selected have a "reasonable relation to the unlawful practices found to exist"? We believe that it does. First, the simplicity of operation of the plan lends itself to unlawful manipulation; second, it had been used in the industry for almost a quarter of a century; and, third, its originator and chief beneficiary had been previously adjudged a violator of the antitrust laws. *United States v. National Lead Co.* [1946-1947 TRADE CASES ¶ 57,575], 332 U. S. 319 (1947).

[*Order Upheld*]

The respondents were found to have plainly disregarded the law. In this respect the Commission correctly considered the circumstances under which the illegal acts occurred. Those in utter disregard of law, as here, "call for repression by sterner measures than where the steps could reasonably have been thought permissible." *United*

States v. United States Gypsum Co. [1950-1951 TRADE CASES ¶ 62,729], 340 U. S. 76, 89-90 (1950). Respondents made no appeal here from some of the findings as to their guilt. Having lost the battle on the facts, they hope to win the war on the type of decree. They fight for the right to continue to use individually the very same weapon with which they carried on their unlawful enterprise. The Commission concluded that this must not be permitted. It was "not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violations more completely than [it] requires . . . ." *International Salt Co. v. United States* [1946-1947 TRADE CASES ¶ 57,635], 332 U. S. 392, 400 (1947). Although the zone plan might be used for some lawful purposes, decrees often suppress a lawful device when it is used to carry out an unlawful purpose. *Ethyl Gasoline Corp. v. United States* [1940-1943 TRADE CASES ¶ 56,013], 309 U. S. 436 (1940) ; *United States v. Bausch & Lomb Optical Co.* [1944-1945 TRADE CASES ¶ 57,224], 321 U. S. 707 (1944). In such instances the Court is obliged not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices. *Ethyl Gasoline Corp. v. United States, supra,* at 461; *Local 167, I. B. T. v. United States* [1932-1939 TRADE CASES ¶ 55,043], 291 U. S. 293 (1934). See also *United States v. United States Gypsum Co., supra; United States v. Crescent Amusement Co.* [1944-1945 TRADE CASES ¶ 57,316], 323 U. S. 173, 188 (1944).[7] We therefore conclude that, under the circumstances here, the Commission was justified in its determination that it was necessary to include some restraint in its order against the individual corporations in order to prevent a continuance of the unfair competitive practices found to exist. *Federal Trade Commission v. Standard Education Society* [1932-1939 TRADE CASES ¶ 55,170], 302 U. S. 112, 120 (1937). We shall now examine the restraint imposed.

Respondents point out that in only one other case in the long history of the Commission has a similar order been entered. They say our restoration of the contested paragraph will effectively prevent competition. In its supplemental memorandum, see note 5, *supra,* the Commission has clearly stated its understanding of the scope and effect of the order. It is our conclusion that the order was not intended to and does not prohibit or interfere with independent delivered zone pricing *per se.* Nor does it prohibit the practice of the absorption of actual freight as such in order to foster competition. Furthermore, as we have said, there is read into the order the provision of § 2(b) of the Clayton Act as to the right of a seller in good faith to meet the lower price of a competitor. This is not to say that a seller may plead this section in defense of the use of an entire pricing system. The section is designed to protect competitors in individual transactions.

Respondents pose hypothetical situations which they say may rise up to plague them. However, "we think it would not be good judicial administration," as our late Brother Jackson said in *International Salt Co. v. United States* [1946-1947 TRADE CASES ¶ 57,635], 332 U. S. 392, 401 (1947), to strike the contested paragraph of the order to meet such conjectures. The Commission has reserved jurisdiction to meet just such contingencies. As actual situations arise they can be presented to the Commission in evidentiary form rather than as fantasies. And, we might add, if there is a burden that cannot be made lighter after application to the Commission, then respondents must remember that those caught violating the Act must expect some fencing in. *United States v. Crescent Amusement Co., supra,* at 187.

Reversed.

[¶ 68,630] Charles Lawlor and Mitchell Pantzer, Co-Partners, Trading as Independent Poster Exchange v. National Screen Service Corporation.

In the Supreme Court of the United States. October Term, 1956. No. 632. Dated February 25, 1957.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[7] We need not discuss the full scope of the powers of the Federal Trade Commission, nor their relative breadth in comparison with those of a court of equity. As this Court said in *May Dept. Stores Co. v. Labor Board,* 326 U. S. 376, 390 (1945), "The test . . . is whether the Board might have reasonably concluded . . . that such an order was necessary. . . ."

Sherman Antitrust Act

Monopolization—Exclusive Agreements—Summary Judgment for Injunctive Relief—Existence of Issues of Fact—Scope of Appellate Review.—Although the United States Supreme Court agreed with a United States Court of Appeals that a motion for summary judgment should have been denied by a trial court in an action charging that a manufacturer-distributor of motion picture advertising accessories monopolized trade in such accessories by entering into exclusive agreements with producers and distributors of motion pictures, the Supreme Court remanded the case to the trial court for trial because the Court of Appeals had passed upon issues other than the *per se* invalidity of the exclusive agreements. The Supreme Court did not want the trial court to be bound by the considerations which the Court of Appeals had given to such other issues. In the opinion of the Supreme Court, it was unnecessary for the Court of Appeals to pass upon such other issues.

See Monopolies, Vol. 1, ¶ 2530.16, 2540.12, 2610.304, 2610.554; Private Enforcement and Procedure, Vol. 2, ¶ 9010, 9013.675, 9015, 9024, 9024.48.

For the petitioners: Francis T. Anderson, Philadelphia, Pa.

For the respondent: Louis Nizer and Walter S. Beck.

Vacating a decision of the U. S. Court of Appeals, Third Circuit, 1956 Trade Cases ¶ 68,509, reversing decisions of the U. S. District Court, Eastern District of Pennsylvania, 1950-1951 Trade Cases ¶ 62,919 and 1955 Trade Cases ¶ 68,122. For a prior opinion of the U. S. Supreme Court, see 1955 Trade Cases ¶ 68,061, reversing U. S. Court of Appeals, Third Circuit, 1954 Trade Cases ¶ 67,709, which affirmed U. S. District Court, Eastern District of Pennsylvania, 1953 Trade Cases ¶ 67,619; for prior opinions of the U. S. District Court, Eastern District of Pennsylvania, see 1955 Trade Cases ¶ 68,217, 68,216, and 1950-1951 Trade Cases ¶ 62,760, 62,603.

[*Judgments Vacated*]

PER CURIAM [*In full text*]: We agree with the Court of Appeals that the motion for summary judgment should have been denied. However, in our view, this disposition of the case made it unnecessary for the Court of Appeals to pass on any other issue than that of the *per se* invalidity of exclusive contracts under the Sherman Act. In order that the District Court not be bound by the consideration the Court of Appeals gave to the remaining issues, and without reaching any of the same, we grant the petition for writ of certiorari, vacate the judgments, and remand the cause to the District Court for trial.

[Dissenting Opinion]

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BURTON and MR. JUSTICE HARLAN join, dissenting.

[*Nature of Proceedings*]

The District Court granted the motion of plaintiffs, the petitioners here, for summary judgment. The Court of Appeals, having found that summary judgment was not warranted, remanded the case for "[t]rial of the disputed factual issues." [1956 TRADE CASES ¶ 68,509] 238 F. 2d 59, 68. This Court also holds that the motion for summary judgment should have been denied by the District Court: it grants certiorari and vacates the judgment of the Court of Appeals, but directs the District Court to do precisely what the Court of Appeals directed that court to do. This is the legal situation unless I wholly misconceive the matter.

Since the Court's disposition of the petition for certiorari affects the proper administration of its own business as well as the relation between this Court and Courts of Appeals, the matter deserves exposition.

[*Court of Appeals Ruling*]

The Court of Appeals thus stated what it called the critical issue before it:

> "Was there, in the cases involved in these appeals [there were other cases affecting other parties], a genuine issue as to a material fact which, under well-settled principles, precluded the entry of summary judgments adjudicating the defendant-appellant, National Screen Service Corporation ('National') to be an unlawful monopoly?" 238 F. 2d, at 60-61.

Having found that there were triable issues of fact, it concluded that summary judgment should not have been entered and sent the case back for trial. This Court now echoes these conclusions: the motion for summary judgment should have been denied and the plaintiffs must establish their claim at trial.

[*"Law of the Case"*]

The explanation of the puzzle must lie in the statement that this Court is doing what it is doing "[i]n order that the District Court not be bound by the consideration the Court of Appeals gave to the remaining issues . . . ." This is an oblique concern about the so-called "law of the case." The only "law of the case" decided by the Court of Appeals is the legal issue on which this Court agrees with the Court of Appeals. Nowhere is there a suggestion in the petition for certiorari that when the case goes back to the District Court, the trial will be restricted in determining the facts relevant to a claim under the antitrust laws. (Indeed, petitioners' only suggestion that the new trial directed by the Court of Appeals will not leave all relevant issues open for trial is that the Court of Appeals indicated that some issues "require determination by the trier of facts," while the petitioners suggest that these are issues to be determined by the trial court as a matter of law.)

One cannot read the thirteen pages of argument in support of the petition here and not be left with the conviction that the adjudication before the Court of Appeals was exclusively of the issue as the Court of Appeals stated it. That is "the law of the case," so far as that phrase has meaning, and nothing else. In the federal courts "the law of the case" is not a legal principle. It is a bogey that has been exposed, a ghost that has been laid, since Mr. Justice Holmes's opinion for the Court in *Messenger v. Anderson*, 225 U. S. 436, 444. The misuse of the rule of practice embodied in the conception of "law of the case," we have occasion to reject in *United States v. United States Smelting Refining & Mining Co.*, 339 U. S. 186, 198:

> "It is not applicable here because when the case was first remanded, nothing was finally decided. The whole proceeding thereafter was *in fieri*."

Here the only thing that was decided was, as this Court holds, rightly decided—namely, that on the facts summary judgment is precluded and the case must go to trial.

[*Effect of Court's Action*]

In granting the writ of certiorari, the Court sets aside all consideration by the Court of Appeals of issues other than "that of the *per se* invalidity of exclusive contracts under the Sherman Act." It is a customary practice for a Court of Appeals, in sending a case back to a District Court for trial, to give guidance on issues that may arise in the course of the trial in order to avoid needless appeals and retrials. No doubt a District Court must follow the adjudication of a Court of Appeals on reversal and remand of a case. But here the only adjudication was that the case be tried on all the relevant issues. We review judgments not talk. The basis of the reversal was a consideration by the Court of Appeals of opinions of this Court, and more particularly of our recent decisions in *Times-Picayune Publishing Co. v. United States* [1953 TRADE CASES ¶ 67,494], 345 U. S. 594, and *United States v. E. I. du Pont de Nemours & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377. What this Court has decided in those and other antitrust cases, and not any passing observations by a Court of Appeals, are the controlling directions for the District Court.

[*Role of Court*]

If the opinion of the Court of Appeals in this case disregarded controlling rulings of this Court, the District Court is of course not bound to disregard such decisions of this Court. A District Court can hardly fail in its duty to its Court of Appeals in obeying what decisions of this Court command. On the other hand, if the Court of Appeals has expressed views that do not run counter to what this Court has decided, this Court should not direct the District Court to disregard them. Surely, this Court should not go out of its way to purport to pass on these questions at this stage of the proceedings, especially when the questions are abstract, and more particularly in such summary fashion. If we begin to grant petitions for certiorari although we agree with the judgment of a Court of Appeals because, perchance, in the opinion some dubious remarks may have been made that cannot as a matter of law control the trial of the cause (I am not implying that such is the case here),

a new fecund source of business will still further swell the docket of this Court. Of course, if ever the contingency arises when a Court of Appeals challengingly or ignorantly disregards the controlling law as set forth by this Court, the means for correction here are ample and sure.

I would deny the petition.

[¶ 68,631] United Liquors Corporation, Sidney Perlberg, King Klein, Hubert R. Lewis, Alex Barizza, and George B. Hart v. United States.

In the Supreme Court of the United States. October Term, 1956. No. 637. Dated February 25, 1957.

On Appeal from the United States District Court for the Western District of Tennessee, Western Division. Marion S. Boyd, District Judge.

Case No. 1246 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Practices—Price Fixing—Alcoholic Beverages.—A trial court finding that wholesalers of alcoholic beverages in the Memphis, Tennessee, trading area engaged in an unlawful combination and conspiracy to fix, maintain, and stabilize the prices of alcoholic beverages was affirmed.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.181, 2011.282; Resale Price Fixing, Vol. 1, ¶ 3015.20.

For the appellants: Thurman Arnold, Washington, D. C., and Hal Gerber, Memphis, Tenn.

For the appellee: J. Lee Rankin, Solicitor General, and Victor R. Hansen, Assistant Attorney General.

Affirming a decision of the U. S. District Court, Western District of Tennessee, Western Division, 1956 Trade Cases ¶ 68,459; for a consent decree entered in the Court, see 1956 Trade Cases ¶ 68,383.

[*Affirmed*]

Per Curiam [*In full text*]: The motion to affirm is granted and the judgment is affirmed.

[¶ 68,632] Kimberly Knitwear, Inc., Jack Lazar and Helen Lazar v. Renee Y. Hall.

In the United States District Court for the Southern District of New York. Civil Action No. 95-296. Filed February 15, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Intervention.—Where a defendant in a patent suit had filed a counterclaim charging that the plaintiffs violated the antitrust laws, a party suing the plaintiffs for similar alleged violations of the antitrust laws in another action was not permitted to intervene in the patent suit. The party was denied intervention as of right on the ground that a determination of the antitrust counterclaim in the patent suit would not be binding on the party in his own antitrust suit, and permissive intervention was denied on the ground that the party's intervention would unduly delay the trial of the patent suit containing the antitrust counterclaim.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.535.

For the plaintiffs: Cooper, Dunham, Dearborn & Henninger (William R. Liberman and John N. Cooper, of counsel), New York, N. Y.

For the defendant: V. Alexander Scher, New York, N. Y.

For the applicant for intervention: Bader & Bader, New York, N. Y.

[*Motion for Intervention*]

DAWSON, District Judge [*In full text*]: This is a motion pursuant to Rule 24 of the Federal Rules of Civil Procedure for an order permitting the petitioner, Lass O'Scotland, Ltd., to intervene in the above entitled action. The motion is made on the ground that said intervenor may be bound by a judgment in the action with respect to the third counterclaim interposed by defendant, Renee Y. Hall, and on the ground that representation of intervenor's interest in the action to that extent may be inadequate.

[*Patent Suit*]

The action is one for a declaratory judgment with reference to the claimed invalidity of United States Patent No. 2,222,946 apparently owned by defendant Hall. The applicant for intervention admits that so much of the action as relates to the validity of the patent is of no interest to the petitioner.

[*Alleged Anti-Trust Violations*]

It appears, however, that defendant Hall on January 31, 1957 interposed a third counterclaim which pleads a cause of action based upon allegations that this defendant had been damaged by activities of the plaintiffs which were violative of the anti-trust laws and in which defendant seeks damages against the plaintiffs. It also appears that there is another action pending in this Court (Civil 108-209) where Lass O'Scotland, Ltd. is suing the present plaintiffs for damages alleged to have been occasioned by their violation of certain provisions of the anti-trust laws. We therefore have a situation where the plaintiff in one anti-trust action seeks to intervene in another anti-trust action brought by entirely different persons, but wherein a counterclaim exists based upon similar alleged violations of the anti-trust laws.

[*Common Questions*]

So far as the allegations in the counterclaim assert that in violation of the anti-trust laws plaintiffs in the present action were engaged in an unlawful conspiracy in restraint of trade, it is true that common questions of law and fact might be involved in both the trial of the counterclaim in the present action and the other action in which Lass O'Scotland is plaintiff. Where such common questions of law and fact exist intervention might be granted in the discretion of the Court, but in exercising this discretion the Court is directed to consider whether permitting the intervention would unduly delay the trial of the original action. Fed. R. Civ. Pro. 24(b).

[*Intervention as of Right*]

A person may intervene as of right in a pending action only when he may be bound by the judgment in the action and his representation by existing parties may be inadequate. Fed. R. Civ. Pro. 24(a). Certainly a determination of the anti-trust counterclaim in the present action will not be binding in the entirely different anti-trust action brought by Lass O'Scotland, for the parties are different, the facts may be different, and the claims for damages of the respective parties must certainly be different. It would indeed be a remarkable situation if we were to hold that a party would be barred from maintaining a successful action under the anti-trust laws simply because another party in another suit and claiming only damages to it had been unsuccessful in winning its case. Petitioner will not be bound by whatever determination is made of the counterclaim in the present action and it has therefore not established that it may intervene in the action as of right. *Sutphen Estates, Inc. v. United States* [1950-1951 TRADE CASES ¶ 62,936], 342 U. S. 19 (1951). See, generally, Note, 63 Yale L. J. 408 (1954).

[*Permissive Intervention*]

Permissive intervention should be granted, as has been pointed out, only if it will not unduly delay the trial of the original action. This action was filed in September, 1954. On the day this motion was argued, the action was No. 22 on the Ready Day Calendar of Non-jury causes and in the ordinary course of events would be sent out for trial within the next week or two. In

fact, when Judge Weinfeld granted the motion permitting the third counterclaim to be added to the answer his order provided:

> ". . . that the motion to amend the answer as herein granted shall not cause or be ground for any application for delay of the trial of this action."

The present action has therefore been pending for a considerable period of time and is about to go out to trial. If granting the intervention would delay the trial of the action this is a fact which must be considered by the Court in determining whether such permissive intervention should be allowed. That granting the intervention would delay the trial seems to be admitted. The petitioner for intervention admits that it is not ready to go to trial. In fact, in its prayer for relief it asks that it be granted sufficient time in order to carry out all the necessary pre-trial discovery proceedings and that the trial be stayed until such pre-trial proceedings are concluded.

[*Motion Denied*]

The equities do not justify granting such permissive intervention with the consequent delay in the trial of the present action. The petition for intervention seems to present essentially a situation where a plaintiff who has one anti-trust proceeding pending in this Court is seeking to latch to another action and to try his claim in that action. Plaintiff will have its day in court but it should not delay the trial of the present action.

Motion denied. So ordered.

[¶ 68,633] Reese Drug Corp. v. Jarvis Drug Co., Inc.

In the New York Supreme Court, New York County, Special Term, Part III. 137 N. Y. L. J., No. 31, page 6. Dated February 14, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Temporary Injunction—Defenses—Price Violation by Enforcing Party.—A drug store's motion for a temporary injunction to restrain another drug store from advertising, offering for sale, or selling fair traded commodities at less than their established prices was granted, although the defendant drug store contended that the plaintiff drug store was selling products below their fair trade prices and therefore came into court with "unclean hands." The defense was rejected since the defendant admitted the price violations by its failure to deny such violations.

See Fair Trade, Vol. 1, ¶ 3452.34.

[*"Clean Hands" Defense*]

DINEEN, Justice [*In full text*]: Motion by the plaintiff to restrain and enjoin the defendants pendente lite, from advertising, offering for sale and selling any commodities owned, produced or distributed by manufacturers or distributors who have entered into fair trade agreements. Numerous instances are cited by the plaintiff indicating violations of the Fair Trade Laws. The defendants contend that the plaintiff is engaged in similar practices and consequently comes into court with unclean hands and is not entitled to any relief. Under like circumstances this court held otherwise (*Librandi v. Berner's Pharmacy, Inc.* [1955 TRADE CASES ¶ 67,966], N. Y. L. J., January 25, 1955, Special Term, Part III). In the cited case the defendants conceded the alleged violative sales while in the instant case such sales are not denied. Failure to deny unless inadvertent must be accepted as an admission of fact. Motion granted. Settle order.

[¶ 68,634] Court Degraw Theatre, Inc. v. Loew's Incorporated, et al.

In the United States District Court for the Eastern District of New York. Civil Action No. 12921. Dated January 29, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Discovery—Production of Documents—Tax Returns.—A plaintiff, having put in issue its income in a suit for treble damages under the antitrust laws, was required to produce for inspection and copying its various tax returns (federal income, admission, state unemployment, federal excess profits, withholding, social security, payroll, excise tax returns). The plaintiff's contentions that such returns are privileged, and that they are not the proper subject of discovery in the absence of a showing that the books and records from which the returns were prepared are false, inaccurate, or incomplete, were rejected.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.825.

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Discovery—Production of Documents—Materiality of Documents.—Defendants in a treble damage action were required to produce for inspection and copying their records pertaining to two motion picture theatres, although they contended that such records were immaterial because the seating capacity of each of the theatres was almost three times that of the plaintiff's theatre and that the theatres were located in an area too remote from the plaintiff's theatre to receive consideration. The court also ruled that records for a period dating two years before the commencement of the conspiracy alleged by the plaintiff would be sufficient to permit the plaintiff to prepare for trial.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.825.

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Discovery and Interrogatories—Priority in Proceeding.—In a treble damage action, the defendants' contention that they should not be required to make their records available for inspection and copying until the plaintiff has answered their interrogatories, which were served prior to the time that the plaintiff moved for the production of the defendants' records, was rejected. While there is priority involved in the taking of depositions, there is no advantage in priority under the present circumstances.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.825, 9013.875.

For the plaintiff: Sperry, Weinberg & Ruskay (Joseph A. Ruskay, of counsel).

For the defendants: Louis Phillips, E. Compton Timberlake, and Bernard E. Kalman.

[*Motion for Discovery*]

RAYFIEL, District Judge [*In full text*]: Both the defendants and the plaintiff have moved under Rule 34 of the Federal Rules of Civil Procedure for the production, inspection and copying of various documents set forth in the moving papers.

[*Tax Returns*]

The plaintiff agrees to produce all the documents requested by the defendants except various tax returns therein specified. It limits its objection to the demands for "14. Copies of federal income and admission tax returns and accompanying schedules and work sheets" and "28. Copies of all tax returns, including state unemployment, federal excess profits, withholding, social security, payroll and excise taxes and related documents, memoranda and supporting data."

[*Privilege*]

The plaintiff contends that its income tax returns are privileged, that it has produced the books and records from which the returns were prepared, and that, in the absence of a showing that they are false, inaccurate, or incomplete, the plaintiff's tax returns are not a proper subject of discovery under Rule 34.

I disagree. The plaintiff brings this action for treble damages for alleged violations of the anti-trust laws, and thereby puts in issue its income for the period in question. The various tax returns can be used by the defendants to determine the accuracy of the

figures obtained from the plaintiff's books and records.

The returns are not privileged and should be disclosed. See *Connecticut Importing v. Continental Distilling Corporation et al.,* 1 F. R. D. 190.

[*Materiality of Documents*]

As to the plaintiff's motion the defendants' objections are confined to two items, (1) the records pertaining to the Clinton and Tivoli Theaters, and (2) the records listed under item II of the notice of motion, namely, the so-called cutoff cards or other records showing, *inter alia,* the titles and dates of pictures exhibited, the license fees paid therefor, etc., in certain theaters, for the period between January 1, 1927 and December 31, 1937.

The plaintiff contends that the Tivoli and Clinton Theaters are approximately a mile from its theater, and that therefore the information it seeks respecting the motion pictures exhibited at those theaters is material and pertinent to its claim of discrimination. The defendants, on the other hand, argue that the seating capacity of each of said theaters is almost three times that of plaintiff's theater, and that they are located in an area too remote from it for consideration herein.

I am not impressed by defendants' argument. Disparity in size, standing alone, cannot justify the denial of access to such information. Further, the said theaters were located—the Tivoli has been demolished—less than a mile from that of the plaintiff, and served the same general clientele. The defendants will, therefore, furnish the plaintiff with the information sought under item (1) above.

I come now to plaintiff's request for the cutoff cards, etc., for the period running from January 1, 1927 to December 31, 1937. The period covered by the alleged violations runs from 1940 to 1947. I reject the plaintiff's contention that the documents in question, although remote in time from the dates of the alleged conspiracy, are material in that they will show the course of conduct of the defendants prior to the commencement of the alleged conspiracy. In my opinion records for the period commencing with 1938, two years before the commencement of the alleged conspiracy, will be sufficient to permit the plaintiff to prepare for trial. Accordingly, item (2) above, is denied.

[*Interrogatories*]

The defendants argue that since they served their interrogatories prior to plaintiff's service of its notice, they should not be required to make their documents and records available for inspection until plaintiff has answered their interrogatories. They contend that the instant situation is analogous to that existing when cross-notices are served to take the depositions of adversary parties, in which case the party serving the earlier notice is generally permitted to conduct the prior examination. The cases are not analogous. There is no advantage in priority here, as there may frequently be in the taking of depositions. Furthermore, there is no reason why inspection by both parties may not proceed simultaneously.

Settle order on notice.

[¶ 68,635] Ben Hur Coal Company v. Earl Wells and M. A. Berman, co-partners doing business as Starr Coal Company.

In the United States Court of Appeals for the Tenth Circuit. January Term, 1957. No. 5413. Dated February 13, 1957.

Appeal from the United States District Court for the Eastern District of Oklahoma.

Robinson-Patman Price Discrimination Act

Price Discrimination—Sales at Unreasonably Low Prices—Purpose of Destroying Competition—Sufficiency of Evidence.—A coal producer's treble damage action charging that a competing producer sold its coal at unreasonably low prices for the purpose of destroying competition or eliminating the plaintiff producer as a competitor in violation of Section 3 of the Robinson-Patman Act was properly dismissed where the trial court found that (1) the defendant producer, in uniformly reducing its prices, was motivated by business considerations, (2) the price reductions were not motivated by malice or by an

intent to injure or destroy competition or the plaintiff producer, and (3) the defendant producer's prices were not low in relation to competitive prices for like products but were always higher than comparable coal from competing mines. To recover under the provision of Section 3 of the Act relating to sales at unreasonably low prices, the prices must not only be unreasonably low, but they must also have been established with the design and purpose to destroy competition. The trial court had absolved the defendant producer of any guilty intent, and its findings and conclusions in that respect were not clearly erroneous. The plaintiff producer's contention that the defendant's method of cost accounting was wholly unrealistic and unreasonable for the purpose of determining whether it sold its coal at unreasonably low prices was rejected. A pricing policy based upon sound economics cannot be said to be inadmissible simply because it may result in the destruction of a competitor. One who reduces his prices in defense of his economic life cannot be guilty of eliminating competition or his competitors.

See Price Discrimination, Vol. 1, ¶ 3551.60, 3551.70.

For the appellant: G. C. Spillers, Jr. (G. C. Spillers was with him on the brief).

For the appellees: Richard B. McDermott (Bradford J. Williams, Fenelon Boesche, T. Hillas Eskridge, and Franklin D. Hettinger were with him on the brief).

Before BRATTON, Chief Judge, and MURRAH and LEWIS, Circuit Judges.

[*Recovery Denied*]

MURRAH, Circuit Judge [*In full text*]: This is an appeal from a judgment denying recovery of triple damages under Section 15, Title 15 USC, for losses incurred by the appellant in competition with appellees' coal sales. Such sales are said to have been made at "unreasonably low" prices "for the purpose of destroying competition or eliminating a competitor" within the meaning of the latter part of Section 3 of the Robinson-Patman Act § 13a, Title 15 U. S. C.

[*Parties—Nature of Action*]

The appellant, a family corporation owned by Ellis, Gene and Amy Taylor, and the appellees have been competing producers of domestic coal in Henryetta, Oklahoma, for a great number of years. Although there have been various price levels in the preceding years, Henryetta domestic stoker coal was selling for $7.35 per ton on November 1, 1953, at which time the appellees reduced their price to all customers to $6.50 per ton f. o. b. Henryetta, and subsequently on June 1, 1954, to $6.00 per ton. To maintain its competitive market, the appellant also reduced its prices, but excessive losses compelled it to increase its price in the latter part of 1954 over that of the appellees. Such reductions, says the appellant, were the culmination of a growing animosity between the parties and were made solely for the purpose of destroying the appellant as a competitor.

[*Trial Court Ruling*]

Upon a trial of the case to the court without a jury, the court found that in making the two price reductions, the defendants were motivated by business considerations, including shrinkage of the competitive market; decline in the prices of immediate competitors; pressure of their wholesale customers; appellant's covert discounts below its published price; desire to maintain existing volume, recover and retain individual customers, and maintain and increase their profit. The court specifically found that the price reductions complained of were not motivated by malice or by an intent to injure or destroy competition or the appellant; that the accused prices of the appellees were not low in relation to competitive prices for like products but were always higher than comparable coal from competing mines. It was on these findings that the trial court dismissed the cause of action and entered judgment for the appellees.

[*Issue*]

There is no question of federal jurisdiction founded in the antitrust law. The sole and only question is whether the findings of the court are without support in the record, hence clearly erroneous. Appellant earnestly contends that they are utterly without factual foundation.

[*Elements of Violation*]

It may be noteworthy to observe at the outset that we do not have the problem of

price discrimination to competing buyers under Section 2(b) of the Robinson-Patman Act (§ 13(b), Title 15 USC) as in *Standard Oil Co. v. Federal Trade Commission* [1950-1951 TRADE CASES ¶ 62,746], 340 U. S. 231; or discriminatory sales for the purpose of eliminating competition under Section 3 as in *Mead's Fine Bread Co. v. Moore* [1953 TRADE CASES ¶ 67,630], 208 F. 2d 777, rev. [1954 TRADE CASES ¶ 67,906] 348 U. S. 115, reh. den., 348 U. S. 932. And so, we have no occasion to indulge in the contrariety of view concerning whether good faith reduction to meet an equally low price of a competitor must be uniform. See "Report of the Attorney General's National Committee to Study the Antitrust Laws", March 31, 1955, pp. 179-186; "Report of the Select Committee on Small Business", H. R. 2966, 84th Cong., 2d Sess., pp. 256-277. We have here only the question of whether uniform price reductions violated the unreasonably low price provisions of Section 3 of the Robinson-Patman Act. And, to recover under this provision of Section 3, prices must not only be unreasonably low, but they must also have been established with the design and purpose to destroy competition. *Balian Ice Cream Co. v. Arden Farms Co.* [1952 TRADE CASES ¶ 67,266], 104 F. Supp. 796, 800, aff'd [1955 TRADE CASES ¶ 68,186], 231 F. 2d 356, cert. den., 350 U. S. 991, reh. den. 351 U. S. 928; *F. & A. Ice Cream Co. v. Arden Farms Co.* [1950-1951 TRADE CASES ¶ 62,848], 98 F. Supp. 180.

[*Product*]

The basic facts are that Henryetta domestic stoker coal, with an established reputation for premium quality, is sold through wholesalers f. o. b. Henryetta to consumer markets in Kansas, Missouri, Nebraska, Iowa, South Dakota and Minnesota in competition with coal of comparable grade and quality from Catoosa, Oklahoma, Southern Illinois and Western Kentucky. It seems agreed, however, that the Henryetta coal has always enjoyed a premium price over other coals by reason of consumer preference.

[*Price Reduction*]

There was an abundance of evidence on behalf of the appellant to the effect that the reduction in price of Henryetta coal on November 1 was "unusual" due to the fact that coal dealers had already contracted for their supply at the higher price, and that the reduction at or just before the peak of the season prompted some of the dealers to demand a price revision. There was also credible testimony to the effect that the reduction of the price of the coal did not stimulate sales, and that there would have been as much Henryetta coal sold at $7.35 per ton as $6.50, or even $6.00; and that in fact the reduced prices were not passed on to the consumer but were pocketed by the retailers. Indeed, there was testimony to the effect that the Henryetta operators could not profitably produce coal at $6.50 per ton and that the price reductions complained of eliminated one competitor and ruined the appellant; that the appellees lost money and were able to survive only with the support of large profitable sales of industrial coal. Specifically there was accounting evidence from which the appellant persuasively argues that according to the appellees' own methods of accounting, they realized 71¢ average profit per ton on $7.35 domestic coal in the fiscal year ending September 30, 1953, and only 11¢ per ton on comparable tonnage for the fiscal year ending September 30, 1954, including approximately $9,000.00 profit made in October 1953 before the November 1st price reduction. The appellees raised the price of their coal from $6.00 to $6.50 on January 1, 1955. And, appellant introduced testimony to the effect that during the latter part of 1954 and most of 1955, the appellees were engaged in what they called "retreating operations" during which they avoided expensive development work, thereby enabling them to show a fanciful profit.

[*Relations Between Parties*]

These facts are portrayed against a hostile background commencing in 1949 when appellant broke a stalemate in a strike between the Coal Operators Association and the Miners Union by signing a contract with the Union against the advice of appellee, Wells, who was representing the Association in the labor dispute. Another event alluded to as indicative of animosity was the option secured by the appellant to lease 120 acres of valuable coal land upon the expiration of appellees' lease. When the lease was inadvertently allowed to expire without renewal, it was taken by the appellant, leaving appellees almost without additional productive coal land. Another

straw in the wind were statements by Wells to the effect that if Manager Ellis Taylor did not cease cutting his price and splitting commissions with his jobbers, he could cut his price. And, finally came the conference between Gene Taylor and Wells, after the price reductions, when Taylor prevailed upon Wells to restore the price in order to spare appellant's business. Wells is said to have replied that he was sorry for Gene and his mother but he "was forced to teach him [Ellis Taylor] a lesson."

[*Demand for Coal*]

The appellees developed their case against a background of a constantly diminishing demand for both consumer and industrial coal due to the encroaching natural gas and fuel oil supplies. It was shown that in the ten years preceding the trial of the case, the national domestic market for coal declined over 51 percent, and that in the last five years, Oklahoma domestic coal tonnage dropped 84 percent; that during the same period, the number of producing coal mines in Oklahoma decreased from 95 to 61; that in 1920 there were 36 producing underground Henryetta coal mines, and at the date of the trial, there were only 2—the appellant and appellees. It was in this context of over-pricing, in a dwindling and competitive market, that the appellees say they reduced their prices of domestic coal in order to increase their volume and decrease the unit cost.

[*Profit or Loss*]

The basic and material difference in the loss on oil-treated domestic coal sales shown by appellant's audit of appellees' accounting records and the profit shown by appellees' audit lies in the accounting methods employed to arrive at divergent results.

[*Accounting Methods*]

In determining appellees' profit or loss on oil-treated domestic stoker coal the appellant first assumed that the two competing mining operations were sufficiently similar for cost accounting purposes. Using its own operation as a criterion, it proceeded to determine the cost of producing oil-treated domestic coal separate and apart from any other line. It charged against this line additional labor, machine and oiling expenses and also the constant loss on slack or fine coal.

In computing their profit or loss, the appellees employed the accounting methods and practices used in the regular course of their business, said to be customary in the coal producing industry. Under this method of accounting all producting costs, fixed and variable, are lumped against the total sales to determine unit cost of production. And, profit or loss on different grades and qualities is determined by the difference between the unit cost of production and the respective sales prices. The only exception recognized by the appellees is to take the costs of oil treating and advertising out of the general cost of production and charge it directly to oil-treated stoker coal. Appellees concede the additional labor and machinery costs in the production of oil-treated domestic coal but take the position that the amount is negligible and indeterminable.

Employing this method of accounting, and based on their own accounting records, the appellee produced a profit and loss statement for the fiscal year ending September 30, 1954, showing a net profit of approximately $153,000 on total coal sales of approximately 231,000 tons, or approximately 66¢ per ton. During this period industrial coal sold for $5.95 per ton and oil-treated domestic coal sold at $7.35, $6.50 and $6.00. Breaking it down into categories of industrial coal and the various grades of domestic coal, the statement showed a net profit of $1.05 per ton on industrial coal; 79¢ per ton on 57,000 tons of oil-treated domestic coal; and a profit of 11¢ per ton on a total of 95,000 tons of all grades of domestic coal, including a $2.00 loss per ton on the slack or fine coal—always sold at a loss.

Using the same method of cost accounting, but relating it to the different pricing periods under consideration, it was shown that for seven months ending May 31, 1954, while oil-treated domestic coal was selling for $6.50 per ton, appellees realized a net profit of 74¢ per ton on total sales of 131,000 tons; a profit of 94¢ per ton on 32,000 tons of oil-treated domestic coal; and total domestic profit of 23¢ per ton on 54,000 tons. For the seven months ending December 31, 1954, during which oil-treated domestic coal sold for $6.00 per ton, the appellees realized a net profit of 68¢ per ton on a total of 58,000 tons; 66¢ per ton on 48,000 tons of oil-treated domestic coal; and 6¢ per

ton on a total of 77,000 tons of all grades of domestic coal. For the four months ending April 30, 1955, during which oil-treated domestic coal sold for $6.50 per ton, appellees realized a net profit of $1.27 per ton on a total of 85,000 tons; $1.44 per ton on 22,000 tons of oil-treated domestic coal; and 73¢ per ton on a total of 36,000 tons of all grades of domestic coal. The statement showed an increased profit on $6.00 oil-treated domestic coal over the $6.50 coal in the face of a diminished per ton profit realization (94¢ to 66¢) because of a volumetric decrease in unit cost. To reflect the increase in sales of $6.00, domestic coal over their sales at higher prices, the appellees produced a comparison of the $6.00 coal sales period with identical months in the previous year. The result showed a total increase of 20 percent of all domestic coal and a 25 percent increase in the oil-treated stoker.

[*Reason for Profits*]

To show the "how and why" for the increased profits based upon the volumetric decrease in unit cost, the appellees produced graphic illustrations of the ratio of unit cost to selling price as related to volume of production. Taking its fixed market of industrial coal of 132,000 tons per fiscal year at a fixed selling price of $5.95, it was shown that it was necessary to produce only 6000 tons of domestic coal at $5.50 net, or a total of 138,000 tons of coal at established selling prices, in order to reach the "break-even point." From that point appellees plotted the curves of unit cost and average selling price in relation to tonnage production to a point where their fiscal 1954 total output of 231,000 tons cost $4.90 per ton, which when sold at an average selling price of $5.40 per ton yielded a net profit of approximately 50¢ per ton. Basically, this cost analysis was based upon actual selling prices, production costs and tonnage, and is in conformity with their accounting records. The discrepancy, however, between this reflected profit and the 66¢ per ton reflected in the audit is explained by an understatement of the industrial production tonnage and an overstatement of some operational costs. In other words, the graph was on the "conservative side." In any event, the appellees accounting records show an overall profit which the appellant cannot gainsay. And, there was testimony to the effect that if this production and pricing pattern were applicable to the appellant's operation, it would result in a profitable enterprise.

[*Reasonableness of Methods*]

The appellant, however, challenges this method of cost accounting as a wholly unrealistic and unreasonable method of determining whether the appellees sold domestic coal at unreasonably low prices. In effect it says that profit and loss must be determined by the unit cost of domestic coal standing alone; that acceptance of the method of accounting employed by the appellees would allow them to use the profits from industrial coal sales as a war chest to destroy competition and to eliminate the appellant as a competitor by selling his domestic coal at a loss.

We do not suppose that the appellees could use their profits from one line to sustain their business while selling another line at a loss to eliminate a competitor with any less impunity than they could discriminate with respect to prices of merchandise of the same grade and quality to different customers for the same purpose. *Cf. Mead's Fine Bread Co. v. Moore, supra.* Furthermore, it would ignore the economic facts of life to say that one in business for a profit would deliberately and consistently sell at a loss without some ulterior motive. It would be equally inadmissible to say that one who consistently sells at a loss without competitive compulsion is not selling at unreasonably low prices. And, one who consistently sells at unreasonably low prices is vulnerable to the inference that he is doing so for the proscribed purpose of destroying competition or eliminating a competitor.

[*Intent and Purpose*]

We cannot say, however, that a pricing policy based upon sound economics is inadmissible simply because it may result in the destruction of a competitor; for it is not within the scope or purpose of the antitrust laws to protect a business against loss in a competitive market. *Balian Ice Cream Co. v. Arden Farms, supra,* at p. 801. One who reduces his prices in defense of his economic life cannot be guilty of eliminating competition or his competitors. If, as the trial court held, the price reductions on domestic coal were made to increase

volume and decrease unit cost in order to retain its proportionate share of a diminishing market, the appellees were certainly within the law. In the final analysis, the question resolves itself into one of intent and purpose, not a choice of accounting methods. The trial court has absolved the appellees of any guilty intent and we cannot say that is [its] findings and conclusions in that respect are clearly erroneous. The judgment is affirmed.

[¶ 68,636] Federal Trade Commission, et al. v. The B. F. Goodrich Company, No. 13,070; Sigurd Anderson, et al. v. The B. F. Goodrich Company, No. 13,071; FTC, et al. v. The General Tire & Rubber Company, No. 13,072; Anderson, et al. v. The General Tire & Rubber Company, No. 13,073; FTC, et al. v. The Goodyear Tire & Rubber Company, Inc., No. 13,074; Anderson, et al. v. The Goodyear Tire & Rubber Company, Inc., No. 13,075; FTC, et al. v. The Firestone Tire & Rubber Company, No. 13,076; Anderson, et al. v. The Firestone Tire & Rubber Company, No. 13,077; FTC, et al. v. Allied Tire & Battery Company, et al., No. 13,078; Anderson, et al. v. Allied Tire & Battery Company, et al., No. 13,079; FTC, et al. v. United States Rubber Company, No. 13,080; Anderson, et al. v. United States Rubber Company, No. 13,081; FTC, et al. v. Inland Rubber Corporation, No. 13,082; Anderson, et al. v. Inland Rubber Corporation, No. 13,083; FTC, et al. v. Pacific Tire & Rubber Company, No. 13,084; Anderson, et al. v. Pacific Tire & Rubber Company, No. 13,085; FTC, et al. v. Denman Rubber Manufacturing Company, No. 13,086; Anderson, et al. v. Denman Rubber Manufacturing Company, No. 13,087; FTC, et al. v. The Mansfield Tire & Rubber Company, No. 13,088; Anderson, et al. v. The Mansfield Tire & Rubber Company, No. 13,089; FTC, et al. v. Carlisle Corporation, No. 13,090; Anderson, et al. v. Carlisle Corporation, No. 13,091; FTC, et al. v. Durkee-Atwood Company, No. 13,092; Anderson, et al. v. Durkee-Atwood Company, No. 13,093; FTC v. Seiberling Rubber Company, No. 13,094; Anderson, et al. v. Seiberling Rubber Company, No. 13,095; FTC, et al. v. Dunlop Tire and Rubber Corporation, No. 13,096; Anderson, et al. v. Dunlop Tire and Rubber Corporation, No. 13,097; FTC v. Missouri Farmers Association, Inc., No. 13,098; Anderson, et al. v. Missouri Farmers Association, Inc., No. 13,099; FTC, et al. v. Western Auto Supply Company, No. 13,100; Anderson, et al. v. Western Auto Supply Company, No. 13,101; FTC, et al. v. Montgomery Ward & Co., Incorporated, No. 13,102; Anderson, et al. v. Montgomery Ward & Co., Incorporated, No. 13,103; FTC, et al. v. The Dayton Rubber Company, No. 13,104; Anderson, et al. v. The Dayton Rubber Company, No. 13,105; FTC, et al. v. Lee Rubber & Tire Corporation, No. 13,106; Anderson, et al. v. Lee Rubber & Tire Corporation, No. 13,107; FTC, et al. v. The American Oil Company, No. 13,108; Anderson, et al. v. The American Oil Company, No. 13,109.

In the United States Court of Appeals for the District of Columbia Circuit. Nos. 13,070-13,109. Decided February 28, 1957.

Appeals from the United States District Court for the District of Columbia. HOLTZOFF, District Judge.

Robinson-Patman Price Discrimination Act

Price Discrimination—Quantity-Limit Rules of the Federal Trade Commission—Tires and Tubes—Validity of Rule—Necessary Statutory Finding.—A trial court ruling that the Federal Trade Commission's quantity-limit rule for tires and tubes, which fixed the maximum quantity discount limit on sales of tires and tubes at 20,000 pounds ordered at one time for delivery at one time, was invalid because the Commission did not find that available purchasers in greater quantities than a 20,000-pound carload are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly was affirmed on the ground that the trial court correctly held that the Commission did not make the finding required by the Clayton Act, as amended by the Robinson-Patman Act. The Commission's finding as to the fewness of available purchasers in annual dollar volumes greater than $600,000 did not support its rule fixing a quantity limit of one 20,000-pound carload. A "Statement of Basis and Purpose," appended to the Commission's quantity-limit rule, cannot be used to supplement the formal findings upon which the

Commission specifically based its quantity-limit rule. When a statute provides, as the Clayton Act, as amended, "that a specified finding is a prerequisite to the exercise of power, and where formal findings are made which are said to be the basis of the power claimed, there is no justification for reliance on a later statement to support the exercise of the power."

See Price Discrimination, Vol. 1, ¶ 3505.654, 3611.01; FTC Enforcement and Procedure, Vol. 2, ¶ 8801.790.

For the appellants: James H. Durkin, Attorney, Department of Justice, with whom Leo A. Rover, United States Attorney at the time record was filed, Oliver Gasch, United States Attorney, and Joseph E. Sheehy, Director, Bureau of Litigation, Federal Trade Commission, were on the brief.

For the appellees: Mathias F. Correa, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of Court, with whom James E. Greeley was on the brief for appellee in Nos. 13,074 and 13,075, argued for all appellees. Edgar Barton, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of Court, with whom Dow H. Harter was on the brief, for appellee in Nos. 13,070 and 13,071. Hammond E. Chaffetz, with whom Perry S. Patterson and Herbert J. Miller, Jr., were on the brief, for appellee in Nos. 13,108 and 13,109. David L. Dickson, of the bar of the Supreme Court of Illinois, *pro hac vice,* by special leave of Court, with whom Robert L. Wright was on the brief, for appellee in Nos. 13,102 and 13,103. Arthur H. Dean and H. Douglas Weaver were on the brief for appellee in Nos. 13,072 and 13,073. Louis A. Gravelle and Thomas S. Markey were on the brief for appellee in Nos. 13,076 and 13,077. J. Strouse Campbell was on the brief for appellees in Nos. 13,078 and 13,079. Henry F. Butler was on the brief and John Geyer Tausig entered an appearance for appellee in Nos. 13,080 and 13,081. Charles Walker was on the brief and Jackson Brodsky entered an appearance for appellees in Nos. 13,082, 13,083, 13,084, 13,085, 13,086, 13,087, 13,088 and 13,089. Folsom E. Drummond was on the brief and Harry A. Toulmin, Jr., and William H. Pavitt, Jr., entered appearances for appellees in Nos. 13,090, 13,091, 13,106 and 13,107. Narvin B. Weaver was on the brief for appellee in Nos. 13,092 and 13,093. John H. Pratt was on the brief for appellee in Nos. 13,094 and 13,095. Francis J. O'Hara, Jr., was on the brief for appellee in Nos. 13,096 and 13,097. William W. Beckett and James M. Desmond were on the brief for appellee in Nos. 13,098 and 13,099. Lawrence C. Moore was on the brief for appellee in Nos. 13,100 and 13,101. Raymond C. Cushwa was on the brief and Alfons B. Landa and James T. Welch entered appearances for appellee in Nos. 13,104 and 13,105.

Affirming a decision of the U. S. District Court, District of Columbia, 1955 Trade Cases ¶ 68,130. For a prior opinion of the U. S. Court of Appeals, District of Columbia Circuit, see 1953 Trade Cases ¶ 67,535, reversing U. S. District Court, District of Columbia, 1952 Trade Cases ¶ 67,367.

Before PRETTYMAN, WILBUR K. MILLER and WASHINGTON, Circuit Judges.

[*Quantity-Limit Rule*]

WILBUR K. MILLER, Circuit Judge [*In full text*]: In these actions, certain tire manufacturers and dealers asked the United States District Court for the District of Columbia to declare invalid and enjoin the enforcement of the Federal Trade Commission's Quantity-Limit Rule 203-1, which is as follows:

"The quantity limit as to replacement tires and tubes made of natural or synthetic rubber for use on motor vehicles as a class of commodity is twenty thousand (20,000) pounds ordered at one time for delivery at one time."

The Commission promulgated the Rule purportedly pursuant to authority conferred upon it by § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.[1] This section provides that "the Federal Trade Commission may . . . fix and establish quantity limits . . . as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render

[1] Act of Oct. 15, 1914, c. 323 § 2, 38 Stat. 730; Act of June 19, 1936, c. 592 § 1, 49 Stat. 1526; 15 U. S. C. § 13(a).

differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce . . . ."

[*Prior Proceedings*]

The District Court dismissed the complaints for lack of jurisdiction and also for failure to state a claim upon which relief could be granted. On appeal we held to the contrary on both grounds, reversed the order of dismissal, and remanded the cases to the District Court.[2] Then that court, after considering cross motions for summary judgment, granted the motion of the plaintiff manufacturers and dealers, holding that "the statutory finding expressly required by the Act of Congress as a basis for the order has not been made and that, therefore, the order should not stand."[3] The Federal Trade Commission and some of its members—Anderson, *et al.*—appeal.

[*Issue on Appeal*]

It is clear from the language of § 2(a) that the Commission has no power to fix and establish quantity limits unless it first makes the finding required by the quantity-limit proviso thereof, quoted above. The primary question is, therefore, whether the District Court correctly held the requisite finding was not made. For if it was not, the matter is at an end, and we need not consider the contentions of appellees that they were denied procedural rights when the Rule was made and that the Rule itself, based not on factual findings but on unwarranted inference from the borrowed experience of the Interstate Commerce Commission, is arbitrary and capricious.

[*Absence of FTC Findings*]

The Commission concedes that the three formal findings, upon which it said in the order of promulgation it was basing the Rule,[4] do not include a finding that available purchasers in quantities greater than a carload are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly. Instead of dealing directly with that question of fact in its findings, the Commission seems to have been primarily concerned with the fewness of available purchasers in annual dollar volumes greater than $600,000.[5] Obviously, a finding concerning that does not support a rule fixing a quantity limit of one 20,000-pound carload.

The Commission argues that the vital finding, which it admits was not expressly made, sufficiently appears in what it termed a "Statement of Basis and Purpose," appended to the promulgating order, which is in the nature of an opinion concerning tire pricing practices. Assuming without deciding that the "Statement" can be construed as indicating a finding of the sort necessary to support the Rule, we hold it may not be used to supplement the formal findings in the manner suggested. It may be that, had the Commission not made any specific separate findings labeled as such, it could have supported the order by writing an opinion embodying the requisite finding of fact. But, when it made formal findings in separate numbered paragraphs and said it was basing its order upon them, the order must stand or fall on the basis of those findings alone.

Section 2(a) conditions its grant of authority upon the prior making of a simple finding. Though well aware of the statutory requirement, the Commission did not meet it in the formal findings on which the order was based. It chose to make a finding concerning the paucity of available purchasers in quantities greater than a certain annual dollar volume, and then fixed a quantity limit in terms of a carload. Even though the Commission's accompanying Statement may have indicated its belief that available buyers in quantities greater than a carload are so few as to give it authority under the quantity-limit proviso (which appellees seriously question), the Commission did not purport to base its order on that belief. We find no satis-

[2] *B. F. Goodrich Co. et al. v. Federal Trade Comm'n* [1953 TRADE CASES ¶ 67,535], 93 U. S. App. D. C. 50, 208 F. (2d) 829 (1953).

[3] *B. F. Goodrich Co. v. Federal Trade Comm'n, et al.* [1955 TRADE CASES ¶ 68,130], 134 F. Supp. 39 (1955).

[4] The order, after reciting three formal findings, said:

"It is *therefore* ordered, That the following rule . . . be, and it hereby is, promulgated . . . ." (Emphasis supplied.)

[5] The first of the formal findings follows:

"1. Available purchasers in the greater quantities of annual dollar volumes of six hundred thousand (600,000) dollars and more are so few as to render differentials on account thereof unjustly discriminatory against purchasers in smaller quantities and promotive of monopoly in the lines of commerce in which the sellers and purchasers, respectively, are engaged."

factory explanation of its failure to do so. When a statute provides, as this one does, that a specified finding is a prerequisite to the exercise of power, and where formal findings are made which are said to be the basis of the power claimed, there is no justification for reliance on a later statement to support the exercise of the power.

[*Rules of Civil Procedure*]

Although Rule 52 of the Federal Rules of Civil Procedure does not apply to administrative agencies, it furnishes a helpful analogy in the consideration of the present question. The Rule provides that in all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon; and that "If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein." With respect to this the following was said in *Ohlinger v. United States*, 219 F. (2d) 310, 311 (9th Cir. 1955):

> ". . . Under the circumstances referred to in the rule, it is not necessary to file formal findings of fact and conclusions of law, but when the trial court *does make formal findings*, they alone serve as the court's findings of fact. In the words of the Supreme Court: 'We are not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings.' [*Stone v. United States*, 164 U. S. 380.]" (Italics in the cited opinion.)

[*Affirmed*]

Being of the view that the reasoning of the *Ohlinger*[6] opinion is sound and should be applied to the agency action involved here, we need not discuss appellees' criticisms of the Rule itself and the method by which it was adopted.

Affirmed.

[¶ 68,637] Union Circulating Company, Inc., National Circulating Company, Inc., Periodical Sales Company, Inc., Publishers Continental Sales Corporation, and Leo E. Light and Roy C. Hodge, Co-Partners, doing business as National Literary Association v. The Federal Trade Commission.

In the United States Court of Appeals for the Second Circuit. No. 16 — October Term, 1956. Docket No. 23588. Argued November 8, 1956. Decided February 18, 1957.

Petition for review of an order of the Federal Trade Commission directing petitioners to cease and desist from certain practices found by the Commission to be violative of 15 U. S. C. § 45(a). Order affirmed.

Federal Trade Commission Act

Unfair Practices—Combining or Conspiring—"No-Switching" Agreements—Supervision of Employee Conduct—Legality.—A Federal Trade Commission order prohibiting sellers of magazine subscriptions by "door-to-door" solicitation from entering into any agreement not to hire any "door-to-door" solicitor who has been employed by any other such seller at any time during a certain period of time was affirmed. The sellers contended that such "no-switching" agreements were not unfair methods of competition because they were directed only at the prevention of abuses within the industry and were not directed at the elimination or obstruction of competition. Although the agreements were not illegal *per se* because a harmful effect upon competition was not clearly apparent from the terms of the agreements, the reasonably foreseeable effects of the "no-switching" agreements were the impairment of competition between existing sellers of subscriptions and the prevention of would-be competitors from engaging in similar activity. The tendency of such agreements is to discourage labor mobility, whereby the magazine selling industry could become static in its composition to the obvious advantage of the large, well-established signatory sellers and to the disadvantage of infant organizations. The "no-switching" agreements, in the context of the industry affected, were harmful to competition; they constituted an unreasonable restraint of trade within the meaning

[6] *Cf.* 2 Barron and Holtzoff, Federal Practice and Procedure § 1128 (1950).

of the Sherman Act and therefore were the proper subject of an injunction by the Federal Trade Commission.

See Unfair Practices, Vol. 2, ¶ 5033, 5043.12.

Unfair Practices—Coercive Agreements to Cut Off Competition—Legality—Sufficiency of Evidence.—A Federal Trade Commission order prohibiting sellers of magazine subscriptions by "door-to-door" solicitation from limiting their efforts to obtain magazine subscriptions for publishers who deal with subscription agencies which employ sales representatives formerly connected with other subscription agencies was affirmed. There was sufficient evidence that several of the sellers or agencies joined in a concerted effort to coerce magazine publishers into withdrawing their authorizations, and that several publishers cancelled their authorizations with an agency. The Commission could reasonably infer that the firms carried out their illegal scheme of coercion; therefore, the order enjoining such conduct in the future was justified.

See Unfair Practices, Vol. 2, ¶ 5031.

Federal Trade Commission Enforcement and Procedure—Cease and Desist Order—Refusal to Modify Order—Review.—The Federal Trade Commission, in affirming an order prohibiting sellers of magazine subscriptions by "door-to-door" solicitation from entering into agreements not to hire each others' former solicitors, properly refused to modify the order so as to permit the application of such agreements to solicitors "who in the course of such business have been using unfair methods of competition, or unfair or deceptive acts or practices." The application and effects of an agreement so restricted had not been explored by the Commission, and therefore there was no evidence in the record by which the reasonableness of such a hypothetical agreement could be tested.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8611.55.

For the petitioners: Gilbert H. Weil (Alfred T. Lee, on the brief; Mortimer M. Lerner, of counsel to National Circulating Company, Inc.), New York, N. Y.

For the respondent: Earl W. Kintner, General Counsel, Federal Trade Commission; Robert B. Dawkins, Asst. General Counsel; and Jno. W. Carter, Jr., Attorney.

Affirming Federal Trade Commission cease and desist order in Dkt. 5978.

Before: MEDINA, LUMBARD and WATERMAN, Circuit Judges.

[*Review of FTC Order*]

WATERMAN, Circuit Judge [*In full text*]: Petitioners are agencies engaged in the business of selling subscriptions for magazines and periodicals by door-to-door solicitation. They were charged with engaging in unfair methods of competition and unfair or deceptive acts or practices in violation of the Federal Trade Commission Act, 15 U. S. C. § 45(a). At the conclusion of the administrative proceedings before the Federal Trade Commission that Commission issued a cease and desist order. Petitioners bring their petition to us seeking to review this order.

[*Subscription Solicitation Business*]

The door-to-door subscription solicitation business is conducted through crews of solicitors who travel from place to place throughout the country. A crew may have from a few to forty or more solicitors, together with a supervising crew manager. The petitioners, the agencies, contract directly with the crew manager, who in turn usually engages the solicitors and controls their work. The solicitors, the managers, and the petitioners are all paid on a commission basis determined by the number and nature of periodical subscriptions secured. The solicitors collect part or all of the subscription money. The proper amounts are remitted by the crew managers through the agencies to the publishers.

The Federal Trade Commission found that door-to-door solicitation of subscriptions to periodicals conducted in this manner accounts annually for millions of subscriptions valued at millions of dollars; that the petitioners are among the leaders in the field and constitute a very substantial segment of the industry; and that they contract for the services of 3,000 solicitors, who procure $15,000,000 of such subscriptions annually.

The Trial Examiner found that for many years the reputation of the magazine-selling industry, both with the publishers and the general public, has been undermined by the

deceptive selling practices and other fraudulent conduct of many of the solicitors in the field. Misrepresentation of magazine content, misappropriation of subscription monies, and false sympathy appeals are among the practices that plague this industry. The history of the petitioners and other subscription agencies over the past twenty years is a chronicle of attempts to curb these abuses by such devices as jointly sponsored "Standards of Practice," a Central Registry providing information about individual solicitors, and a trade association created to study new remedial techniques and to sponsor their industry-wide adoption.

[*"No-Switching" Agreements*]

In recent years the petitioners have entered into "no-switching" agreements with each other, typically providing that each agency will not hire any solicitors who have been employed by the other signatory agency at any time during a certain period, usually the preceding year. Petitioners have also agreed at various times not to hire solicitors who have been employed by *any other* agency, whether or not a party to the agreement. The petitioners contend that these agreements have been entered into solely in order to prevent the fraudulent practices of certain crew members, it being maintained that they are less likely to respond to agency discipline or to observe agency standards when they are able to move about freely from one agency to another; and, in particular, that such crew members, when their fraudulent practices are discovered by one agency, find it easy to obtain new employment with a less scrupulous agency.

From this testimony the hearing examiner concluded that the "no-switching" agreements represent a reasonable attempt at self-regulation by members of an industry and therefore the practice of entering into them should not be enjoined. The Commission rejected this conclusion, however, finding that the "no-switching" agreements were an unreasonable restraint of trade and constituted unfair methods of competition within the meaning of Section 5 of the Federal Trade Commission Act, 15 U. S. C. § 45(a).

The Commission also found that several of the petitioners had illegally attempted to coerce the publishers into withdrawing the authority to sell subscriptions from the Federal Readers Guild, an agency that was not a party to any "no-switching" agreement.

[*FTC Order*]

The Commission accordingly enjoined the petitioners from:

> "* * * 1. Entering into, carrying out, enforcing or giving effect to any agreement not to employ parties who have previously been actively engaged for themselves or for others in the business of soliciting magazine subscriptions.
>
> "2. Ceasing or limiting, or threatening to cease or limit, their efforts to obtain subscriptions for magazines for publishers unless such publishers refuse or discontinue authority to solicit subscriptions for their magazines to subscription agencies employing sales representatives formerly connected with other subscription agencies."

The petitioners appeal from the order of the Commission, and seek to have both of its provisions set aside.

[*Coercive Practices*]

Substantial evidence was adduced at the hearings to support the second part of the order. The Commission found that several of the petitioners joined in a concerted effort to coerce the magazine publishers into withdrawing their authorizations from a newly formed competitor, the Federal Readers Guild. Several experienced crew managers, with their crews, had switched employment to the new competitor. At the Commission hearings the owner of Federal Readers testified without contradiction that he had attended a meeting with several representatives of the petitioners at which petitioner Leo Light threatened to have all the publishers "cancel out" the Federal Readers Guild. Light indicated that a meeting would be held that evening to discuss ways and means to accomplish this. Although no evidence was introduced to show whether the meeting was ever held, there was evidence that several publishers subsequently canceled their authorizations with Federal Readers. Since the Commission could reasonably infer that the petitioners carried out their illegal scheme of coercion, the second part of its order enjoining such conduct in the future is clearly justified.

[*Legality of "No-Switching" Agreements*]

Of much greater significance are the "no-switching" agreements proscribed by the

first part of the order. Petitioners readily admit the widespread existence of these agreements, but contend that they are not unfair methods of competition because they are directed only at the prevention of abuses within the industry and are not directed at the elimination or obstruction of competition.

[*Concerted Restraints of Trade*]

A violation of the Sherman Act, 15 U. S. C. § 1 *et seq.*, is an unfair method of competition under the Federal Trade Commission Act. *FTC v. Beech-Nut Packing Co.*, 257 U. S. 441, 453 (1922); *Keasbey & Mattison Co. v. FTC* [1946-1947 TRADE CASES ¶ 57,537], 159 F. 2d 940, 946 (6th Cir. 1947). Under the Sherman Act the test of validity for any restraint of trade is not the motive of the parties who act in concert. Restraints of trade must be examined not merely for the intent of their creators but for their reasonableness, *Standard Oil Co. v. United States*, 221 U. S. 1 (1911), and therefore they must be considered in the light of their impact upon the competitive structure of the industry affected.

Since the *Standard Oil* decision, many concerted restraints of trade have been held unlawful or unreasonable *per se*,[1] and "no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." *United States v. Socony-Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,031], 310 U. S. 150, 218 (1940). Many group boycotts or concerted refusals to deal, and certain other restraints such as price-fixing, market-sharing, or production control, are considered so inimical to competition that they will not be countenanced regardless of the portion of the industry that they actually affect or the alleged beneficial ends that they are designed to serve. See *United States v. Columbia Steel Co.* [1948-1949 TRADE CASES ¶ 62,260], 334 U. S. 495, 522 (1948); *Fashion Originators' Guild v. FTC* [1940-1943 TRADE CASES ¶ 56,107], 312 U. S. 457, 467-68 (1941); *United States v. Socony-Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,031], 310 U. S. 150, 218 (1940); *Las Vegas Merchant Plumbers Ass'n v. United States* [1954 TRADE CASES ¶ 67,673], 210 F. 2d 732, 740-41 (9th Cir.), *cert. denied*, 348 U. S. 817 (1954).

Although "some agreements and practices are invalid *per se*, * * * others are illegal only as applied to particular situations." *United States v. E. I. Du Pont de Nemours & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 387 (1956). When the courts or the Commission are confronted with an alleged boycott whose deleterious effect on competition is not as apparent on its face as that of the agreements which have been held illegal *per se*, they may consider its actual or potential impact upon the competitive fabric of the particular industry affected. *Ruddy Brook Clothes v. British & Foreign Marine Ins. Co.* [1952 TRADE CASES ¶ 67,244], 195 F. 2d 86 (7th Cir.), *cert. denied*, 344 U. S. 816 (1952); *United States v. Insurance Board of Cleveland* [1956 TRADE CASES ¶ 68,460], 144 F. Supp. 684 (N. D. Ohio 1956). The restraints here under consideration, the "no-switching" agreements, are dissimilar in several significant respects to the group boycotts that have been held illegal *per se* by the Supreme Court. The "no-switching" agreements are directed at the regulation of hiring practices and the supervision of employee conduct, not at the control of manufacturing or merchandising practices.[2] The agreements are not designed to coerce retailers, or other independent members of an industry, into abandoning competitive practices of which the concerted parties do not approve. Rather, they are ostensibly directed at "housecleaning" within the ranks of the signatory organizations themselves. Because a harmful effect upon competition is not clearly apparent from the

[1] Judge Medina believes that we should avoid a discussion of the applicability of the *per se* doctrine, because, upon appeal, it was neither briefed nor argued by either side, and it is not necessary to discuss it in order to reach our result. He would prefer to leave *per se* applicability here an open question.

[2] The Supreme Court, in the long and active history of anti-trust litigation, has rarely considered the validity of agreements directed solely at the employment practices of an industry. Perhaps the closest parallel to the situation at bar was reviewed in *Anderson v. Shipowners Ass'n of the Pacific Coast*, 272 U. S. 359 (1926). There it was alleged that the members of the respondent associations owned, operated or controlled substantially all the merchant vessels of American registry engaged in interstate and foreign commerce between the ports of the Pacific Coast and to and from foreign countries. The associations required every seaman seeking employment to register with them, receive a number, and await his turn before he could obtain employment. A certificate was issued to each seaman reciting in part that no person would be employed unless registered, that the certificate must be delivered to the master of the vessel, and that

terms of these agreements, we believe them to be distinguishable from those boycotts that have been held illegal *per se.* See *United States v. Insurance Board of Cleveland, supra,* at 696-98. We shall therefore consider their application within the specific framework of the magazine-selling industry and in the light of the fact that the signatory parties represent a very substantial segment of that industry.

[*Injury to Competition*]

The petitioners contend that the Commission found actual injury to competition only in the Federal Readers episode, and that this was an isolated incident unrelated to the "no-switching" agreements. The validity of these contentions is not determinative of the issue at bar, because the agreements should be struck down if their reasonable tendency, as distinguished from actual past effect, is to injure or obstruct competition. Under the Federal Trade Commission Act, industry agreements and practices have been enjoined without an actual showing of injury to competition in order to extinguish monopolistic practices before injury occurs. See *Fashion Originators' Guild v. FTC* [1940-1943 TRADE CASES ¶ 56,101], 312 U. S. 457, (1941); *FTC v. Raladam Co.,* 283 U. S. 643, 647 (1931).

Because the hearing examiner in this case concluded that these agreements were not illegal *per se,* he properly admitted evidence tending to show the circumstances prompting their formulation and adoption and the allegedly beneficial effects that they have upon the industry. But in order to decide whether these restraints are reasonable, we must also consider their actual or potential impact upon the competitive structure of the magazine-selling industry. Here it appears that the reasonably foreseeable effect of the "no-switching" agreements will be to impair or diminish competition between existing subscription agencies, and to prevent would-be competitors from engaging in similar activity. One probable result of the agreements, because entered into by organizations that represent a very substantial segment of the industry, will be to "freeze" the labor supply, which is the indispensable element of the door-to-door magazine-selling trade. Although only the signatory agencies are bound by the agreements, a crew member working for one of them will hesitate to leave his employer in order to join a newly formed competitor, or an expanding established one, if he knows that he may be out of work for a year in the event that the latter agency does not prove to be successful. The tendency of the "no-switching" agreements is to discourage labor mobility, and thereby the magazine-selling industry may well become static in its composition to the obvious advantage of the large, well-established signatory agencies and to the disadvantage of infant organizations.

Thus we find the "no-switching" agreements, in the context of the industry affected, to be harmful to competition, and therefore an unreasonable restraint of trade within the meaning of the Sherman Act, and the proper subject of injunction by the Federal Trade Commission.

[*Scope of Agreements*]

One last contention of the petitioners remains to be considered. They claim that the agreements were intended to affect only those crew members who have a record of deceptive selling practices and other fraudulent conduct, and, in practice, that they have been invoked only against such crew members. Whether or not this be true, the agreements considered by the Federal Trade Commission are capable of enforcement against any crew member. The petitioners can not be left to police the magazine-selling industry by a method as ripe for abuse as that offered by such agreements.

the certificate was the personal record of the seaman and the basis of his future employment. The shipowners, as members of the association, were bound to hire in accordance with the terms of the certificates. In addition, the associations fixed the wages to be paid the seamen.

The Supreme Court, reversing the district court and the court of appeals, held that the shipowners, if these alleged facts were so, by jointly surrendering their "freedom of action in the matter of employing seamen," had unlawfully restrained trade in violation of section 1 of the Sherman Act. The decision does not indicate whether this restraint would be invalid *per se* or whether it would be found unreasonable under the particular circumstances of the industry, the Court saying only that "each of the shipowners and operators, by entering into this combination, has, in respect to the employment of seamen, surrendered himself completely to the control of the associations." *Anderson v. Shipowners Ass'n of the Pacific Coast,* 272 U. S. 359, 362 (1926). Furthermore, since the appeal was from a dismissal of the complaint for failure to state a cause of action, the Court was not required to consider evidence in justification of the rules of the associations.

The agreements here went beyond what was necessary to curtail and eliminate fraudulent practices. Therefore dicta in cases cited by the petitioners from such decisions as *Butterick Publishing Co. v. FTC* [1932-1939 TRADE CASES ¶ 55,130], 85 F. 2d 522 (2d Cir. 1936), *Fashion Originators Guild v. FTC,* 114 F. 2d 80 (2d Cir. 1940), *aff'd* [1940-1943 TRADE CASES ¶ 56,101], 312 U. S. 457 (1941), and *Ruddy Brook Clothes v. British & Foreign Marine Ins. Co.* [1952 TRADE CASES ¶ 67,244], 195 F. 2d 86 (7th Cir.) *cert. denied,* 344 U. S. 816 (1952), are no guide to us here and we need not pass on the questions raised by those cases.

[*Modification of Order*]

The petitioners asked the Commission to modify its original order so as to permit the application of the "no-switching" agreements to solicitors "who in the course of such business have been using unfair methods of competition, or unfair or deceptive acts or practices." The Commission properly refused this request, pointing out that the application and effects of an agreement so restricted had not been explored by it, and thus there was no evidence in the record by which the reasonableness of such a hypothetical agreement could be tested.

[*FTC Order Affirmed*]

For the reasons expressed above, the "no-switching" agreements do not survive the close scrutiny that must be given under Section 5 of the Federal Trade Commission Act to any concerted restraints of trade. Therefore the order of the Commission must be affirmed in all respects.

Order affirmed.

[¶ 68,638] William Goldman Theatres, Inc. v. Twentieth-Century Fox Film Corporation, Fabian Theatres, Jay Emanuel, and Key City Theatres, Inc.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 21,077. Filed February 11, 1957.

Sherman Antitrust Act

Combinations and Conspiracies—Licensing of Motion Pictures—Competitive Bidding as Method of Preventing Antitrust Violations.—In a motion picture theatre operator's action charging that a motion picture distributor and other theatre operators conspired to limit the operator's ability to compete in the exhibition of first run films by adopting a system of competitive bidding for motion pictures, contention that the operator's complaint failed to state a cause of action because the motive of the distributor in requiring competitive bidding and the defendants' conduct with respect to the bidding for one particular picture in a single locality did not violate the antitrust laws was rejected. The mere requirement of competitive bidding for a product does not prevent conduct and dealings involving that bidding from coming in conflict with the antitrust laws. The fact that the complaint only alleged one incident of the alleged conspiracy does not preclude the operator from showing additional incidents. Also, the fact that the alleged conspiracy was of a local nature does not put the conspiracy beyond the reach of the antitrust laws.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.553; Private Enforcement and Procedure, Vol. 2, ¶ 9009.600.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments to State Cause of Action—Injury to Public.—In a motion picture theatre operator's action charging that a distributor of motion pictures and other theatre operators conspired to adopt a system of competitive bidding to the operator's injury, the defendants' motion to dismiss the operator's complaint because it failed to allege an injury to the public was denied. The complaint set forth facts from which it could be inferred that the public interest was injured by the defendants' conduct. The public is interested in the preservation of free competition, and when competition is restrained by means declared unlawful by the antitrust laws, the interest of the public is harmed. The complaint need not allege that the public has been injured as the result of the defendants' conduct.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.475.

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Summary Judgment on Basis of Deposition.—In a motion picture theatre operator's action charging that a distributor of motion pictures and other theatre operators conspired to adopt a system of competitive bidding to the operator's injury, the distributor's motion for a summary judgment on the ground that the deposition of the president of the plaintiff operator failed to set forth a cause of action was denied. Although it was apparent from the deposition that the president would not be able to supply all of the facts necessary to prove the operator's case, there is no burden on the plaintiff operator to establish its case in a pretrial deposition. "So long as the deposition did not constitute a demonstration of the invalidity of plaintiff's claim, its mere inadequacy to establish that claim has no persuasiveness."

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.675.

For the plaintiff: Edwin P. Rome, Philadelphia, Pa.

For the defendants: Speiser, Satinsky, Gilliland & Packel for Jay Emanuel; Schnader, Harrison, Segal & Lewis, by Arlin M. Adams, for Twentieth-Century Fox Film Corp.; and Thomas D. McBride for Fabian Theatres; all of Philadelphia, Pa.

Opinion

[*Motion Picture Exhibition*]

GANEY, District Judge [*In full text*]: Prior to May 30, 1956, there were five first-run moving picture theatres in Reading, Pennsylvania. They were as follows: Warner, Loew's Colonial, Embassy, Astor and Park. The Warner was operated by Stanley Warner Management Corp. and showed pictures made by Warner Bros. Loew's Colonial was managed by Loew's, Inc. and displayed films released by Loew's, Inc., United Artists Corp., Universal Pictures, Inc., RKO Radio Pictures, Inc., Walt Disney Productions and some by Columbia Pictures. The Embassy, under the control of Fabian Theatres, exhibited two-thirds of the movies made by Twentieth-Century Fox Film Corporation ("20th-Century Fox"), Paramount Pictures, Inc., and Columbia Pictures Corp. The Astor and Park Theatres, managed by Jay Emanuel, divided the remaining products between them.

[*Complaint*]

For a period beginning May 30, 1956, the plaintiff, an operator of a chain of motion picture theatres in Pennsylvania, leased the Astor, a large favorably located theatre, for the purpose of exhibiting motion pictures to the public.[1] It was unable to operate for a month immediately following that date because it could not obtain first-run feature products. On July 23, 1956, plaintiff brought the action here involved under the antitrust laws. The defendants are 20th-Century Fox, one of the major motion picture distributors in the United States; Fabian Theatres, which controls approximately forty motion picture theatres, including the Embassy in Reading and the Colonial and State in Harrisburg, Pennsylvania; and Jay Emanuel, the chief executive officer of Key City Theatres, Inc., in which capacity he owns and controls a number of motion picture theatres in Pennsylvania, including the Park in Reading and the Senate in Harrisburg. Key City Theaters, Inc., was also named as a defendant. Paragraphs 7 and 8, the nub of plaintiff's complaint, aver:

> "7. Plaintiff's Astor Theatre is eminently suitable for the exhibition of motion pictures on first run in Reading, Pennsylvania, and plaintiff is fully qualified to operate such first run theatre. For a number of years past, the said theatre divided the product of certain motion picture distributors, including the defendant Fox, with the Park Theatre owned and operated by the defendant Emanuel. This division or split of product was accomplished without resorting to the practice of so-called 'competitive bidding' between the two theatres. During this period of time, the defendant Fabian's Embassy Theatre in Reading, Pennsylvania, did not seek to license pictures which fell on the Astor-Park Split.
>
> "8. On May 30, 1956, when plaintiff took over the operation of the Astor Theatre, Emanuel refused to continue the division of product which had formerly existed between the Park and

[1] The Astor is the second largest theatre in Reading. It has a seating capacity of 2,251, which is 231 less than that of the Embassy.

Astor Theatres, but combined and conspired with Fox and Fabian in an attempt to limit and restrain plaintiff's ability to compete in Reading and towards that end brought into effect the device of 'competitive bidding' for licensing motion pictures in Reading in an effort to deprive plaintiff's Astor Theatre of a proper, fair supply of first run pictures and to enable Fox to exact excessive film rental from plaintiff. Fox has, as a result, refused to license its pictures in Reading to plaintiff unless plaintiff would comply with the 'competitive bidding' system."

As an example of how the requirement of "competitive bidding" had prevented it from obtaining first-run items, plaintiff cites its failure to obtain the highly regarded motion picture and outstanding box office attraction, "The King and I." It also alleges that it failed because the defendants "maneuvered and manipulated the so-called competitive bidding" so that Fabian's Embassy was awarded "The King and I" in Reading and Emanuel's Senate was given the privilege of showing the film in Harrisburg. The complaint further alleges that the business of distributing and exhibiting motion pictures constitutes interstate commerce, that the conspiracy charged is in restraint of such commerce and that as a result of it plaintiff has and will continue to suffer severe financial loss.

[*Motions*]

20th-Century Fox, Jay Emanuel and Key City Theatres, Inc. have filed motions to dismiss on the ground that the complaint fails to state a claim upon which relief may be granted under the antitrust laws. 20th-Century Fox has also filed a motion for summary judgment. The reasons given why the complaint allegedly fails to meet the test are (1) the motive of 20th-Century Fox in requiring competitive bidding on the part of the exhibitors, and defendants' conduct with respect to the bidding for one particular picture in a single locality do not violate the antitrust laws, and (2) the complaint fails to aver an injury to the public.

[*Competitive Bidding*]

As for the first reason, defendants are apparently under the impression that the mere requirement of competitive bidding for a product prevents conduct and dealings involving that bidding from coming in conflict with the antitrust laws. That is not the law. See *United States v. Paramount Pictures, Inc.* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131 (1948); *Maple Drive-In Theatre Corp. v. Radio-Keith-Orpheum Corp.*, CCH TRADE REGULATION REPORTS ¶ 68,422, (S. D. N. Y., June 26, 1956). We do not read the complaint as involving just one motion picture. The averment concerning the picture "The King and I" is similar to an allegation of an overt act under an indictment for conspiracy. By making such an averment, the plaintiff is not precluded from showing additional incidents. That the conspiracy was of a local nature will not for that reason put it beyond the reach of the antitrust laws. *United States v. Crescent Amusement Co.* [1944-1945 TRADE CASES ¶ 57,316], 323 U. S. 173, 183-84 (1944); *William Goldman Theatres v. Loew's, Inc.* [1944-1945 TRADE CASES ¶ 57,410], 150 F. 2d 738, 744 (3 Cir. 1948); *White Bear Theatre Corp. v. State Theatre Corp.* [1940-1943 TRADE CASES ¶ 56,222], 129 F. 2d 600, 605 (8 Cir. 1942).

[*Injury to Public*]

In answer to defendants' second reason, it is our opinion that the complaint sets forth facts from which it can be inferred that the public interest was injured by defendants' conduct. The public is interested in the preservation of free competition. And when competition is restrained by means declared unlawful by the antitrust laws, the interest of the public is harmed. *Apex Hosiery Co. v. Leader* [1940-1943 TRADE CASES ¶ 56,039], 310 U. S. 469, 491-493 (1940); *William Goldman Theatres v. Loew's, Inc. supra,* 743. It is not necessary that the complaint aver that the public has been injured as the result of defendant's conduct. "While detail is not necessary, it is essential that the complaint allege facts from which it can be determined as a matter of law that by reason of interest, tendency, or the inherent nature of the contemplated action, the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce." *Feddersen Motors v. Ward* [1950-1951 TRADE CASES ¶ 62,579], 180 F. 2d 519, 522 (C. A. 10, 1950). Also see *Southern Rendering Co. v. Standard Rendering Co.* [1953 TRADE CASES ¶ 67,530], 112 F. Supp. 103, 109 (E. D. Ark. 1953).

[*Summary Judgment*]

Finally, 20th-Century Fox argues in support of its motion for summary judgment that its deposition of William Goldman, president of plaintiff, fails to set forth a cause of action against it. By this argument we take it that this defendant means to say that plaintiff will not be able to substantiate the claim made in the complaint. From our reading of the deposition it seems apparent to us that William Goldman, through lack of personal knowledge, will be unable to supply all the facts necessary to prove plaintiff's case. He admitted that he obtained knowledge of some of the facts in conversations with other persons. The testimony of those other persons may be sufficient to supply the pertinent facts. There is no burden on plaintiff to establish his case in a pre-trial deposition. "So long as the deposition did not constitute a demonstration of the invalidity of plaintiff's claim, its mere inadequacy to establish that claim has no persuasiveness." *Southern Rendering Co. v. Standard Rendering Co., supra,* 109. Although a jury may not draw the same inferences as William Goldman does from certain facts, up to this point he has not "talked" the plaintiff out of a lawsuit.

[*Motions Denied*]

Accordingly, the motions to dismiss the complaint and the motion for summary judgment will be denied.

[¶ 68,639] United Grocers' Company v. Sau-Sea Foods, Inc., and Ernest Schoenbrum and Abraham Kaplan, doing business as Shore Distributors.

In the United States District Court for the Southern District of New York. Civ. 114-365. Filed February 20, 1957.

Sherman Antitrust Act

Combinations and Conspiracies—Refusal To Deal—Proof of Unlawful Conspiracy—Motion for Summary Judgment.—In an action by a wholesale distributor of groceries charging that a manufacturer and a distributor of frozen foods conspired to refuse to sell the manufacturer's products to the wholesaler because it refused to increase the price at which it sold the manufacturer's products, the defendants' motion for summary judgment on the ground that an officer of the wholesaler failed to give direct evidence of the alleged conspiracy in his deposition was denied. Conspiracies, by their very nature, are rarely established by direct evidence. Usually, only circumstantial proof is available. The fact that the wholesaler's orders were not filled and its supply cut off after it refused to yield to demands to increase prices, if accepted by the trier of the fact, is a circumstance that may be taken into account in deciding the existence of the conspiracy. The existence of fact issues precluded the granting of a summary judgment.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.355; Private Enforcement and Procedure, Vol. 2, ¶ 9013.675.

For the plaintiff: Manes, Sturim, Donovan & Laufer, New York, N. Y.

For the defendants: Louis G. Greenfield, New York, N. Y.

Memorandum

[*Refusal To Sell Charged*]

EDWARD WEINFELD, District Judge [*In full text*]: Plaintiff, a wholesale distributor of food stuffs and groceries, commenced this action for treble damages and injunctive relief charging the defendants, a manufacturer and a distributor of frozen and refrigerated foods, with violations of the anti-trust laws.

The defendants move for summary judgment pursuant to Rule 56 based principally upon the affidavit of their attorney and upon the incomplete deposition before trial of the plaintiff through one of its officers. The gist of the plaintiff's charge is that because of its refusal to yield to the defendants' demand to increase the price at which it sold defendants' product, the defendants and a number of distributors who were in competition with the plaintiff engaged in a conspiracy unreasonably to restrain trade and to fix the resale price of the defendants' product by continued refusal to sell to plaintiff any of the defend-

ants' products. The plaintiff specifically charges, and the deposition of its principal officers alleges, that when upon demand of defendants' sales representative it refused to increase the price of the defendants' product to accord with those at which it was sold by competitors, its orders were not filled and its supply was cut off. Other witnesses for the plaintiff submit affidavits which charge threats to this effect had previously been made by the president of the corporate defendant. The latter has submitted no affidavit in reply to this charge although the defendants' sales representative denies he ever attempted to dictate the price at which plaintiff was to sell the defendants' product or that he threatened to cut off the supply. The defendants concede they refused to sell their product to the plaintiff and assert that the reason therefor, and the only reason, was because the salesman had disagreeable relations with the plaintiff; that their refusal to continue to sell was unrelated to any attempt to coerce plaintiff to increase prices.

[*Summary Judgment Denied*]

The fact question posed by this one issue (apart from others) is so clear that it is difficult to understand the basis for the motion for summary judgment. Apparently it is predicated on the ground that plaintiff's officer in his deposition failed to give direct evidence of conspiracy against the defendants. The defendants overlook the fact that conspiracies, by their very nature, are rarely established by direct evidence, and that usually only circumstantial proof is available. The fact that the plaintiff's orders were not filled and its supply cut off after it refused to yield to demands to increase prices, if accepted by the trier of the fact is a circumstance that may be taken into account in deciding the existence of the conspiracy as charged.

Summary judgment may not be availed of to defeat a party's right to trial where a genuine issue of fact exists. The papers here establish fully the existence of fact issues and accordingly the motion is denied.

[¶ 68,640] Ace Tackless Corporation v. American Tackless Corporation.

In the New York Supreme Court, Kings County, Special Term, Part III. 137 N. Y. L. J., No. 34, page 10. Dated February 19, 1957.

Clayton and New York Donnelly Antitrust Acts

Combinations and Conspiracies—Agreement Not To Compete—Sale of Business—Legality Under Federal and State Antitrust Laws.—Where a manufacturer of tackless carpet installation accessories sold its business, including goodwill and a list of customers, to another manufacturer of such accessories, an agreement by the selling manufacturer and its officials that they would not for a period of five years engage in the business of manufacturing and selling tackless carpet installation accessories in any place in the United States was not illegal under the Clayton Act or the New York antitrust laws. Where a business is sold and the seller, or those in official connection with the seller, agree not to compete, such an agreement is not illegal under the Clayton Act. The agreement was not too broad in providing that the sellers should not engage in such a business in any place in the United States because the sellers had done business, directly or indirectly, in all of the states.

See Combinations and Conspiracies, Vol. 1, ¶ 2319.34; Exclusive Dealing, Vol. 1, ¶ 4009.

[*Nature of Action*]

The Referee [HON. MEIER STEINBRINK, Special Referee, *In full text*]: This is an action brought by the plaintiff for an injunction against a number of named defendants, some of whom have been dropped from the case. During the trial the action was dismissed as against the American Tackless Corporation and William Snyder and this was on consent. The defendants named as Jack Allen and Irving Allen were never served. The only remaining defendants, therefore, in the case are Irving Alexander and Abe Selton. This is the third day that we have been in this trial. From all that has been established here, I say with more than formal respect for counsel on both sides, that this case could easily have been disposed of in less than a day. The defendants could very well have admitted those allegations of the complaint which they denied, namely, that they violated the restrictive covenants which were

contained in the bill of sale and in the agreement supplementary to that bill of sale. For that fact has not only been clearly established but has not been refuted by either of the two remaining defendants though they were present in court. This case seems to have had its origin when the Ace Tackless Corporation entered into an agreement to purchase the American Tackless Corporation, resulting in a bill of sale dated August 23, 1956. The provisions of that bill of sale are quite germane and important to the decision of this case. The bill of sale recites the sale of the goods and chattels particularly described in Schedule A, which was annexed, and the list of customers set forth in Schedule B, which likewise was annexed. It included the good will of the American Tackless Corporation and the list of customers was warranted by the American Tackless Corporation that this contained the list of customers then appearing on the books of the seller. In addition, Ace Tackless Corporation purchased certain raw materials which were on hand, including nails, cardboard cartons, wood, and so forth, which are specifically enumerated in a separate memorandum executed simultaneously with the bill of sale. I pause for a moment and turn to Schedule B which is annexed to the bill of sale. Without reciting the name and address of each customer, it appears that quite a number of the customers were located in Illinois, in Pennsylvania, in Arizona, in Maryland, in Ohio, in New Jersey, in Utah, in Georgia, in North Carolina, in Florida, in Michigan and in Kansas. I call specific attention to this in view of one of the affirmative defenses which is pleaded in the answer by Alexander and Selton. The supplementary agreement which was a part of this transaction recites the names of all the parties, including the two defendants who remained in this case. It recites that both the American Tackless Corporation and Ace Tackless Corporation were engaged in designing, manufacturing and selling carpet and rug installation accessories, more particularly in the form of tackless installation accessories and equipment.

[*Restrictive Covenants*]

It again makes cross-reference to the list of customers to which I have already alluded. It specifically recites:

> "Whereas a valuable and substantial part of the consideration paid by Ace Tackless Corporation for the property and list of customers so as aforesaid described was and is the agreement herein contained and the first parties will derive great profit, benefit and advantages from and in consequence of the said purchase."

It then recites "Consideration." It then goes on to provide as follows in paragraph 1:

> "That the first parties, individually and collectively, covenant with the second party, its successors and assigns, that they and each of them will not at anytime during the period of five years from and after the date hereof, directly or indirectly, under any circumstances or conditions whatever, engage in or be or become interested as an individual, partner, stockholder, director, officer, principal, agent, employee, trustee or in any relation or capacity whatsoever in or to the business of designing, manufacturing and sale of carpet and rug installation, accessories, more particularly, in the form of tackless installation accessories and equipment in any place in the United States of America."

There is then the usual provision that in the event of a breach that the party as against whom the breach is committed would be entitled to an injunction.

There is then the third paragraph to which I call specific attention and which I quote for the reason that there is a separate defense which refers to it. That third paragraph is as follows:

> "That the said first parties, individually and collectively, shall not at anytime and forever canvass, solicit or accept any business for carpet and rug installation accessories, more particularly in the form of tackless installation accessories and equipment from any customer or customers contained in the list of customers, as set forth in Schedule B annexed to the bill of sale herein referred to, which bill of sale runs from American Tackless Corporation to Ace Tackless Corporation either for themselves or any of them or for another directly or indirectly as an employee, owner, partner, dormant or otherwise, agent or stockholder, director or officer of any corporation or otherwise."

This was signed by the American Tackless Corporation by its president and attested by its secretary. Irving Allen, William Snyder, Irving Alexander, Abe Selton and Jack Allen signed as individuals and Ace Tackless Corporation signed by its president Lionel H. Rosenhaft.

[*Violation of Covenants*]

That there was a violation of the restrictive covenant no one would seriously dispute. It was amply proven, especially by the testimony of Mr. Meyer Yorsamer, who said that within two weeks after August 23, 1956, that both Alexander and Selton became associated with the business that he was engaged in, which was a competitive business with the Ace Tackless Corporation, and that he paid to them $125 a week as a drawing account against a ten per cent interest in the profits of the corporation and the business.

Yorsamer certainly did not try to help the plaintiff. In fact, he testified with considerable hesitation, which casts some doubt on his credibility in an endeavor, if he could, to hide the activities of both Alexander and Selton. And I will point out specifically where that arose.

He was asked to take the list of Schedule B and then to tell us which one of those were customers with whom he had come in contact through introduction by either Alexander or Selton or by both. He had his sales book, which was marked for identification. The court specifically asked counsel whether it was agreeable to them that that book should be examined and tested as against the list of customers on Schedule B. Yorsamer had testified that there were only seven concerns. He was entirely in error. And when I say that I am speaking charitably, for there were not seven, there were seventeen and they were read into the record.

I say, therefore, that the fact that they violated the restrictive covenant is as clear as anything could be.

[*Defenses*]

I deal now, however, with the affirmative defenses, one of which is that the agreement which was supplemental to the bill of sale was void since it was an agreement to create a monopoly in the manufacture, production and sale of an article of common use.

The second affirmative defense is, in effect, the same thing, that it is void because contrary to public policy of the State of New York for the reason that it tends to restrain trade and creates a monopoly.

The General Business Law applicable to this has often been referred to as the little Clayton Act.

The third is that it violated the terms of the Clayton Act. And the final one that the defendant, the plaintiff, together with others, agreed and conspired to purchase the assets of the American Tackless Corporation and to restrain the members of the American Tackless from competing with them in the field and sale and manufacture of carpet and rug tackless installation.

No one of these defenses has been established. Conspiracy cannot be guessed at. It must be a conspiracy to do a wrong. The law does not recognize such a thing as a conspiracy standing baldly by itself. It must be either a conspiracy to do an act unlawful in itself or to refrain from doing that which one is called upon to do.

It cannot be said and I do not find that this agreement was void because it ran for a period of five years. There are many cases in the reports where a period longer than five years has been embodied in an agreement of sale and there is a distinction which is recognized by the decisions between the sale of a business, its good will and a restrictive covenant as against individuals interested in the business and that of a contract of mere employment.

[*Antitrust Laws*]

This was not a contract of mere employment. This agreement was not void as contrary to the public policy of the State of New York nor is it void under and by virtue of the terms of the Clayton Act, because both in the state courts and in the federal courts, it has been repeatedly held that where a business is sold and with it the seller, or those in official connection with the seller, agree not to compete, that it does not fall within the condemnation of the terms of the Clayton Act.

Now, the next question that arises is: Was it too broad in providing that they shall not engage in this line of business anywhere in the United States? My answer to that is no, it was not too broad, and for this reason: In addition to the customers which I have previously listed in different parts of the United States, we have the testimony of the president of the plaintiff, Lionel H. Rosenhaft, that they had distributors with whom they did business directly in thirty-three states in the United States and through those distributors that their products were also sold in the other fifteen states. There they ob-

tained them indirectly from the plaintiff and from the plaintiff's distributors.

[*Evidence*]

Now, these two defendants were left absolutely free to go into any other business that they desired to go into. But they bound themselves not to go into a competing business and they did so within a period of two weeks after August 23, 1956.

We have the testimony of Frank Felty of Sloane and Company, who did business with one of these two defendants, but who then believed that he was buying from Allied Tackless Corporation, when as a matter of fact, he was buying through these two defendants from either that concern or some other concern.

I repeat that I think the credibility of Meyer Yorsamer was rudely shaken.

I have no reason whatever to disbelieve the testimony of Harry J. Lockman of the E. L. Supply Company that Selton came to him as early as September 14, 1956, and told him he had good news for him and that he could get him tackless from another source.

I have no reason to doubt the testimony of Edward Lieberman, of William Fuhrman, or Lionel H. Rosenhaft, nor of the young lady who was last called and who was the bookkeeper for the plaintiff, Evelyn Warshauer.

I think that what the two defendants did here was unconscionable. They were parties to this agreement in this sale for which the price of $25,000 was paid, and in addition, some added items of merchandise or other incidentals; and by defendant's Exhibit C in evidence, both Abe Selton and Irving Alexander acknowledged receipt of their distributive share on the liquidation and dissolution of the American Tackless Corporation. That is set forth in the sheet appended to defendant's Exhibit C. The total that they received either by accounts receivable, in cash paid at the time or in cash at the time of the signing of this paper was $7,382.58.

At no time did they assert the invalidity of that which they have done nor did they tender back the moneys that they had received.

I do not think it necessary to go any further into the facts. Suffice it to say that there is not a shred of evidence on which one could predicate a decision in favor of these two defendants on their affirmative separate or partial defenses.

[*Injunction*]

It will appear in the record that a little while ago this afternoon I asked if Irving Alexander and Abe Selton were in the courtroom. Counsel responded that they were both present. Neither of them saw fit to take the stand in aid of their denials or their affirmative defenses.

An injunction will issue.

Now, since they are both present and their counsel is present, the injunction will be effective as of the end of this week, regardless of whether it has been reduced to typewritten form and signed or not. The Court of Appeals of this state has held that an injunction or order made from the Bench is just as effective as a written order.

They must cease immediately their activities with the competitor of the plaintiff.

Should the plaintiff desire the opportunity to offer evidence of money damage with respect to any of the seventeen customers who unquestionably were sold because it's on the book which was produced here, that opportunity will be afforded.

The injunction order, however, should be prepared promptly and served on defendants' attorney.

Costs will run as a matter of course in a case of this kind.

[¶ 68,641] James F. Crafts v. Federal Trade Commission.

In the United States Court of Appeals for the Ninth Circuit. No. 14,972. Filed February 27, 1957.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division. Oliver D. Hamlin, District Judge.

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Production of Documentary Evidence—Enforcement of Subpoena by U. S. District Court—Jurisdiction of District

Court—Scope of Subpoena—McCarran-Ferguson Act.—An order of a United States District Court enforcing a subpoena *duces tecum* issued by the Federal Trade Commission in a false advertising proceeding against an insurance company was reversed on the ground that the order was too broad. The order required the production of all books, papers, and records of the insurance company, including those relating to the intrastate business of the company in California. Under the McCarran-Ferguson Act, the power of the Federal Trade Commission to regulate the business of insurance is limited. The District Court had jurisdiction to determine, and should have determined, whether or not the Federal Trade Commission had any power over the subject matter of its proceeding in view of the McCarran-Ferguson Act. Also, the court should have determined whether or not the broad demand for documents covering the whole field of intrastate operation in California and in other states, which respectively attempted to legislate with regard to advertising in the field of insurance, was arbitrary and unreasonable. There was no examination by the court of the relevancy and pertinence of the documents demanded to any matter into which the Commission was empowered by statute to inquire. While it may be the duty of a court to enforce a subpoena insofar as the demand is in accordance with the law, the phraseology of the subpoena in the instant case was such that the court had no means of separating the items, if any, over which the Commission had jurisdiction from those as to which Congress had explicitly denied authority to the Commission.

See Unfair Practices, Vol. 2, ¶ 5081.362, 5201, 5301; FTC Enforcement and Procedure, Vol. 2, ¶ 8741.55.

For the appellant: Christopher M. Jenks, of Orrick, Dahlquist, Herrington & Sutcliffe, San Francisco, Cal.

For the appellee: Earl W. Kintner, General Counsel, Federal Trade Commission; Robert B. Dawkins, Assistant General Counsel, FTC; and Janet D. Saxon, Washington, D. C. Don Eastvold, Attorney General, State of Washington; Bernard C. Lonctot, Chief Assistant; and J. Calvin Simpson, Olympia, Wash. James E. Corkey; John W. Brookfield, Jr.; Edmund G. Brown, Attorney General, State of California; and Harold B. Haas, San Francisco, Cal.

Reversing an order of the U. S. District Court, Northern District of California, Southern Division, enforcing a Federal Trade Commission subpoena in Dkt. 6310.

Before: LEMMON, FEE and CHAMBERS, Circuit Judges.

[*FTC Subpoena—Court Order*]

JAMES ALGER FEE, Circuit Judge [*In full text*]: This is an appeal from an order enforcing a subpoena *duces tecum* issued by the Federal Trade Commission to Crafts in a proceeding against Fireman's Fund Indemnity Company. The trial court issued an order as follows:

"Order Requiring the Giving of Evidence and the Production of Documentary Evidence

"The Federal Trade Commission, having invoked the aid of this Court in requiring the attendance and testimony of James F. Crafts and the production of documentary evidence by James F. Crafts, as a witness in a proceeding instituted by the Federal Trade Commission against Fireman's Fund Indemnity Company (D. 6310) and

"The Court having considered the application, it is hereby

"Orderd: That the application be, and the same hereby is granted, and that the said James F. Crafts be, and he is, hereby ordered to appear upon not less than ten days' notice at a time and place to be set by the Federal Trade Commission or a Hearing Examiner thereof designated by the said Commission to take testimony and receive evidence, and to perform all other duties authorized by law in the prosecution of the inquiry pending before said Commission entitled, 'In the Matter of Fireman's Fund Indemnity Company, a corporation, Docket No. 6310,' or an examiner subsequent hereto designated by it for such purposes, to give evidence and testimony at the aforesaid time and place touching matters brought in question by the complaint of the Federal Trade Commission against Fireman's Fund Indemnity Company, a corporation, and the answer thereto, to then and there produce the documentary evidence identified and described in a subpoena issued by the said Commission, on September 22, 1955, and

already served upon said James F. Crafts, and which the said James F. Crafts has not produced, and to answer at said time and place every question relevant and material to said proceeding and necessary and proper to the conduct thereof and to attend before said Examiner of the Federal Trade Commission from day to day until his examination shall have been completed.

"It Is Further Orderd: That this Order and its effectiveness be and the same is hereby stayed for the time permitted by law for an appeal therefrom, and if such appeal is filed, thereafter until final determination of such appeal."

[*Enforced Subpoena*]

The subpoena which was thus enforced read:

"United States of America Federal Trade Commission

"Subpoena Duces Tecum

"To Mr. James F. Crafts, Fireman's Fund Indemnity Company, 401 California Street, San Francisco 20, California.

"You are hereby required to appear before J. Earl Cox, a Hearing Examiner of the Federal Trade Commission, at Room 261, U. S. Post Office and Court House, 7th and Mission Streets in the City of San Francisco, California, on the 17th day of October, 1955, at ten o'clock a.m., of that day, to testify at the instance of the Federal Trade Commission in the Matter of Fireman's Fund Indemnity Company, Docket No. 6310, and you are hereby required to bring with you and produce at said time and place the following books, papers, and documents: described in Schedule 'A' attached hereto and incorporated by reference as if fully rewritten herein.

"Fail not at your peril.

"In testimony whereof, the undersigned, a Hearing Examiner of the Federal Trade Commission, has hereunto set his hand and the said Federal Trade Commission has caused its seal to be affixed at Washington, D. C., this 22nd day of September, 1955.

[Seal] /s/ J. EARL COX,
Hearing Examiner.

"Schedule 'A'

"1. One copy of each form letter, bulletin, circular, folder, brochure, stuffer, newspaper advertisement, magazine advertisement, or other written or printed advertising material which was disseminated by respondent Fireman's Fund Indemnity Company (hereinafter described in this Schedule 'A' as respondent) to the general public, or to its employees or agents for dissemination to the general public or which was disseminated to the general public by any person, partnership, or corporation with the permission of, request of, order by, or under the terms of any contract with the respondent from March 1, 1954, to date, which advertised, described, or related to any of the accident and health insurance policies named in the complaint or any policies issued by the respondent since March 1, 1954, as substitutes or modifications for such policies.

"2. All contracts, memorandums of agreement, or correspondence between respondent, its officers, agents, employees, or contractors, or any records, books of accounts, or verified summaries thereof which have reference to the following listed advertisements and which show on a state by state basis volume of dissemination of such advertisements by respondent to the general public or to its agents for redissemination to the general public during the years 1953 and 1954.

1. Form letter of A & H No. 2.
2. Form letter of A & H No. 7.
3. Form letter of A & H No. 9.
4. Form letter of A & H No. 10.
5. Circular bearing form No. A & H 4800.
6. Postcard bearing form No. A & H 4800-A.
7. Circular bearing form No. A & H 4801.
8. Postcard bearing form No. A & H 4801-A.
9. Circular bearing form No. A & H 4803.
10. Postcard bearing form No. A & H 4803-A.
11. Pamphlet bearing form No. A & H 4804.
12. Pamphlet bearing form No. A & H 4807.

"3. One specimen copy of each accident and health insurance policy issued by respondent since March 1, 1954, as a substitute or modification for any of the accident and health insurance policies named in the complaint.

"4. Original books, records, or accounts of the respondent, or verified summaries thereof, showing: the dollar volume of the premium receipts received by it from insureds residing in each of the several states of the United States and in the District of Columbia during the years 1953 and 1954 to whom respondent has issued during those years one or more of the following listed policies on a family or group basis; or the total number of

such policies issued by respondent during the years 1953 and 1954 in each of the several states of the United States and the District of Columbia:

1. The Basic Equity Accident Policy (No. BA).

2. The Basic Income Equity Accident Policy (No. BAI).

3. The Basic Equity Life and Limb Accident Policy (No. BAL).

4. The Basic Health Policy (No. BHP).

5. The Budget Hospital and Medical Policy (No. GMA).

6. The Hospital Nurses and Expense Policy (No. HNE).

7. Hospital and Medical Policy (No. IMH).

8. Polio Policy (No. PS).

"[Endorsed]: Filed October 18, 1955."

[*FTC Complaint*]

The complaint in the original proceeding is of extremely broad scope:

"United States of America Before Federal Trade Commission Docket No. 6310

"In the Matter of:

Fireman's Fund Indemnity Company, a Corporation

"Complaint

"Pursuant to the provisions of the Federal Trade Commission Act, as that Act is applicable to the business of insurance under the provisions of Public Law 15, 79th Congress (Title 15, U. S. Code, Sections 1011 to 1015, inclusive), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Fireman's Fund Indemnity Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

"Paragraph One: Respondent, Fireman's Fund Indemnity Company, is a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 410 California Street, San Francisco, California.

"Paragraph Two: Respondent is now, and for more than two years last past has been, engaged as an insurer in the business of insurance in commerce, as 'commerce' is defined in the Federal Trade Commission Act, by entering into insurance contracts with insureds located in various States of the United States in which the business of insurance is not regulated by state law to the extent of regulating the practices of respondent alleged in this complaint to be illegal. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said insurance policies in commerce between and among the several States of the United States.

"Respondent, during the two years last past, has sold insurance indemnification in a variety of policies, among which are the following:

1. The Basic Equity Accident Policy (No. BA).

2. The Basic Income Equity Accident Policy (No. BAI).

3. The Basic Equity Life and Limb Accident Policy (No. BAL).

4. The Basic Health Policy (No. BHP).

5. The Budget Hospital and Medical Policy (No. GMA).

6. The Hospital Nurses and Expense Policy (No. HNE).

7. Hospital and Medical Policy (No. IHM).

8. Polio Policy (No. PS).

"Paragraph Three: Respondent is licensed, as provided by the respective State laws, to engage in the business of insurance, as heretofore generally described, in all of the forty-eight States of the United States and the District of Columbia.

"Paragraph Four: In the course and conduct of its aforesaid business, respondent, during the two years last past, disseminated, and caused to be disseminated, in the form of printed and written matter, false, misleading and deceptive advertising statements concerning the terms and provisions of its contracts of insurance, as reflected by policies as aforesaid. These statements were disseminated by letters, bulletins, circulars, etc., through the United States mail and by other means; or through its agents in commerce, between and among the various States of the United States. The purpose and effect of these statements was and is to induce members of the public to become insured by the respondent under the terms and provisions of the policies advertised.

"Paragraph Five: In the course and conduct of its said business in said commerce, as aforesaid, the respondent has disseminated, among others of similar import and meaning, not herein set out, advertisements relating to its said policies containing the statements hereinafter set forth:

1. 'Available to Males ages 18-54 . . . Females 18-54 . . . Renewable to age 70.'
2. 'A Perfect Combination for Full Coverage Disability Insurance.'

'Let Accident and Health Insurance Protect Your Income as Fire Insurance Protects Your Home.'

'Adequate Sickness Protection Combined With Sound Accident Insurance.'

'Basic Coverages

Hospital Confinement cases:

	Benefits Plan A
1. Hospital room and board for a period not exceeding 100 days for any one disease or injury,	
Adults, per day up to	$ 5.00
Children, per day up to	4.00
2. Actual expense incurred for operating room, anaesthesia, anaesthetist's fee, drugs, dressings, diagnostic X-ray and laboratory examinations, up to an aggregate maximum of..	100.00
Ambulance Expense:	
Transportation to or from the hospital, up to	15.00'

'Optional Coverages

Surgical Operation Expense:	
Whether at hospital, doctor's office or home, schedule up to..	$250.00
Housewives and Unemployed Females	187.50
Doctor's Visits During Hospital Confinement	
In non-surgical cases, reimbursement will be made for physician's fees up to a maximum of 100 days for each disease or injury, per day up to	3.00'

4. 'Loss of Business Time Weekly Income up to 52 weeks Confining Illness Coverage from first day or with waiting period of 7, 14, 21 or 28 days.'

"Paragraph Six: Through the use of such statements and representations, and others of similar import and meaning, not specifically set out herein, the respondent represents and has represented directly or by implication, with respect to said policies of insurance, as follows:

"1. That the policies providing indemnification against loss caused by accident or sickness may be continued at the option of the insured to a specific age or for life as long as the insured makes such premium payments within the time and in the amounts as are required by the terms of the policy.

"2. That complete indemnification is provided for any or all sicknesses, illnesses or accidents suffered by the insured.

"3. (a) That indemnification is provided in the form of cash benefits for the payment of hospital room and board at the rate of $5.00 per day for a period not to exceed 100 days for any one disease or injury which may be suffered by the insured.

"(b) That indemnification in the form of cash benefits in an amount up to $250.00 is provided for surgical expense incurred by the insured as a result of illness or injury.

"(c) That indemnification is provided for doctors' visits in non-surgical cases during hospital confinement at the rate of $3.00 per day for a maximum 100 days for each sickness or injury suffered by the insured.

"(4) That indemnification is provided for any confining sickness which may be suffered by the insured during the policy term from the first day of such sickness or after a waiting period of 7, 14, 21, or 28 days as the policy may prescribe.

"Paragraph Seven: The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact:

"1. Contrary to the statements made in paragraph 1 of Paragraph Five, respondent's policies may not be renewed at the option of the insured until the age of 70 years or any other specific age by the timely payment of premiums in the amounts required by such policies. On the contrary, respondent's policies provide, in effect, that they are subject to cancellation by the respondent at any time for any reason or for no reason at all.

"2. Contrary to the statement made in subparagraph 2 of Paragraph Five concerning respondent's Basic Health Policy and Basic Equity Accident Policy, the insured is not provided with complete indemnification by such policies against any loss which may be incurred by reason of any or all sicknesses or accidents. For example, Respondent's Basic Health Policy provides, (a) in effect, that no cash benefits are payment for any loss due to sickness the cause of which is traceable to a condition existing prior to or within 15 days after the effective date of the policy; (b) any loss due to pregnancy, childbirth or miscarriage; and (c) suicide or any attempt threat, death, dis-

ability or other loss caused or contributed to, by disease or infection (except pyogenia infection) or injury sustained by the insured while in or on any aircraft or other device for air travel. Total disability benefits are only provided if the disability wholly and continuously disables the insured and prevents the insured from performing each and every duty pertaining to his occupation. Further, such total disability must occur within 30 days of the date of the accident.

"3. Contrary to the statements made in subparagraph 3 of Paragraph Five:

"(a) Respondent's Hospital and Medical Expense Policy (as referred to in subparagraph 3(1) of Paragraph Five) does not provide indemnification for hospital room and board for a period not to exceed 100 days for any one disease or injury. On the contrary, such policy does not cover losses resulting from any illness the cause of which is traceable to a condition existing prior to or within 30 days of the effective date of the policy. Further, the policy does not provide for the payment of cash benefits for losses resulting from insanity, pregnancy or childbirth, or any condition resulting therefrom; intentional self-inflicted injuries; or operations for removal of tonsils or adenoids, or both, upon children up to the age of 18; unless the policy has been in effect for at least 12 consecutive months. Also, it is to be noted that the policy provides that benefits payable thereunder shall be reduced 25% when the insured reaches 60 years of age and 50% when the insured reaches 65 years of age.

"(b) Respondent's Hospital and Medical Expense Policy does not cover any surgical expense which may be suffered by the insured by reason of sickness or accident in all cases to a maximum of $250.00. The surgical benefits provided by the policy, if payable at all, are limited to the maximum amounts stated in the schedule of operations (Rider Form MSE) contained in the policy. This schedule lists 114 different types of operations. A maximum of $250.00 will be payable for surgical fees for only four of these types of operations. A maximum of $75.00 or less is provided for 90 of the listed types of operations.

"(c) Respondent's Hospital and Medical Policy does not provide indemnification for doctors' visits to the insured during hospital confinement in all non-surgical cases. Instead, such policy excludes indemnification for this expense in many instances for the reasons previously stated in subsection (a) of this section.

"4. Contrary to the statements contained in subparagraph 4 of Paragraph Five (which refer to respondent's Basic Health Policy) indemnification is not provided for the first day of any illness which may be contracted by the insured during the policy term. Instead, such policy excludes payment for losses resulting from any sickness the cause of which originates on or prior to fifteen days after the effective date of the policy.

"Paragraph Eight: The use by the respondent of the aforesaid false and misleading statements and representations with respect to the terms and conditions of its said policies and its failure to reveal the limitations of said coverage found in said policies have had and now have the tendency and capacity to mislead and deceive and have misled and deceived a substantial portion of the purchasing public into the erroneous and mistaken belief that the aforesaid statements and representations were and are true and to induce said portion of the purchasing public to purchase insurance coverage from the respondent because of said erroneous and mistaken belief.

"The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

"Wherefore, the Premises Considered, the Federal Trade Commission, on this 11th day of March, A. D. 1955, issues its complaint against said respondent."

[*Appeal*]

Crafts appeals, claiming it is not shown that the proceeding lies within the power of the Commission and that the testimony and exhibits demanded are therefore not shown to be relevant to any inquiry within the jurisdiction of the administrative body to conduct. No claim of personal privilege is made.

The proceeding raised the question of whether Congress had not totally proscribed action by the Commission in the insurance field, albeit trafficking across state lines in insurance now constitutes interstate commerce.[1] It must be determined at the

[1] *United States v. South-Eastern Underwriters Association* [1944-1945 TRADE CASES ¶ 57,253], 322 U. S. 533, rehearing denied 323 U. S. 811.

outset whether the demand of the subpoena related specifically to any books, documents or other papers, the production of which the Commission had a right to require from this corporation or its officers, as being within the closely circumscribed area which Congress may have left remaining for Commission action as to insurance.

[*Jurisdiction of District Court*]

The two bases for the claim of the Commission that the order should be upheld cut diagonally across these fields.

First, it is said that the District Court had no authority to determine whether the Commission was empowered to bring the proceeding and issue the subpoena, and, second, it is argued that the only question involved is one of "coverage," which must be left to the discretion of the Commission. It will be demonstrated that neither of these contentions is sound. As paraphrased by the agency brief, the trial court took the position that "the subpoena must be enforced without deciding whether the appellant is covered by the statute, provided the subpoena is relevant to a legitimate field of inquiry and is otherwise reasonable." But it must be pointed out that even this test, so loosely defined, was not really employed by the trial court in the instant case.

The present proceeding to enforce the subpoena was frankly initiated in order to gain complete disclosure of all records by Fireman's Fund Indemnity Company without settling the question of the authority of the Commission to investigate that company in their present proceeding. Indeed, as noted above, the claim was made and was apparently accepted by the trial judge that the District Court had no jurisdiction to consider whether the Commission had power to investigate this particular corporation at all. It is urged by the agency that this Court accept the interpretation of the Commission of its own powers for the purpose of making the investigation and that the breadth thereof can be reviewed when the final order in the main proceeding is attacked. We reject this limitation upon the jurisdiction of the trial court.

It cannot be too often reiterated that the attempt to enforce an administrative subpoena initiates a case or controversy.[2] All questions relating to jurisdiction of the court, authority of the administrative body, reasonableness of the demand under all the circumstances, with regard for due process and protection of individual rights, and relevancy of the testimony and documents demanded are justiciable. Since the Commission was asking for relief of an affirmative nature, it was incumbent upon that agency to establish affirmatively its legal power to act in the field, among other essentials. The postulate upon which any jurisdiction to act in the field of interstate commerce by the Commission depends is that Congress had not explicitly excluded such action by specific statute. The power of Congress to exclude completely such action under the Commerce Clause of the Federal Constitution cannot be denied. If the Commission were then precluded from regulation by Congress, it would have no power to act and the court would be bound so to declare.

[*Issues*]

The jurisdiction of the District Court and the extent of the area denied by Congress to the Commission in regulation of insurance in interstate commerce are the cardinal questions here. Therefore, the decision here is not affected by the principles set forth in cases recently decided by this Court. In these decisions, the element of personal privilege, the right of privacy, the right of a person to be secure from a general search and seizure and not to be required to be a witness against oneself as constitutionally guaranteed were discussed.[3] Here, as noted above, no claim of any personal

[2] *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 489.

[3] These decisions turn on the propriety of judicial enforcement of subpoenas issued by various administrative agencies in the light of claims of personal privilege or privacy by those directly involved or by third parties to the proceeding. In *Boren v. Tucker*, 9 Cir., No. 15,010, filed December 3, 1956, it was held, so far as is important here, that the subpoena was reasonable in that the evidence sought was sufficiently material and relevant to the tax liability of the defendant taxpayers. In *Chapman v. Maren Elwood College*, 9 Cir., 225 F. 2d 230, the denial of enforcement of a subpoena issued by the Veterans Administration was affirmed, as the subpoena was found, on the facts, to reach unreasonably far back in time.

Three cases involve the rights of third persons to protection where the administrative agency is authorized to investigate another directly. The question presented is whether a general, rather than specific, demand allows the third person to raise questions of personal privilege and avoid disclosure which might tend to incriminate him. Enforcement of a Civil

privilege or right is made. The issue is essentially one of authority to determine jurisdictional questions.

There are three separate questions in this case which were before the trial court. First, did the Federal Trade Commission have any authority to demand production of any papers whatsoever from Fireman's Fund Indemnity Company? Second, has the Commission any power over the subject matter of the inquiry? Third, was the subpoena definite enough to show all the material demanded was relevant to any inquiry which the Commission was empowered to conduct?

[*Duty of District Court*]

The question of whether either Indemnity or Crafts was covered by an act, regulation or statute personally was really not involved or, perhaps we may rather say, was entirely a dependent proposition which could only be solved by a determination of whether Congress had precluded the Commission from acting in the particular field. The trial court refused to consider the scope of authority of the Commission, the relevancy of the testimony or documents to any inquiry which the agency had the authority to conduct and the arbitrary nature of the demand considering that Congress may have prohibited action or at least closely circumscribed action in this field of interstate commerce by the Commission.

But at the threshold of any inquiry a District Court must consider not only its own jurisdiction, but also the authority of any agency to act which seeks relief before it.[4] The idea that a fiat of an administrative agency that it possesses authority to act in a particular field is sacrosanct is illusory. In certain statutes, Congress has permitted an agency to determine conclusively whether a certain person or state of facts comes within the orbit of its administrative power.[5] But those instances are not analogous to the instant proceeding.

[*McCarran-Ferguson Act*]

Here the trial court places an imprimatur upon each demand of the subpoena without any consideration of the limitations upon

Aeronautics Board subpoena was reversed and the case remanded in *Hermann v. Civil Aeronautics Board*, 9 Cir., 237 F. 2d 359, in part because the District Court failed to pass upon privilege asserted by third parties to the proceeding in behalf of documents relating "entirely to their personal affairs, such as their income tax reports." A similar result obtained in Local 174, International Brotherhood of Teamsters, 9 Cir., No. 14,746, filed November 8, 1956, where the subpoena issued by the Internal Revenue Service to the Local, a third party to the tax investigation of another, was so broad on its face as to compel a holding that the District Court had not given consideration to the right of privacy of the Local. Likewise, this Court, in *Hubner v. Tucker*, 9 Cir., No. 14,704, filed January 30, 1957, set aside a contempt order imposed against defendant, a third party to a tax investigation for failure to obey the subpoena issued by the Internal Revenue Service, and remanded the case. It was held that the blanket demand, by its very breadth, precluded the defendant from effectively raising the defense of unlawful search and seizure and the privilege against self-incrimination.

It should be noted that, in all these cases, there was no question raised as to the broad legal authority of the various agencies involved to issue subpoenas, and to have them enforced: "coverage" was not an issue in any of them. Rather, the issues raised in these enforcement proceedings concern more particular problems, such as what may be subpoenaed, from whom, and in what manner.

[4] *Jones v. Securities and Exchange Commission*, 298 U. S. 1. A leading "coverage" case indicates that evidence sought by subpoena cannot be "plainly incompetent or irrelevant to any lawful purpose" of the agency. *Endicott Johnson Corporation v. Perkins*, 317 U. S. 501, 509. As the District Court stated in Application of Barnes, 116 F. Supp. 464, 467, ultimately affirmed *sub nom. United States v. Minker*, 350 U. S. 179, "Subpenas should not issue on hit or miss legal grounds." See also cases where enforcement was denied on analogous legal grounds: *Cudahy Packing Co. v. Holland*, 315 U. S. 357 (improper delegation of subpoena power); cf. *Ellis v. Interstate Commerce Commission*, 237 U. S. 434; *Harriman v. Interstate Commerce Commission*, 211 U. S. 407 (witnesses not required to answer questions outside the scope of the statutory authority of the Commission).

[5] See, for example, *Endicott Johnson Corporation v. Perkins*, 317 U. S. 501, so holding as to the Walsh-Healy Public Contracts Act, 41 U. S. C. A. § 38, and *Tobin v. Banks and Rumbaugh*, 5 Cir., 201 F. 2d 223, cert. den. 345 U. S. 942, so holding as to the Fair Labor Standards Act, § 9, 29 U. S. C. A. § 209.

The trial court was impressed with the rationale of these cases and treated the question raised in the instant case as one of "coverage." The government has cited a wealth of cases on this point, which have properly treated "coverage" questions following the same line of reasoning. These are not applicable here. In each of them Congress had vested an agency with regulatory power in a broad field, and the particular question was whether some individual or entity was within or without the field. The agency was given primary jurisdiction to reach a tentative conclusion and subpoenaed records to prove the fact of coverage. But here Congress has severely circumscribed, if not destroyed the power of any agency to enter the field, if the regulation by a particular state is sufficiently comprehensive.

the power of the agency to act. However, Congress had passed an act specifically stating its position with regard to the business of insurance, which reads in part:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> "Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically related to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law." McCarran-Ferguson Insurance Regulation Act, 59 Stat. 33, 15 U. S. C. A. §§ 1011-1012.

In the face of this statute, the Commission has decided by a vote of three to two that it has a broad and uncontrolled power to regulate the business of insurance.[6] This result seemingly was reached by rationalization from the terms of the statute. However, it is not the intention to attempt to construe the statute because the demand of the subpoena is so broad and general that such a holding is not compelled here.

[*State Regulation*]

The appellant Crafts, contrary to the Commission, claims that California is the state of origin of the company and that the operations of the company with regard to advertising are completely regulated by the law of that state.[7] It is urged that California has the complete control of the existence of the corporation and may revoke its charter for violations of the laws, even if the particular act may have occurred in another state, federal district or foreign country.[8] Nor, it is claimed, is this a dry letter of the enactment, since the proper officers do enforce such regulations upon violations outside the state.[9] Furthermore, it is said, practically every state in the Union and the District of Columbia have statutes which regulate and control the advertising of the persons and corporations, domestic or foreign, doing insurance business in the state or district.[10] It is urged upon us that these are purely questions of law and that therefore it is incumbent upon this Court to decide now just what are the limitations, if any, upon the power of the Commission. We hold it improper for us to rule upon the questions thus presented in this ancillary case except insofar as these may affect breadth of the demand of the subpoena.

That there are limitations upon the power of the Commission in this field is beyond all doubt. It is apparently conceded by everyone that the agency had no power to inquire into the advertising of this corporation in the State of California. Indeed, it is stated that some such limitation was placed upon the claim to discovery by the trial examiner and affirmed by the Commission. It has also been stated by counsel that the agency has no interest in discovery as to this area. But this Court cannot consider this as a supposition or admission. The trial court enforced the subpoena as it read without qualification or exception. This was error.

[6] *In the Matter of American Hospital and Life Insurance Company,* F. T. C. Docket No. 6237, decided April 24, 1956.

[7] Cal. Stat. (Insurance Code) (West, 1956) §§ 780, 781.

[8] Cal. Stat. (Insurance Code) (West, 1956) §§ 704, 783.5.

[9] Appellant draws our attention to the pending case of *Foster v. McConnell,* Docket No. 422572, in Superior Court at San Francisco, in which just this application of the statutes is being tried.

[10] Almost four-fifths of the states have adopted, with minor variations, the so-called "Model Act," which was drafted by the National Association of State Insurance Commissioners and provided for the regulation of trade practices. See R. C. W. §§ 48.30.010-48.30.250. The remaining states all have statutory provisions regulating to various degrees deceptive representations or advertising.

[*Scope of FTC Jurisdiction*]

The entire complaint in the proceeding is predicated upon the overriding authority of the Commission to regulate and punish advertising in the business of insurance which may affect interstate aspects thereof in accordance with the ruling by that body, split three to two.[11]

When the Congress passes an act which is intended to cure an evil, legislatively designated and defined, the courts will not circumscribe the sphere of action of the agency. Here the Commission acts within the scope of power conferred by a general statute which purports to confer authority "to prevent * * * corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."[12] This Act covers a broad field and unquestionably sets out a legislative purpose of great public importance. As such, the legislation has been upheld and broadly enforced by the courts. Yet even the Commission will not contend that this legislation is of universal application to all corporations, persons and partnerships in the United States. Indeed, before the decision of the Supreme Court of the United States in *United States v. South-Eastern Underwriters Association* [1944-1945 Trade Cases ¶ 57,253], 322 U. S. 533, the Commission had never attempted to exercise this authority against insurance companies. If such an attempt had been made before that time, surely no claim could have been made that an insurance company could not resist the investigation at the outset on ground that the Commission had no jurisdiction. This consideration highlights the proposition that the primary question for a court here is jurisdictional and does not involve coverage.[13]

This point serves to distinguish all legislation and all decisions thereon where the particular entity may or may not be as a matter of fact within the general sweep of power conferred.[14] Where Congress has conferred broad authority upon an agency to exercise regulatory power over a legislative classification such as interstate commerce, the question as to whether the entity or person subpoenaed is within the classification and thus subject to administrative control is one of "coverage." As it is a question of fact, the agency usually has complete power of determination, and the courts cannot interfere. As to many fields, the Commission has such unhampered power in regulation of interstate commerce.

Here Congress had plenary power to refuse to occupy the field of regulation of insurance in interstate commerce. Whether the refusal was complete with a clause of re-entry left for future contingency or whether a considerable area was left for present regulation by the Commission, we do not attempt presently to decide. But the determination involves a question of law. The jurisdiction of the Commission certainly was drastically circumscribed in this field in any event. How far the prohibition has gone is dependent upon a construction of this act of Congress and the statutes of the several individual states regulating insurance. It may be conceived the actual practice in insurance regulations of a particular state may become pertinent eventually, but such matter will still relate to jurisdiction of the Commission and not to "coverage."

Patently, the power of the Commission to act at all is based upon the exception contained in a proviso.[15] The distinct purpose of Congress, emphatically set out in the act, was to abandon the field of regulation to the states, where the power traditionally lay.[16] Judicial knowledge may be taken of the fact that, in view of the responsibility which lay on the individual states to regulate this business when by hypothesis there could be no federal regulation,[17] the field was well covered both in the states of origin of the corporations and in the states of dissemination of advertising

[11] *In the Matter of American Hospital and Life Insurance Company*, F. T. C. Docket No. 6237, decided April 24, 1956.

[12] Federal Trade Commission Act, § 5(a)(6), as amended July 14, 1952, 66 Stat. 632, 15 U. S. C. A. § 45(a)(6).

[13] See cases at Note 4, *supra*.

[14] See cases at Note 5, *supra*.

[15] McCarran-Ferguson Insurance Regulation Act, § 2(b), as amended 61 Stat. 448, 15 U. S. C. A. § 1012(b), quoted in text, *supra*.

[16] McCarran-Ferguson Insurance Regulation Act, § 1, 59 Stat. 33, 15 U. S. C. A. § 1011, quoted in text, *supra*.

[17] Before the decision in *United States v. South-Eastern Underwriters Association* [1944-1945 TRADE CASES ¶ 57,253], 322 U. S. 533, rehearing denied 323 U. S. 811, it had been consistently held for many years that insurance was not "commerce." *Paul v. Virginia*, 75 U. S. 168, 183; *New York Life Insurance Co. v. Deer Lodge County*, 231 U. S. 495.

and of written policies. In the time zone which Congress deliberately created for the purpose,[18] state legislation to fill lacunae in regulation was widely enacted, as was the intention. A major portion controls the corporation in the place of its incorporation or where it has its principal place of business. But it must not be forgotten that many states scrupulously control the media of dissemination of policies, such as brokers, agents and advertising of foreign corporations engaged in the insurance business within the territorial jurisdiction thereof. In initiating a scheme of regulation of strictly interstate negotiation and sale of insurance policies, it might have been well for the Commission to establish as to two different states what the limits of such business are. Of course, this Court is not attempting to set boundaries to the jurisdiction of the Commission, but rather to seek a solution for the problem at bar.

[*Reasonableness—Relevancy*]

The trial court should then have considered the second proposition. It should have found affirmatively upon the question whether the broad demand for the testimony and documents covering the whole field of intrastate operation in California[19] and that in other states, which respectively attempted to legislate with regard to advertising in the field of insurance, was arbitrary and unreasonable or not.

The decisive point, however, encompasses all these phases. There was no examination by the District Court of the relevancy and pertinence of the testimony and documents demanded to any matter into which the Commission was empowered by statute to inquire.[20] Section 6 of the Administrative Procedure Act provides in part:

> "Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law * * *." Administrative Procedure Act, § 6(c), 60 Stat. 240 5 U. S. C. A. § 1005(c).

It may be incumbent upon the trial court to place limitation upon the subpoena. So only could the demand be sustained "to the extent that it is found to be in accordance with law." This Court is of the opinion that the subpoena was so broad on its face and the implications of the complaint upon which it was based are so farreaching that it would have been almost impossible to frame appropriate phrases of limitation. If the subpoena be enforced without regard to the relevance of the testimony sought to the areas over which the Commission has established jurisdiction, the ruling would not only be unfair to the company, but could be quoted as a precedent for an unlimited authority for investigation and discovery in the field of insurance, whether intrastate or interstate. The agency could have limited the subpoena itself so as to have raised the question of its power by particularizing the demand. If the demand had been confined to records relevant to interstate commerce with another single state such as Montana, where there is probably the least regulation of advertising by a foreign corporation in the insurance area,[21] a much closer question would have been presented. But decisions as to relevance as well as those as to reasonable or arbitrary exercise of power must have bases in facts.

[*Subpoena Too Broad*]

We hold that not only did the District Court have jurisdiction to decide, but also that it is required to decide whether the statutes have withdrawn the power from the Commission to regulate the particular area of interstate commerce in insurance solely when the court is moved to enforce a subpoena so definite in demand for specific books or papers that the scope of authority may be defined. Since this present subpoena demanded in mass all books, papers and records of the Indemnity Company including those relating to the intrastate business of that company in California, wherein Fireman's Fund was incorporated,

[18] McCarran-Ferguson Insurance Regulation Act, § 2(b), as amended, 61 Stat. 448, 15 U. S. C. A. § 1012(b), quoted in text, *supra*.

[19] See *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 307.

[20] Federal Trade Commission Act, § 9, 38 Stat. 722, 15 U. S. C. A. § 49.

[21] And, even in Montana, there is general legislation governing false statements in advertising. Montana Revised Code, § 94-1819, which would seem to be specifically applicable to "any insurance company * * * organized in this state, or in any other state." Montana Revised Code, § 40-1106.

the order of enforcement was too broad. While it may be the duty of the court to enforce a subpoena insofar as the demand be "in accordance with law," [22] here the phraseology was such that the court had no means of segregation of items, if any, over which the Commission had jurisdiction from those as to which Congress had explicitly denied them authority. *Hale v. Henkel,* 201 U. S. 43; *Federal Trade Commission v. American Tobacco Company,* 264 U. S. 298. The subpoena in the instant case is not sufficient to present the question of jurisdiction, if any, remaining to the Commission. The proceeding should be dismissed.

Reversed.

[¶ 68,642] Federal Trade Commission v. American Crayon Company.

In the United States Court of Appeals for the Sixth Circuit. No. 12,286. Filed February 16, 1957.

Petition for Enforcement of Decision of Federal Trade Commission.

Robinson-Patman Price Discrimination Act

Federal Trade Commission Enforcement and Procedure—Price Discrimination—Cease and Desist Order—Court Review.—A Federal Trade Commission order prohibiting violations of Sections 2(a) and 2(d) of the Clayton Act, as amended, was affirmed and enforced by a United States Court of Appeals, upon a petition of the Federal Trade Commission for affirmance and enforcement and upon a mandate of the United States Supreme Court, 1956 TRADE CASES ¶ 68,497.

See Price Discrimination, Vol. 1, ¶ 3508.132, 3522.426, 3522.655; FTC Enforcement and Procedure, Vol. 2, ¶ 8801.

For the petitioner: Robert B. Dawkins and J. B. Truly, Washington, D. C.

For the respondent: Flynn, Py & Kruse, Sandusky, Ohio; and Thomas F. Butler, of Marshall, Melhorn, Bloch & Belt, Toledo, Ohio.

Affirming and enforcing a Federal Trade Commission cease and desist order in Dkt. 4142. For prior opinions of the U. S. Supreme Court, see 1956 Trade Cases ¶ 68,497, and 1955 Trade Cases ¶ 68,204, reversing a judgment of the U. S. Court of Appeals, Sixth Circuit, 1955 Trade Cases ¶ 68,044.

Before ALLEN, MARTIN and STEWART, Circuit Judges.

Order

[*FTC Order Affirmed*]

FLORENCE E. ALLEN, Circuit Judge [*In full text*]: This case came on to be heard upon the petition of the Federal Trade Commission for affirmance and enforcement of its order of December 31, 1940, and upon the mandate of the Supreme Court of the United States dated October 8, 1956, and upon the record and briefs and oral argument of counsel;

On consideration whereof, it is ordered that the order of the Federal Trade Commission be and it hereby is affirmed.

It is further ordered that the order of the Federal Trade Commission be enforced in its entirety.

[¶ 68,643] Victor N. Alexander v. The Texas Company.

In the United States District Court for the Western District of Louisiana, Shreveport Division. Civil Action No. 5432. Filed March 1, 1957.

Robinson-Patman Price Discrimination and Sherman Antitrust Acts

Price Discrimination—Unlawful Effects of Discrimination—Sufficiency of Complaint.—A service station dealer's complaint, alleging that an oil company forced him to pay $.0365 more per gallon of gasoline than other dealers because he refused to request the

[22] Administrative Procedure Act, § 6(c), 5 U. S. C. A. § 1005(c), quoted *supra.*

company's assistance in a price war, failed to state a claim for damages on account of price discrimination. The effect of the alleged discrimination must be to (1) substantially lessen competition, (2) tend to create a monopoly, or (3) injure, destroy, or prevent competition among sellers, buyers, or their customers. The plaintiff dealer was one of nineteen of the company's dealers in the area, and there were more than two hundred other dealers in the area handling competitive brands of oil products. Whatever consequences the alleged discrimination may have had upon the dealer's business would have been almost infinitesimal in their effect upon the over-all business of the area. Such small-scale discrimination could not have substantially lessened competition or tended to create a monopoly. Furthermore, the dealer did not allege in detail how the price difference injured, destroyed, or prevented competition between his business and that of any or all of the favored dealers. The dealer did not show that he was actually in competition with any of the favored dealers.

See Price Discrimination, Vol. 1, ¶ 3505.365, 3505.390.

Combinations and Conspiracies—Elements of Unlawful Conspiracy—"Horizontal" and "Vertical" Conspiracies—Proof of Illegality.—Where a service station dealer's complaint, charging that an oil company conspired with its other retail dealers to fix the maximum prices of gasoline, was dismissed for insufficiency, the court noted that only a "horizontal" conspiracy between competitors at the same level, and not a "vertical" conspiracy between a manufacturer-distributor and its retail dealers, is proscribed by the Sherman Act, and that, in those decisions which have held a "vertical" conspiracy to be prohibited, the manufacturer-distributor occupied a "dominant" position in the trade area. The court further noted that the oil company did not occupy a "dominant" position in the area.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.355.

Combinations and Conspiracies—Monopolies—Refusal to Deal—Cancellation of Service Station Lease.—An oil company was granted a summary judgment in an action charging that it unlawfully cancelled a service station dealer's lease for the reason that the dealer refused to request assistance from the oil company in a price war. Under the terms of the lease, the oil company had a contractual right to cancel the lease. Also, the dealer failed to allege that the cancellation of the lease was directly or indirectly involved in any alleged conspiracy or that the oil company violated the antitrust laws. A simple unilateral refusal to deal is not proscribed by Section 1 of the Sherman Act, and a bilateral refusal to deal is prohibited only where there is concerted action by those who are true "competitors." In the instant case, the oil company could not be characterized as a "competitor" of its retail dealers, who were allegedly given favored treatment. Furthermore, it is only where an actual monopoly or a specific intent to monopolize has been properly pleaded that a unilateral refusal to deal constitutes a violation of Section 2 of the Sherman Act. No such monopoly or intent was alleged by the dealer. The undisputed facts established that the oil company could not, did not, and cannot monopolize or unreasonably restrict competition in the service station business in the area.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785; Monopolies, Vol. 1, ¶ 2610.720.

Combinations and Conspiracies—Monopolies—Refusal To Buy—Prevention of Sale of Goods.—An oil company was granted a summary judgment in an action charging that it violated the antitrust laws when it prevented a service station dealer, whose lease had been cancelled, from selling its stock and equipment by inducing a prospective buyer not to purchase the dealer's stock and equipment. The dealer admitted that the company was merely acting as a go-between between himself and the in-coming dealer, and the dealer did not have a contract with the prospective purchaser. Unilateral refusals to buy are not prohibited by Section 1 of the Sherman Act. They are only unlawful where there is a group boycott or concert of action between horizontal competitors. If the company was representing the dealer as his agent, the company's actions were the dealer's actions, and, therefore, there could be no violation of Section 1 of the Sherman Act since a person cannot conspire with himself. If the company was acting as the prospective buyer's agent, there could be no conspiracy under Section 1 since a principal cannot conspire with his agent. Furthermore, the prospective buyer and the oil company were not competitors

and, therefore, there could be no violation of the section. Such a refusal was not unlawful under Section 2 of the Sherman Act. The dealer's complaint did not allege that the oil company was engaged in the business of buying stock and equipment; therefore, it could not monopolize any part of that business.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.355, 2005.785; Monopolies, Vol. 1, ¶ 2610.720.

Private Enforcement and Procedure—Suit for Civil Damages—Measure of Damages —Price Discrimination.—Where a service station dealer alleged that an oil company discriminated in price by charging him $.0365 more per gallon of gasoline than its other dealers, any loss the dealer may have sustained would not be measured by the amount of the alleged discrimination of $.0365 per gallon of gasoline. The measure of the dealer's loss, if any, would be the gross loss of profit on sales he otherwise would have made to those customers who bought from the favored dealers, instead of from the plaintiff dealer, because of the price differential. The dealer failed to allege, among other things, that he sustained any loss of business to the favored dealers; therefore, his claim for damages based on the alleged discriminatory price was dismissed as insufficient.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.640.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments To State Cause of Action—Allegations of Conspiracy and Public Injury.—A service station dealer's complaint charging that an oil company conspired with other service station dealers to fix maximum retail prices of gasoline was dismissed on the ground that the complaint did not allege facts which show that there was a conspiracy and that any injury occurred to the public as a result of the conspiracy. The dealer merely alleged that he was eliminated as a competitor pursuant to the oil company's endeavor to eliminate competition and to gain a monopoly on the service stations in his area, that the company forced the dealer from his business, and that the interest of the general public in the area has been or will be affected. The dealer's deposition established that he became a dealer for another oil company.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.170, 9009.475.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments To State Cause of Action—Injury to Plaintiff—Damages.—A service station dealer, who alleged that an oil company unlawfully cancelled his service station lease, failed to allege any recoverable damages proximately resulting from such cancellation. The damages claimed by the dealer were computed on the basis of alleged profits he anticipated realizing through the continued operation of the station over a three-year period. Such a computation assumed a legal right that did not exist, since, under the terms of the lease, the oil company could legally cancel the lease. Therefore, the damages claimed by the dealer were purely speculative and were not founded upon any enforceable right.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.275, 9011.200.

For the plaintiff: Malcolm E. Lafargue, Shreveport, La.

For the defendant: John T. Guyton, of Hargrove, Guyton, Van Hook and Hargrove, Shreveport, La.; Jack D. Childers, Houston, Tex.; and A. B. Steed, New York, N. Y.

Memorandum Ruling on Pending Motions

[*Damages Claimed*]

BEN C. DAWKINS, JR., Chief Judge [*In full text*]: The suit is brought under 15 U. S. C. § 15. Plaintiff, a former service station dealer in Texaco products, seeks to recover treble damages from defendant totalling $63,696.72, plus an attorney's fee of $21,232.24, upon general allegations that defendant has violated the antitrust laws. The actions complained of allegedly occurred during a gasoline "price war" which began in the Shreveport-Bossier City, Louisiana, area on August 12, 1955. Plaintiff avers that he sustained losses, because of defendant's conduct, in four respects:

1. He sues for $1,818.18 (untrebled) as damage he is said to have sustained on account of defendant's allegedly unlawful price discrimination, in favor of other Texaco dealers, in violation of Section 2(a) of the

Clayton Act as amended by the Robinson-Patman Act, 15 U. S. C. § 13(a);

2. He sues for $1,057.26 (untrebled) as damage he is said to have sustained because of defendant's allegedly conspiratorial price-fixing, in league with other Texaco dealers, in violation of Section 1 of the Sherman Act, 15 U. S. C. § 1;

3. He sues for $12,000.00 (untrebled) as damage he is said to have sustained because of defendant's allegedly unlawful termination of his service station lease in violation of Section 2 of the Sherman Act, 15 U. S. C. § 2; and,

4. He sues for $6,356.80 (untrebled) as damage he is said to have sustained because of defendant's allegedly wrongful acts in inducing a "prospective buyer" not to purchase his service station stock and equipment, following termination of his lease, in violation of Section 2 of the Sherman Act, 15 U. S. C. § 2.

His complaint does not categorize the sections of the antitrust laws upon which his claims are based, but it is plain that he must rely upon those cited.

[*Motions*]

Defendant has moved to dismiss the complaint for failure to state a claim upon which relief may be granted, and also for summary judgment. The motion to dismiss is directed against the claims for damages on account of alleged price discrimination and conspiratorial price-fixing; and the motion for summary judgment is levelled at the remaining claims. Defendant also has moved to strike certain allegations from the complaint, and for a more definite statement.

We shall consider these matters seriatim. In doing so, we must follow the more recent federal jurisprudence which uniformly holds that the liberal attitude of Rule 8(a), Fed. Rules Civ. Proc., as to notice pleadings, should not be applied in antitrust actions, and that all essential ultimate facts must be plainly detailed. Conclusions of fact or law are not enough to state a claim upon which relief may be granted. *Kinnear-Weed Corporation v. Humble Oil & Refining Company* (5th Cir.) [1954 TRADE CASES ¶ 67,822] 214 F. 2d 891, 893, cert. den. 348 U. S. 912; *Crummer v. Du Pont* (5th Cir.) [1955 TRADE CASES ¶ 68,042] 223 F. 2d 238, 244; *Beegle v. Thomson* (7th Cir.) [1940-1943 TRADE CASES ¶ 56,291] 138 F. 2d 875, 881, cert. den. 322 U. S. 743; *Shotkin v. General Electric Company* (10th Cir.) [1948-1949 TRADE CASES ¶ 62,341] 171 F. 2d 236, 238; *Bader v. Zurich General Accident & Liability Insurance Company* [1952 TRADE CASES ¶ 67,277], 12 F. R. D. 437, 438; *Dublin Distributors, Inc., v. Edward & John Burke* [1952 TRADE CASES ¶ 67,398], 109 F. Supp. 125, 126.

Approaching the case with those principles in mind, we make the following findings:

1. PRICE DISCRIMINATION

[*Allegations*]

At Articles 12, 13, 14 and 15 of the complaint, plaintiff has attempted to allege "price discrimination" by defendant, and anti-competitive consequences to his business, in violation of the Robinson-Patman Act, but we do not believe he has succeeded in doing so. In sum, all he actually asserts is that, between August 12, 1955, and November 18, 1955, because he would not subscribe to defendant's "Chicago Plan", by writing a "letter" requesting price assistance from defendant in the price war then going on, he was forced to pay $.0365 more per gallon of gasoline than were twelve other local dealers in Texaco products, as the result of which he sold a somewhat smaller gallonage than he had been selling, and made that much less profit per gallon. He does not allege any ultimate facts showing how this price difference amounted to a true price discrimination under the Robinson-Patman Act.

[*Effect of Alleged Discriminations*]

That statute prohibits price discrimination only where it has produced one or more of the three anti-competitive consequences it is intended to prevent. The effect of the alleged discrimination must be (1) substantially to lessen competition, or (2) tend to create a monopoly, or (3) to injure, destroy or prevent competition among sellers, buyers or their customers. *Balian Ice Cream Co. v. Arden Farms Co.* (9th Cir.) [1955 TRADE CASES ¶ 68,186] 231 F. 2d 357, and authorities therein cited.

It is perfectly clear that the results of defendant's alleged price discrimination did not fall within the first or second of these categories. This Court judicially notices, and the record shows, that plaintiff was merely one of nineteen Texaco dealers in the Shreveport-Bossier City area between August 12, and November 18, 1955. At that

time there also were more than 200 other gasoline service stations, handling many competitive brands of petroleum products, in the area. Whatever consequences the alleged price discrimination may have had upon plaintiff's business would have been almost infinitesimal in their effect upon the over-all service station business of the area; and any such small-scale discrimination could not (1) have substantially lessened competition in interstate commerce or (2) have tended to create a monopoly of such commerce in the area, within the meaning of the statute.

It is possible, although not shown by the complaint, that defendant's alleged price discrimination may have come within the third category by injuring, destroying or preventing competition between plaintiff and the twelve dealers who are said to have been given cheaper prices. Plaintiff has not alleged that this was so.

All he has done is to level a broad charge against defendant that it was guilty of "price discrimination"—a mere legal conclusion—in that he had to pay more for gasoline than did the twelve other Texaco dealers named, but he does not allege in detail, as he must, how or to what extent the difference in price injured, destroyed or prevented competition between his business and that of any or all of the favored dealers.

[*Loss to Plaintiff*]

Moreover, any loss he may have sustained would not be measured by the "discrimination" of $.0365 per gallon of gasoline. Rather, the true yardstick of his damages, if any, in this respect would be the gross loss of profit on sales he otherwise would have made to those customers who bought from the favored dealers, instead of from plaintiff, because of the price differential. *Enterprise Industries, Inc., v. The Texas Company* (2d Cir.) [1957 TRADE CASES ¶ 68,596] — F. 2d —, No. 24045, decided January 7, 1957, and authorities therein cited.

As stated, plaintiff makes no factual allegations that he sustained any loss of business to those dealers and he likewise does not take into account any losses which may have occurred by reason of his customers patronizing the many other service stations participating in the general price war. Neither does he allege whether he passed on any part or all of the "discrimination" in the retail prices he charged to those customers who actually bought from him during the period involved; nor does he allege whether he absorbed any part or all of the price difference. Inferentially, at Article 15 of his complaint, he indicates that he absorbed the entire price difference, in alleging that his margin of profit was diminished to that extent, but this is far from clear.

[*Competitive Area*]

In addition, plaintiff does not attempt to define, as he must, what he contends is the so-called Shreveport-Bossier City trade area or to show, as he must, that at the time of the "discrimination", he actually was in competition with any one or all of the favored dealers, most of whose businesses were located miles away from his station. The mere possibility that there was competition between his business and theirs is not enough. Such competition must be clearly shown. *Enterprise Industries, Inc., v. The Texas Company, supra.* For aught that appears, since his station was located in a residential district in Shreveport, it might have served, in its usual business, only a relatively small area in its immediate vicinity, without actually being in true competition with any of the favored dealers.

[*Exclusive Contracts*]

At Article 13 of his complaint, plaintiff alleges that, under his lease and sales contracts with defendant, he could not obtain an agency for the sale of other petroleum products during the period involved because the contracts required him to handle defendant's products exclusively. Evidently he makes this allegation in an effort to excuse himself from failure to mitigate his alleged damages. This is a conclusion not borne out by the contracts themselves, which he has attached to his complaint and which are completely silent on the subject of exclusiveness.

[*Failure To State Claim*]

Having alleged only generalities and legal conclusions, in the language of the statute, plaintiff has failed to state a claim for damages, on account of price discrimination, upon which relief may be granted. *Lipson v. Socony-Vacuum Corporation* (2d Cir.) [1932-1939 TRADE CASES ¶ 55,069] 76 F. 2d 213, 217; *National Used Car Market Report, Inc., v. National Auto Dealers Association* [1952 TRADE CASES ¶ 67,369], 108 F. Supp. 692, 694.

2. Conspiratorial Price-Fixing

[*Allegations*]

At Article 16 of his complaint, plaintiff alleges that defendant, in violation of the antitrust laws, acted in concert and conspiracy with "other retail dealers" (presumably those allegedly favored by defendant with price assistance) in fixing "maximum" retail prices of gasoline, as the result of which he was damaged, in that he was prevented from making sales, during the period from August 12, 1955, to November 18, 1955, of "at least 17,786 gallons of gasoline," upon which he would have made a profit of $1,057.26. He claims treble that amount from defendant.

[*Claim Defective*]

As presently presented, this claim is defective, among other reasons, because (a) there are no facts alleged which show that there was such a conspiracy and (b) there are no facts alleged which show that an injury occurred to the public interest as the result of the conspiracy.

It is true that, at Article 20 of his complaint, plaintiff alleges that this (and the other acts of defendant complained of) ". . . is an endeavor to eliminate competition and to gain a monopoly on the service stations in said trade area, that it has eliminated petitioner as a competitor, [Plaintiff's deposition refutes this. He almost immediately became a Conoco dealer.] that it has forced petitioner from his business and that in addition the interest of the general public in said community has been or will be affected by reason thereof." This is not enough.

The Fifth Circuit Court of Appeals has settled these points in no uncertain language. In *Nelson Radio & Supply Company v. Motorola, Inc.,* [1952 Trade Cases ¶ 67,386], 200 F. 2d 911, cert. den. 345 U. S. 925, the Court said:

> "* * * It is the well recognized rule that in pleading a conspiracy in an [antitrust] action such as this, a general allegation of conspiracy, without a statement of the facts constituting the conspiracy to restrain trade, its object and accomplishment, is but an allegation of a legal conclusion, which is insufficient to constitute a cause of action. *Black & Yates v. Mahogany Association,* 3rd Cir., 129 F. 2d 227, 148 A. L. R. 841; *Neumann v. Bastian-Blessing Company,* D. C., 70 F. Supp. 447, 448."

In *Crummer Company v. Du Pont* [1955 Trade Cases ¶ 68,042], 223 F. 2d 238, Chief Judge Hutcheson, speaking for the Court, said:

> "* * * Charges as to such conspiracies must be based on substantial and affirmative allegations, and no mere gossamer web of conclusion or inference, as here, trifles light as air, to the suspicious strong as proofs from Holy Writ, will suffice * * *."

See also, to the same effect, *Hudson Sales Corporation v. Waldrip,* (5th Cir.) [1954 Trade Cases ¶ 67,694] 211 F. 2d 268; *Feddersen Motors, Inc., v. Ward,* (10th Cir.) [1950-1951 Trade Cases ¶ 62,579] 180 F. 2d 519.

In the *Waldrip* case, Judge Hutcheson emphasized that the decisions:

> "* * * have firmly established the principle that an essential to a private recovery is a showing of a public injury."

In *Kinnear-Weed Corp. v. Humble Oil & Refining Company,* (5th Cir.) [1954 Trade Cases ¶ 67,822] 214 F. 2d 891, Judge Rives, as the organ of the Court, stated:

> "Public injury alone justifying the threefold increase in damages and being an indispensable constituent of a claim for violation of the antitrust laws, a general allegation of such injury is not sufficient. It is essential that the complaint allege facts from which it can be determined that the conduct charged to be in violation of the antitrust laws was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce.",

citing numerous decisions, including two by the Supreme Court.

We have noted also, in this connection, *Schwing Motor Company v. Hudson Sales Corporation* [1956 Trade Cases ¶ 68,292], 138 F. Supp. 899, aff. *per curiam,* 4th Cir. [1956 Trade Cases ¶ 68,564], 239 F. 2d 176. That case held, *inter alia,* that only a "horizontal" conspiracy between competitors at the same level, not a "vertical" conspiracy between a manufacturer-distributor and its retail dealers as is here alleged, is proscribed by the Sherman Act; and that in those decisions which have held a "vertical" conspiracy to be prohibited, the manufacturer-distributor occupied a "dominant" position in the trade area, which defendant here certainly does not do.

Accordingly, we find that plaintiff has failed to state a valid claim for damages,

on account of the alleged conspiratorial price-fixing, upon which relief may be granted.

3. Unlawful Cancellation of Lease

[*Allegations*]

At Article 18 of his complaint, plaintiff alleges that on October 19, 1955, defendant cancelled his service station lease for no other reason than his refusal to write "the letter" requesting assistance in the price war (in his deposition, he merely "presumes" or "assumes" that this was the reason); that because of this unwarranted, capricious and arbitrary action by defendant he was forced to give up the service station on November 18, 1955, losing ". . . his good will in a location where he had been established for the past twenty-one years . . .", as the result of which he was damaged to the extent of $12,000.00 (untrebled), for which he sues defendant.

[*Lease*]

The lease, a duplicate original of which is attached to the complaint, was dated November 7, 1951, and contained the following pertinent clause:

"(2) Term. This lease shall remain in full force and effect for a period of one (1) year beginning November 9, 1951, and ending November 8, 1952, and thereafter from year to year, subject to termination by either party at the end of the first year or any subsequent year on ten (10) days' prior written notice; . . ."

It is obvious from this proviso that unless plaintiff in some way adequately can connect the least termination with a violation of the antitrust laws, defendant had a perfect contractual right to cancel it, and is not liable for damages on that account.

[*Antitrust Violation*]

Plaintiff makes no allegation that the lease cancellation was directly or indirectly involved in the alleged conspiracy between defendant and the twelve favored Texaco dealers. Indeed, he alleges nothing in this respect from which a reasonable conclusion could be drawn that defendant violated any of the antitrust laws.

Even if this article of the complaint is read in connection with all other articles, particularly Article 20, which attempted, but failed (as shown above), adequately to allege a conspiracy, price discrimination, monopolistic efforts or public injury, still this claim, as now asserted, must fall for the same failure to make sufficient factual allegations showing that such antitrust violations actually were intended, attempted or committed by defendant.

[*Refusal to Deal*]

It is clear that a simple "refusal to deal" is not proscribed by Section 1 of the Sherman Act. *Times Picayune Publishing Company v. United States* [1953 Trade Cases ¶ 67,494], 345 U. S. 594, 625; *United States v. Colgate & Company*, 250 U. S. 300; *Nelson Radio & Supply Company v. Motorola, Inc.*, (5th Cir.) [1952 Trade Cases ¶ 67,386] 200 F. 2d 911, 915, cert. den. 345 U. S. 925. A unilateral "refusal to deal" always is permissible except where actual monopoly, or intent to monopolize, exists, *Nelson Radio & Supply Company v. Motorola, Inc., supra; Hudson Sales Corporation v. Waldrip* (5th Cir.) [1954 Trade Cases ¶ 67,694] 211 F. 2d 268, cert. den. 348 U. S. 821; and a bilateral refusal is prohibited only where there is concerted action by those who are true "competitors." *Hudson Sales Corporation v. Waldrip, supra; Times Picayune Publishing Company v. United States, supra; Kiefer-Stewart v. Seagram* [1950-1951 Trade Cases ¶ 62,737], 340 U. S. 211, 213. It also must be shown that such concerted, or bilateral, refusal unduly affects interstate commerce. *Interborough News Company v. Curtis Publishing Company* (2d Cir.) [1955 Trade Cases ¶ 68,129] 225 F. 2d 289. It would be ridiculous to characterize defendant as a "competitor" of its retail dealers, such as those who allegedly were favored here; and there is no allegation, or other showing, that the lease cancellation affected interstate commerce in any degree.

It is only where an actual monopoly or a specific intent to monopolize has been properly pleaded that a unilateral refusal to deal constitutes a violation of Section 2 of the Sherman Act. *Nelson Radio & Supply Company v. Motorola, Inc., supra; Hudson Sales Corporation v. Waldrip, supra.* There is no adequate allegation of a monopoly or intent to monopolize anywhere in the complaint, and the documents on record show that such a charge would not be true, even if properly alleged.

When the lease was cancelled, defendant did not attempt to take over and operate the service station, but immediately released it to another dealer, Ray Stump. At that time there were at least eighteen other

Texaco dealers, and more than 200 unrelated dealers handling numerous competing gasoline brands, in the Shreveport-Bossier City area. Plaintiff himself reopened as a Conoco dealer at another location in Shreveport within less than four months. These undisputed facts show that defendant could not, did not, and cannot monopolize or unreasonably restrict competition in the service station business in this area. Monopolization under Section 2 means monopoly in the economic sense—". . . power to raise prices or to exclude competition when it is desired to do so. *American Tobacco Company v. United States* [1946-1947 TRADE CASES ¶ 57,468], 328 U. S. 781, 811; *United States v. Du Pont* [1956 TRADE CASES ¶ 68,369], 351 U S. 377, 380, 393. The price, quality or quantity of gasoline available to the motoring public was not, and could not have been, affected by defendant's termination of plaintiff's lease; and it would be sheer nonsense to any that defendant terminated the lease ". . . in an endeavor to eliminate competition and to gain a monopoly on the service stations in said trade area," as is spuriously claimed by plaintiff.

[*Damages*]

Finally, plaintiff has not alleged any recoverable damage proximately resulting from this alleged antitrust violation. The damages he claims, as shown by his deposition, are computed on the basis of alleged profits he anticipated realizing through continued operation of the service station over a three-year period. Necessarily, this assumes a legal right which did not exist, for by the terms of the lease defendant legally could have cancelled it at the end of any lease-year, as was done. Consequently, the damages he claims for this are purely speculative and are not founded upon any enforceable right. *Cf. Goodman & Son v. United Lacquer Manufacturing Company* (D. C. Mass.) [1948-1949 TRADE CASES ¶ 62,355] 81 F. Supp. 890, 893.

Therefore, defendant's motion for summary judgment as to this claim, in its present status, must be granted.

4.

PREVENTION OF STOCK AND EQUIPMENT SALE

[*Allegations*]

At Article 19 of his complaint, plaintiff alleges that it is customary in the trade, when a dealer gives up a service station, that he sell his stock and equipment to his successor; that upon cancellation of his lease he was negotiating with a buyer to purchase his stock and equipment, but that this prospective buyer would not go through with the purchase because defendant threatened him with refusal to lease the station if he bought from plaintiff; that, consequently, plaintiff was unable to sell it and lost its entire value of $6,356.80 (untrebled), for which defendant is liable to him.

In his deposition, plaintiff admitted that defendant simply was acting in this transaction as a ". . . go-between between the out-going dealer and the in-coming dealer to see that neither one of them takes advantage of the other." Both his complaint and his deposition show that plaintiff did not have a firm contract with the "prospective buyer," but simply hoped to sell his stock and equipment to him.

[*Refusal to Buy*]

Like refusals to deal or sell, unilateral refusals to buy are not prohibited by Section 1 of the Sherman Act. *F. T. C. v. Raymond Brothers,* 263 U. S. 565, 573. Refusals to buy, like refusals to sell, violate Section 1 only where there is a group boycott or concert of action between horizontal competitors. Here, by plaintiff's own admission, defendant acted simply as a "go-between" or agent for either plaintiff or the prospective buyer, or for both. No matter who defendant was representing, the legal consequence is the same. If defendant was representing plaintiff as his agent, then defendant's actions were his actions, and he has no valid complaint under Section 1, for, as stated in *Nelson Radio & Supply Company v. Motorola, Inc., supra,* a person "cannot conspire" with himself.

On the other hand, if defendant was acting as the prospective buyer's agent, still, there could be no conspiracy under Section 1, because a principal cannot conspire with his agent. *Motorola, supra.*

Moreover, the prospective buyer and defendant were not "competitors," horizontal or otherwise, engaged in purchasing service station stock and equipment, and there could be no "contract, combination, or conspiracy" under Section 1. Plaintiff admitted in his deposition that defendant was not in the business of buying service station equipment.

Plaintiff has cited no decisions holding that a unilateral refusal to buy violates the monopoly provisions of Section 2 of the Sherman Act, and we have found no cases to that effect. In any event, as stated, the complaint does not allege, and plaintiff does not contend that defendant was in the business of buying stock and equipment. Consequently, it could not and did not monopolize any part of that business, so as to have violated Section 2.

[*Insufficient Allegations*]

In addition to those considerations, as already pointed out, plaintiff generally has failed to allege any ultimate facts which validly show 1) a conspiracy to restrain trade or competition, 2) a monopoly or intent to monopolize, or 3) any public injury, with respect to this or any other item of alleged damage. Likewise, it is plain that interstate commerce was not, and could not have been affected by defendant's alleged conduct. *Myers v. Shell Oil Company* [1950-1951 TRADE CASES ¶62,816], 96 F. Supp. 670.

Even if plaintiff had held a firm contract with the prospective buyer to purchase his stock and equipment, and defendant induced a breach of such contract, he could not recover ordinary tort damages from defendant on that account under Louisiana law. *Moulin v. Monteleone,* 165 La. 169, 115 So. 447, *Latter & Blum v. Metropolitan Life Insurance Company,* 208 La. 490, 23 So. 2d 193.

Consequently, defendant's motion for summary judgment as to this claim, in its present status, must be granted.

CONCLUSIONS

[*Amended Complaint*]

For the reasons given, defendant's motion to dismiss will be granted as to claims for damage on account of alleged price discrimination and conspiratorial price-fixing; and its motion for summary judgment will be granted as to the claims for damages on account of the allegedly unlawful cancellation of plaintiff's lease, and the prevention of the proposed stock and equipment sale. Because plaintiff may be able to correct some, or all, of the faults in his case, as herein noted, leave is granted to file a supplemental or amended complaint within thirty days. Because of these rulings, we deem it unnecessary to pass upon defendant's motions to strike and for a more definite statement.

[¶ 68,644] Laskey Bros. of W. Va., Inc., et al. v. Warner Bros. Pictures, Inc., et al.

In the United States District Court for the Southern District of New York. Civ. 96-335. Filed February 21, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Dismissal of Actions—Lack of Prosecution—Bar as to Other Actions.—An order dismissing an action "with prejudice" for lack of prosecution was modified so that the dismissal of the action could not be used as an adjudication on the merits in any other action of the plaintiff on the same cause of action in any other United States District Court. Since the plaintiff had an action based on the same set of facts pending in another District Court, the court was of the opinion that it would be an unwarranted punishment to bar the plaintiff from a hearing in the other action because of its dilatory action in the instant court.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.355.

For the plaintiff: Myron Saland, New York, N. Y.

For the defendant: Lawrence R. Condon; John H. Galloway; Frisch & Goldfuss; Louis M. Seber; Meyer H. Lavenstein; William B. Jaffe; Schwartz & Frohlich; R. W. Perkins; O'Brien, Driscoll & Raftery; Weisman, Celler, Allan, Spett & Steinberg; Dwight, Royall, Harris, Koegel & Caskey; Adolph Schimel; Benjamin Melniker; Louis Phillips; Phillips, Nizer, Benjamin & Krim; J. Miller Walker; and George G. Gallantz. All of New York, N. Y.

For a prior opinion of the U. S. Court of Appeals, Second Circuit, see 1955 Trade Cases ¶ 68,103; and for prior opinions of the U. S. District Court, Southern District of New York, see 1955 Trade Cases ¶ 68,017, 67,967.

Memorandum

[*Dismissal—Lack of Prosecution*]

ARCHIE O. DAWSON, District Judge [*In full text*]: This is a motion by plaintiff under Rule 60(b) for an order modifying the previous order entered by this court which dismissed the action "with prejudice" for lack of prosecution. See Fed. R. Civ. Pro. 60(b). Plaintiff seeks to modify the order so as to provide that the action is dismissed without prejudice.

[*Disqualification Proceeding*]

The records of this court show that the action was instituted on November 6, 1954 through the law firm of Malkan & Ellner as attorneys for the plaintiff. Shortly after the action was instituted these attorneys filed a motion for an order that they might properly represent, and were not barred or disqualified from representing, the plaintiff. Certain of the defendants cross-moved for an order disqualifying this firm from representing the plaintiffs in the action. On March 25, 1955 the court granted the cross-motion of the defendants. *Laskey Bros. of W. Va. v. Warner Bros. Pictures* [1955 TRADE CASES ¶ 68,017], 130 F. Supp. 514, *aff'd* [1955 TRADE CASES ¶ 68,103], 224 F. 2d 824, *cert. denied,* 350 U. S. 932. This determination was affirmed by the Court of Appeals on July 13, 1955 and a petition for a writ of certiorari was denied by the United States Supreme Court on January 9, 1956.

[*No Attorney*]

Plaintiff did not substitute a new attorney to represent it in this action. From January 9, 1956 to January 28, 1957, it had an action pending with no attorney qualified to represent it and no proceedings of any nature took place in the action. In the month of January 1957, this court, pursuant to General Rule 21, called for review all cases on the docket where the case had been pending for more than two years and had not been noticed for trial. See General Rules of United States District Courts for the Southern and Eastern Districts of New York. Notice was given to the attorneys of record in these cases to appear on a certain day. The notice stated: "The rule will be strictly enforced and your case may be dismissed for lack of prosecution." A further notice of this special calendar call was published in the New York Law Journal.

The above action was called for review before the undersigned on January 28, 1957. No attorney appeared representing plaintiff. The attorneys who appeared representing defendants moved for dismissal of the action for lack of prosecution. Thereafter the Court, after hearing argument and ascertaining that no action had taken place for over one year, entered the following decision and order:

> "It appearing that plaintiff has not substituted a qualified attorney for the prosecution of the case, and that this condition has existed for over one year, and nobody appearing on behalf of plaintiff on this call, motion is granted to dismiss this action under Rule 21 for lack of prosecution."

[*Modification Sought*]

Thereafter a judgment was entered on February 6, 1957 dismissing the action with prejudice. It is this judgment the plaintiff now seeks to amend by making the dismissal "without prejudice."

Plaintiff's new attorneys who appeared on this motion stated that they were retained by the plaintiff several months ago but that they never filed a notice of substitution and therefore never received the notice of the special calendar call hereinabove referred to. They also stated that there is now pending in the Western District of Pennsylvania an action by the same plaintiff against some of the defendants in this action, which includes the same claim that is asserted in this action and that dismissal of this action with prejudice might have a prejudicial effect on the case pending in Pennsylvania. Counsel for plaintiff stated on oral argument that he would have no objection to dismissal of the present action with prejudice so far as it relates to the defendants in this action who are not defendants in the Pennsylvania action.

The power of the Court to dismiss a case for lack of prosecution probably derives from the inherent power of a court to control its calendars. *Zielinski v. United States,* 120 F. 2d 792 (C. A. 2, 1941). The power is also specifically granted in Rule 41(b) of the Federal Rules of Civil Procedure. This rule provides in part:

> "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision, and any dismissal not provided for in this rule, other

than dismissal for lack of jurisdiction or improper venue, operates as an adjudication on the merits."

See *Bartfield v. Parkhurst,* 117 F. Supp. 82 (D. Puerto Rico, 1953).

This case is a graphic illustration of the unsatisfactory type of practice which has led to congestion of the court calendars. The plaintiff, not content with starting one action, has instituted two actions on the same set of facts in two separate districts. Thereafter when plaintiff's counsel is found to be disqualified, plaintiff takes no steps to substitute new counsel for many months. When new counsel is finally selected, the new counsel does not even note his appearance in the case and no steps are taken to bring the case on for trial. A plaintiff who has shown so little interest in the action which it has started does not awaken much sympathy in the Court.

Nevertheless, plaintiff has another action pending in Pennsylvania. The instant action has not been decided on the merits. It would perhaps be an unwarranted punishment to bar plaintiff from a hearing in the Pennsylvania action because of its dilatory action in this court. *Cf. Gill v. Stolow,* — F. 2d — (2d Cir. Feb. 7, 1957).

[*Modified Order*]

Therefore, in the exercise of its discretion, the Court directs that the order and judgment heretofore entered herein on February 6, 1957 is to be amended to read:

"It is hereby ordered, adjudged and decreed that this action be and it hereby is dismissed for lack of prosecution, but this order and judgment shall not be pleaded or used as an adjudication on the merits in any other action of the plaintiff now pending on the same cause of action in any district court other than the District Court for the Southern District of New York."

So ordered.

[¶ 68,645] Central Liquor Store, Inc. et al. v. Capitol City Liquor Co., Inc., et al.

In the United States District Court for the District of Columbia. Civil No. 4824-55 Dated January 23, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Where Suit May Be Brought—Proper Judicial District—Corporations.—Two corporations were held to be "found" and "transacting business" within the District of Columbia; therefore, their motions to dismiss a private action brought against them in the District were denied.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.210.

For the plaintiffs: Arnold, Fortas & Porter, Washington, D. C.

For the defendants: Jaffee, Chase & Donnelly, Washington, D. C.

Memorandum

[*Transacting Business*]

MATTHEW F. MCGUIRE, District Judge [*In full text*]: The motion to dismiss of the defendant Joseph E. Seagram & Sons, Inc., is denied, as the Court finds that the defendant corporation is found and transacts business in the terms of the statute within the District of Columbia. The so-called distributing corporations are engaged solely in the sale of the product of Joseph E. Seagram & Sons, Inc. (deposition of Fischel, p. 509). Again, one corporation does not ordinarily act as a bookkeeper for another out of mere largess, nor does the fact that it is paid for such ostensibly in any way negative the situation here, as Joseph E. Seagram & Sons, Inc. is not engaged in the business of bookkeeping and accounting, but in the manufacture of distilled spirits and the corporation whose books are kept is engaged solely in the selling of these same manufactured spirits.

The motion of the defendant House of Seagram (formerly Seagram Distillers Corp. and Calvert Distillers Corp.) is also denied because the Court finds that it is found within the District of Columbia and is transacting business within its confines. The so-called "missionary" activities of its employees Maxon and Biondi are alone sufficiently indicative of its activities in this respect, apart from anything else, to warrant the conclusions drawn.

[*Factual Question*]

It might be said here, by way of paraphrase of the language of Frankfurter, J., in *U. S. v. Scophony Corp.* [1948-1949 Trade Cases ¶ 62,238], 333 U. S. 795 at 819-820, that whether or not a corporation transacts business in a particular district is a question of fact and the resolution of the question turns on the particular and peculiar circumstances of a given situation, and he says categorically

". . . a corporation can be 'found' anywhere, whenever the needs of law make it appropriate to attribute location to a corporation, only if activities on its behalf that are more than episodic are carried on by its agents in a particular place."

It will be noted in this reference that Mr. Justice Frankfurter makes the observation:

"To reach this result, however, I do not find it necessary to open up difficult and subtle problems regarding the law's attitude toward corporations. . . . I prefer to reach its destination by the much shorter route of recognizing that a corporation as such never transacts business and is never found anywhere, but does 'transact business' and is 'found' somewhere by attribution to the corporation of what human beings do for it."

Order accordingly.

[¶ 68,646] Roy W. Darden and Roy Darden Industries, Inc. v. Jesse H. Besser, Besser Manufacturing Company, and Stearns Manufacturing Company, Inc.

In the United States District Court for the Eastern District of Michigan, Southern Division. No. 11765. Filed December 27, 1956.

Sherman Antitrust Act

Combinations and Conspiracies — Monopolies — Patents — Threatening Infringement Suits—Agreement Not to License Others—Legality.—A manufacturer of concrete block-making machinery was held to have suffered damages in the amount of $15,000 due to violations of the Sherman Antitrust Act by two other manufacturers of such machinery. The court relied, in part, upon findings in a Government antitrust suit against the defendant manufacturers that the defendants, as licensees of patents concerning such machines, agreed with the licensors that no further licenses would be granted without the defendants' consent; that the licensed patents were used by the defendants in a campaign to threaten competition with suits for alleged infringements; and that the defendants violated Sections 1 and 2 of the Sherman Act. The instant court found, among other things, that the defendants brought a patent infringement suit against a customer of the plaintiff; that the defendants refused to consent to the grant of a license to the plaintiff; that the defendants warned the trade against infringement knowing that certain claims of the patents which they licensed were invalid; that one of the defendants induced a supplier of the plaintiff to cease dealing with the plaintiff; and that the plaintiff, faced with the destruction of its business, entered into an agreement with the defendants which authorized a limited production of such machines by the plaintiff.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.225, 2013.360; Monopolies, Vol. 1, ¶ 2610.525, 2610.550.

Private Enforcement and Procedure—Suit for Civil Damages—Damages Recoverable —Proof of Damages.—A manufacturer of concrete block-making machinery was held to have suffered damages to its business in the amount of $15,000 due to violations of the Sherman Antitrust Act by two other manufacturers of such machinery. "Where the tort itself is of such a nature as to preclude ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference although the result be only approximate." The court also noted that the loss of prospective profits may constitute an element of recoverable damages.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.325, 9011.385.

Private Enforcement and Procedure—Suit for Civil Damages—Award of Attorneys' Fees.—Where a manufacturer of concrete block-making machinery was found to have suffered damages in the amount of $15,000, a reasonable allowance to the manufacturer for attorneys' fees was found to be $10,000. Reasonable attorneys' fees must be fixed in accordance with the usual considerations, including the difficulty of the litigation; the amount recovered; time and labor spent; the learning, skill, and experience required; and the responsibility undertaken. The court noted that the case was relatively simple so far as liability was concerned because much of the evidence used in the case was substantially the same as that in a Government antitrust action against the defendants, that most of the time and effort of the attorneys was spent in attempting to establish their theory of damages, and that the attorneys were not successful in establishing their theory of damages.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.725.

For the plaintiffs: Justin L. Giltner, Detroit, Mich., and Edward S. Irons, of Burns, Doane & Benedict, Washington, D. C.

For the defendants: Fildew, DeGree & Flemming, Detroit, Mich., for Stearns Mfg. Co., Inc.; Carl R. Henry, Alpena, Mich., for Besser Mfg. Co. and Jesse H. Besser; and Cook, Beake, Miller, Wrock & Cross, Detroit, Mich.

Findings of Fact

[*Treble Damage Action*]

ARTHUR F. LEDERLE, Chief Judge [*In full text*]*:* 1. Plaintiffs in this action are seeking to recover damages under Sections 4 and 5 of the Clayton Act (15 USC 15 and 16) on the ground that they have been injured in their business and properties by reason of violations by defendants of Sections 1 and 2 of the Sherman Act (15 USC 1 and 2). Plaintiffs rely, in part, on a judgment rendered in this Court on behalf of the United States holding that these defendants and others had monopolized the business of manufacturing and selling concrete block machinery. *U. S. A. v. Besser* [1950-1951 TRADE CASES ¶ 62,773], 96 Fed. Supp. 304, affirmed [1952 TRADE CASES ¶ 67,280], 343 U. S. 444.

[*Plaintiffs*]

2. The plaintiff, Roy W. Darden, hereinafter referred to as "Darden," is a citizen of the United States and a resident of Atlanta, Georgia.

The plaintiff, Roy Darden Industries, Inc., hereinafter referred to as "Darden Industries," is a corporation organized and existing under the laws of the State of Georgia, with offices and principal place of business at Atlanta, Georgia.

[*Defendants*]

The defendant, Jesse H. Besser, hereinafter referred to as "Besser," is a citizen of the United States and a resident of Alpena, Michigan, and is president and was, on the date his answer was filed, principal stockholder of defendant, Besser Manufacturing Company.

Defendant, Besser Manufactuing Company, hereinafter referred to as "Besser Company," is a corporation organized and existing under the laws of the State of Michigan, with offices and principal place of business at Alpena, Michigan.

Defendant, Stearns Manufacturing Company, Inc., hereinafter referred to as "Stearns," is a corporation organized and existing under the laws of the State of Michigan, with offices and principal place of business at Adrian, Michigan.

All of the defendants are inhabitants or residents of, transact business in, and are found within the Eastern District of Michigan.

[*Concrete Block-Making Machinery*]

3. The parties hereto are and have been at all times relevant hereto, engaged in the business of manufacturing and selling concrete block machinery. These machines are manufactured for and sold extensively in interstate commerce.

4. Concrete building blocks and other concrete masonry units are utilized extensively in the construction of residential, farm and commercial structures. The commercial production of such blocks and units is almost entirely accomplished by machines, herein referred to as "concrete block machines," which form and compress a concrete mixture into molded units of a size and shape suitable for building purposes.

5. Some block machines utilize a hand or power tamp for settling and packing the

concrete mixture into the mold and other machines use vibration or a combination of vibration and pressure for this purpose. Block machines also range in size and complexity from hand operated units to completely automatic units capable of turning out three blocks at a time. The highest production and greatest efficiency and economy are obtained by these automatic machines of the vibration type, some of which by 1947 were capable of producing over 800 standard sized concrete blocks per hour. The market for such machines is necessarily limited by its own high production and the very substantial investment required for their purchase.

6. Sales of concrete block machines are normally accompanied by sales of auxiliary equipment, such as concrete mixers and attachments. In 1946, both Besser Company and Stearns had been in business for many years and had thousands of machines in the field. They had extensive service facilities and large sales organizations and did a large volume of business in maintenance parts. Both did national advertising and had a variety of machines on the market.

[*Business Trend*]

7. At the end of World War II, the demand for block machines became too great for the established companies to meet. Besser Company and Stearns were a year to eighteen (18) months behind in deliveries. By the end of 1946 or early 1947, this abnormal demand was largely filled and the established companies experienced a sharp and steady decline in sales. It became necessary for block machine makers to finance sales of their machines and to take in old machines in trade.

[*Government Antitrust Suit*]

8. On April 28, 1949, the United States filed a civil suit in the United States District Court for the Eastern District of Michigan, charging all of the present defendants and Louis Gelbman and Hamlin F. Andrus with violation of Sections 1 and 2 of the Sherman Act. After a lengthy trial, the Court rendered its opinion on January 30, 1951, that all defendants had combined and conspired to restrain and monopolize trade and commerce in concrete block machines in violation of Sections 1 and 2 of the Sherman Act and that Besser and Besser Company had attempted to monopolize and had monopolized said trade and commerce in violation of Section 2 of the Sherman Act. Judgment was entered on April 12, 1951. Thereafter, Besser and Besser Company appealed to the United States Supreme Court which, on June 24, 1952, affirmed the judgment of the District Court [1952 TRADE CASES ¶ 67,280], (343 U. S. 444). A new final judgment was entered by the District Court on July 20, 1952. This judgment is relied on here by plaintiffs as *prima facie* evidence under 15 U. S. C. 16.

9. In the foregoing action, the District Court found the following facts relevant to the present suit:

a. That on December 7, 1942, Besser Company and Stearns became licensees under a patent license agreement with Gelbman and Andrus, which provided that no further licenses would be given without the consent of both Besser Company and Stearns.

b. That the patents forming the basis of the aforesaid license agreement were used by Besser Company and Stearns in a campaign to threaten competition with suits for alleged patent infringement.

c. That Besser brought influence on a material supply source of Darden Industries that curtailed the output of concrete block machines by Darden Industries.

d. That Besser controlled Stearns, such control having to all intents and purposes become complete in 1948.

The Court concluded that:

a. The aforesaid license agreement of December 7, 1942 was illegal.

b. That all defendants in the Government action had combined and conspired to unreasonably restrain and monopolize trade and commerce in concrete block-making machines in violation of Sections 1 and 2 of the Sherman Act.

c. That Besser and Besser Company had attempted to monopolize and had monopolized trade and commerce in concrete block-making machines in violation of Section 2 of the Sherman Act.

[*Plaintiff's Business*]

10. In 1938, Roy W. Darden entered the employ of an Atlanta, Georgia, concrete block manufacturing plant known as the Concrete Manufacturing Company. He subsequently became General Superintendent of that plant. In 1941, Darden designed, built, and successfully tested a semi-automatic block-making machine which was subsequently introduced to the trade as the

"Rockercrete Machine." Darden left the employ of the Concrete Manufacturing Company in early 1945 and engaged in manufacturing and selling the Rockercrete Machine.

11. In October, 1945, a partnership known as "Roy Darden Equipment Company" was formed in which Darden had a 75 per cent interest and one Milton E. Posey a 25 per cent interest. During the year 1945, Darden and subsequently the partnership sold a total of 12 to 15 Rockercrete Machines.

12. On or about February 5, 1946, Darden Industries was incorporated with a capitalization of twenty thousand dollars ($20,000) of which approximately three thousand dollars ($3,000) was goodwill. Darden became president of the corporation, and has held that position up to the present time. The Company maintained a small one-room office in Atlanta and employed a maximum of four people. It had no manufacturing or assembly facilities of its own, its machinery being fabricated initially by Atlanta Welding & Machine Company of Atlanta, Georgia, and later by the Atlanta plant of the Link-Belt Company. Darden Industries was, nevertheless, responsible for and controlled the design and specifications for machines manufactured for, and sold by it.

13. In its first fiscal year ending January 31, 1947, Darden Industries sold some 30 Rockercrete Machines and had a total sales of block machines and auxiliary equipment in the amount of $282,765 of which $97,250 was from sales of block machines.

[*Patent Infringement Claim*]

14. The Rockercrete was a small, inexpensive cored pallet, semi-automatic type machine selling for about $3,250. A fully automatic vibrating machine developed by Millard Warren of Knoxville, Tennessee, was investigated by Darden in 1946. Darden entered into an oral agreement with Warren to produce and market this machine as the "Warren 800." The arrangement with Link-Belt was enlarged to provide that Link-Belt would fabricate the "Warren 800" machine to the specifications of Darden Industries. The first order for the fabrication of three "Warren 800" machines was placed with Link-Belt on October 24, 1946, but it was necessary for Link-Belt to tool up to make the "Warren 800." The first delivery of a "Warren 800" machine manufactured by the Link-Belt Company was made in June, 1947. There was no written contract with Link-Belt and the price of the machines that it built was not definitely fixed. They were supplied on open purchase order with payment made on the basis of cost plus ten per cent (10%). A deposit of $15,000 was maintained with Link-Belt to secure payment for the machines. Darden's selling price for the "Warren 800" was around $20,000. In January, 1946, Gelbman advised Darden and representatives of Besser Company and Stearns that, in Gelbman's opinion, Darden's Rockercrete Machine infringed patents owned by Gelbman and Andrus and licensed to Stearns and Besser Company. Gelbman informed Besser that he was going to Atlanta to investigate the matter and was advised by Besser that he had already been to see Darden and, after securing copies of the Gelbman-Andrus patents, was going to return to Atlanta for further investigation. Nothing further was done until the summer of 1946 when Eugene F. Olsen, the president of Stearns, wrote to Gelbman and to Besser suggesting that they revive the matter and proceed with it.

15. Stearns and Besser Company were clearly interested in protecting their rights as licensees under the Gelbman-Andrus patents, but it is also clear that defendants were concerned about Darden as a competitor and not merely as a patent infringer. On July 8, 1946, Olsen wrote to Besser, urging that Besser give Gelbman a report on the Darden matter. He said, in part:

> "I think it is important that we move in on this case (if it is justified at all) because I know that Darden has some rather ambitious plans including the manufacture of a high production vibrator machine which has been pretty well proven out in the field in a way that would make it really effective competition."

By letter from Haakon Paulson, Distribution Manager of Besser Company, to Gelbman on July 31, 1946, Besser Company stated that Darden was infringing and that suit should be started. Paulson stated further:

> "We can further protect the future of the industry in which we are all interested by greatly reducing or eliminating the avalanch of small machines that are now flooding the market. Many of these machines make an inferior block and this, together with the lack of information for

these small operations and the lack of interest of the sellers of this equipment, will make for another period of inferior blocks and thereby greatly retard the industry."

16. In addition to the proposed infringement suits, defendants in their correspondence discussed as further moves against Darden:

a. Publicity about the infringement action.

b. Publicity to the effect that only Stearns and Besser Company were licensed under the Gelbman-Andrus patents along with a warning against infringement of these patents by others.

c. Giving notice to the home office of Link-Belt that their branch plant in Atlanta was making block machines which infringed the Gelbman-Andrus patents.

17. It was not until November, 1946, that defendants or Gelbman obtained a legal opinion in regard to the alleged infringement of the Gelbman-Andrus patents by the Rockercrete Machine.

18. Both Stearns and Besser Company purchased chain, bearings and other items from Link-Belt. Defendants expected and desired that giving notice to Link-Belt of the impending patent action would result in Link-Belt's refusal to ship any more machines to Darden Industries until the matter was settled.

[*Infringement Suit*]

19. On January 14, 1947, Gelbman and Andrus brought suit against Landis Concrete Products of Landisville, New Jersey, a customer of Darden Industries, alleging infringement of patents Nos. 2,276,676 and 2,366,780, two of the patents covered by the 1942 joint license agreement. Stearns and Besser Company shared the expense of this litigation as required by the 1942 agreement.

[*Refusal to License Patents*]

20. On January 15, 1947, Darden requested of Gelbman a license under the Gelbman-Andrus patents. This request was relayed to the Besser Company and Stearns to determine if Besser Company and Stearns would consent to granting such a license. Both Besser Company and Stearns refused to give their consent.

[*Notices to Trade*]

21. The advertisements contemplated by the correspondence mentioned in Finding 18 appeared in the February, 1947, issues of leading periodicals of the concrete block plant industry. These advertisements featured the words "vibration under pressure." The text of the advertisement in relevant part stated that Louis Gelbman, inventor, announced that only Besser Company and Stearns were licensed to make block machinery under his patents. The advertisement then listed the numbers of the patents covered by the joint license agreement and concluded with a warning against infringement.

22. These advertisements were intended to make the industry "patent conscious" and to give the impression that the Gelbman patents had something to do with making blocks with vibration or vibration under pressure. During and prior to February, 1947, Besser Company advertised that it was licensed under Gelbman's "basic vibration patents." During and prior to February, 1947, Stearns advertised that it was licensed under "basic Gelbman vibration patents." Besser Company, in 1939, had taken the position that "vibration with pressure" was broadly disclosed prior to the Gelbman patents. All defendants knew that in 1942 two claims of the Gelbman patents were held invalid as there was no novelty in vibrating or reciprocating a mold.

[*Unfair Competition Suit*]

23. With the advice of counsel, plaintiffs, in February, 1947, started suit in Cook County, Illinois, against Gelbman, Olsen and Besser asserting that these advertisements and other alleged activities of the defendants constituted unfair competition.

[*Plaintiff's Supply Cut-off*]

24. On February 18, 1947, Besser, Olsen and one Stark, patent attorney for Besser Company, called on the president and other officials of Link-Belt Company in Chicago, Illinois. They notified Link-Belt that the machines being made in Link-Belt's Atlanta plant for Darden infringed patents which they controlled and that suit had been started against a user of one of these machines. The president of Link-Belt decided that Link-Belt should discontinue supplying Darden Industries with materials that were claimed to infringe until the patent controversy was settled. Darden was advised of this decision by the manager of Link-Belt's Atlanta plant on February 20, 1947.

[*Settlement of Litigation*]

25. Plaintiffs, in the absence of a source of supply for machines, were not capable of financing the defense of the patent infringement suit which had been instituted by Gelbman and Andrus in New Jersey or the prosecution of the unfair competition suit which they had started in Illinois. Darden Industries was threatened with immediate destruction of its business and with financial ruin unless its established source of machines could be maintained. In this dilemma, Darden decided that there was nothing he could do except to settle the matter on the best terms possible. On February 20, 1947, Darden signed an agreement with Gelbman which provided:

a. That Darden and Darden Industries would be licensed to make, sell and service 32 Rockercrete, three "Warren 800" and 30 mixers.

b. That Darden and Darden Industries, after the above quantities had been disposed of, would discontinue the manufacture, sale or use of block machinery, including machines of the type mentioned and other mixers.

c. That Darden would withdraw the suit for unfair competition mentioned in Finding 23.

d. That the agreement was to be supplemented and replaced by a formal agreement to be later signed by Darden.

26. The formal agreement contemplated by the preliminary agreement of February 20 was executed by Darden on March 17, 1947, by Gelbman and Andrus on March 21, 1947, and by Darden for Darden Industries on April 7, 1947. That agreement referred to the preliminary agreement of February 20, 1947, and provided in part:

a. A license to Darden Industries under Patent Nos. 2,275,676 and 2,366,780 to complete, use, and sell machines embodying the invention claimed with the license being limited to a total of 35 machines including not more than five multiple block machines.

b. That Darden Industries was not to be restricted in the sale of repair parts or the rendering of service to these machines or any other machines heretofore sold by Darden or Darden Industries.

c. That after 35 machines were completed and sold, Darden and Darden Industries would cease from further making and selling any machines covered by any of the claims of Patent No. 2,275,676.

d. That Darden's suit for unfair competition would be dismissed.

e. That the patent infringement suit in New Jersey against Landis Concrete Products would be dismissed.

27. After this agreement was entered into by the plaintiffs and Gelbman, Darden Industries advertised that it was licensed under Gelbman's patents and thereafter Darden Industries sold its machines as a licensee under the Gelbman patents.

28. Under the provisions of the limited license agreement granted to Darden Industries by Gelbman, the Company was authorized to sell 30 Rockercrete and five "Warren 800" machines. In the period following the grant of that license to the time of this suit, Darden Industries was able to dispose of only 16 of the 30 Rockercrete machines. The last of the five "Warren 800" machines authorized was sold in 1951.

[*Damages*]

29. Plaintiff sought to prove damages by reviewing the history of Darden Industries and making a prophesy as to what the future profits would be in the absence of interference by defendants. In order to bolster this prophesy, they reviewed the history of Besser and Stearns during the same period. Although it is true that in a case of this kind damages do not have to be proved to an exact certainty, they cannot be based upon speculation and conjecture. In a highly competitive business, such as that involved in this case, there are so many factors involved that no reasonable person would conclude that the method adopted by the plaintiffs would give even an approximate measure of the damages sustained.

30. This is not to say that the evidence submitted to support the plaintiff's theory should be disregarded. Loss of prospective profits may constitute an element of recoverable damages. Certainly a prospective purchaser of Darden Industries, as a going concern, would give serious consideration to this evidence. At the time the defendants started their campaign to destroy Darden Industries' business, that Company had acquired some goodwill and going concern value. It had a small staff qualified to carry on the business. It had established some credit and satisfactory arrangements with Link-Belt, its supplier of machines.

31. The restrictions placed upon the operations of Darden Industries by the 1947 agreements, which it was forced to accept, limited the future development of the Company.

32. Giving consideration to all the factors, it is determined that Darden Industries suffered damages due to the illegal conduct of defendants in the amount of fifteen thousand dollars ($15,000).

33. Darden, individually, has failed to show any injury from the defendants' activities apart from his interest as officer and stockholder of Darden Industries.

[*Attorneys' Fees*]

34. Plaintiffs were represented by able counsel, who spent much time in the preparation and trial of the case. In essence, the case was relatively simple so far as the liability was concerned. Much of the evidence used in this trial was substantially the same as *U. S. A. v. Besser, supra.* Most of the time and effort of the attorneys was spent in attempting to establish their theory of damages. Basing his opinion quite largely upon the time spent by plaintiff's counsel; a highly respected and competent member of the local bar gave his opinion as to the value of these services. Had it been possible for the plaintiff's counsel to sustain the theory of damages which they advanced, the opinion of this expert would have been more persuasive. However, the fact remains that plaintiff's counsel were not successful. It follows that reasonable attorneys' fees must be fixed in accordance with the usual considerations including the difficulty of the litigation, the amount recovered, time and labor spent, the learning, skill and experience required, and the responsibility undertaken. A reasonable allowance to Darden Industries for attorneys' fees is determined to be ten thousand dollars ($10,000).

Conclusions of Law

1. The Court has jurisdiction of the parties and of the subject matter of the claims of the plaintiffs (15 U. S. C. 15).

2. In addition to the *prima facie* effect that the Court is compelled to give to the decision of the courts in *U. S. A. v. Besser, supra,* sufficient evidence has been offered to establish that all of the defendants herein have committed acts forbidden by the anti-trust laws of the United States and that these acts have injured the business of Darden Industries entitling it to some of the relief sought (15 U. S. C. 15 and 16).

3. Where the tort itself is of such a nature as to preclude ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. *Story Parchment Co. v. Paterson Co.,* 282 U. S. 555.

4. Plaintiff, Darden Industries, is entitled to judgment against the defendants for threefold the damages found to be sustained by it in Finding 32, a total sum of forty-five thousand dollars ($45,000). It is also entitled to recover its reasonable attorneys' fees as found in Finding 34 and its costs (15 U. S. C. 15).

[¶ 68,647] Federal Trade Commission v. Fred J. Bowman, President, Wilson Athletic Goods Manufacturing Company.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 56 C 1372. Dated February 15, 1957.

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Production of Documentary Evidence—Clayton Act Proceeding—Power of Commission To Serve Subpoena on Witness Not Being "Proceeded Against".—In a proceeding charging that a manufacturer of sporting goods purchased a competing manufacturer in violation of Section 7 of the Clayton Act, the Federal Trade Commission had the power to serve a subpoena on another

manufacturer in the industry demanding the production of certain of its records. The manufacturer contended that the Commission did not have the power to issue the subpoena under Section 9 of the Federal Trade Commission Act because it was not being "investigated or proceeded against" within the meaning of the section. The court, conceding that the manufacturer was not being "proceeded against," ruled that the manufacturer was being "investigated" as that word is used in the Act. Under Section 6 of the Act, the Commission has the power to gather and compile information concerning, and to investigate the organization and practices of, any corporation engaged in commerce. The power to investigate so conferred is broad and sweeping, and there is nothing to suggest that only corporations suspected of a violation of law are subject to the power. The court further noted that the subpoena power conferred upon the Commission is available to it in the discharge of its duties under the Clayton Act, and that the instant proceeding would be crippled if the Commission could not produce by compulsory process essential industry data.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8701.55, 8701.74, 8741, 8741.55, 8801.870.

Federal Trade Commission Enforcement and Procedure—Production of Documentary Evidence—Clayton Act Proceeding—Reasonableness of Subpoena Served on Witness Not Being "Proceeded Against"—Trade Secrets.—In a proceeding charging that a manufacturer of sporting goods purchased a competing manufacturer in violation of Section 7 of the Clayton Act, the Federal Trade Commission was held to have the power to serve a subpoena on another manufacturer in the industry demanding the production of certain of its records. In ruling on the manufacturer's contention that the subpoena was unreasonable and oppressive, the court held that while the requested information may be relevant to the Commission's proceeding against the other manufacturer, the imposition of a heavy burden upon a witness not a party to that proceeding should be avoided. Accordingly, the court ruled that the witness must produce any compilations already prepared by it, that the Commission must bear the burden of making any new compilations, that the witness will be required to make available the necessary records at the places of business where they are ordinarily kept, and that copies of specific single documents should be produced at the place of hearing. With respect to confidential business information, the court ruled that Section 6(f) of the Federal Trade Commission Act excepts trade secrets from the Commission's general power to make public the information it gathers, and that the order enforcing the subpoena will provide against the disclosure of confidential information.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8701, 8701.92, 8741, 8741.70.

For the petitioner: William A. Somers, Dwight L. Carhart, and Andrew C. Goodhope, Chicago, Ill.

For the defendant: Thomas Freeman, Louis R. Simpson, and Howard C. Parson, Chicago, Ill.

Modifying and enforcing a Federal Trade Commission subpoena relating to Dkt. 6478.

Memorandum

[*Enforcement of Subpoena*]

JULIUS J. HOFFMAN, District Judge [*In full text*]: The Federal Trade Commission has filed in this court a petition for enforcement of its subpoena *duces tecum* directed against the defendant, Fred J. Bowman, President of the Wilson Athletic Goods Manufacturing Company, under Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. § 49 (1914). The defendant has resisted enforcement upon the grounds that the subpoena is beyond the power of the Commission to issue and that it is unreasonable and oppressive.

[*FTC Merger Proceeding*]

The dispute arises in the course of a proceeding commenced by the Commission against A. G. Spalding & Bros., charging Spalding with a violation of Section 7 of the Clayton Act, 15 U. S. C. § 21, resulting from its purchase of a competitor, Rawlings Manufacturing Company. The issues as framed in that proceeding center around the question whether the effect of this purchase may be "substantially to lessen competition, or to

tend to create a monopoly" within the meaning of the Clayton Act and the allegations of the complaint.

[*Subpoena*]

Seeking evidence concerning the effect of the purchase, the Commission issued its subpoena against the defendant, as President of the Wilson Athletic Goods Manufacturing Company, a competitor in the field. As summarized in the Commission's memorandum filed in support of this petition, the subpoena required the defendant to appear to testify and to produce documents showing:

1. Defendant's production for the past four years as shown by compilations in defendant's possession and any related documents;

2. Athletic goods manufactured by the Wilson company by units for the years 1952 through 1955;

3. Sales by the Wilson company of athletic goods by units, dollars, and price class of products during the years 1952 through 1955;

4. Purchases by the Wilson company of athletic goods for resale by units, dollars, and price class for the past four years;

5. All patents on athletic goods or production thereof which the Wilson company owns, the licensees under the patents, and the royalties paid to the Wilson company since January 1, 1952;

6. All patents on athletic goods or production thereof owned by others of which the Wilson company is the licensee, the license agreement, and the royalties paid by the Wilson company since January 1, 1952;

7. All agreements between the Wilson company or any subsidiary with any athlete or athletic organization for the use, gift, sale, or endorsement of any of the Wilson company's athletic goods during the last four years;

8. Catalogs and price lists of the Wilson company for the last four years; and

9. Names and addresses of suppliers of the Wilson company who supplied more than 5% of the Wilson company's total purchases of raw material used in the production of athletic goods, including the units and the dollar value thereof.

[*Defendant's Objections*]

The defendant Bowman personally appeared in response to the subpoena, but refused to supply the requested documents, claiming that the Commission lacked power to compel their production; that production would impose an unreasonable burden upon the Wilson company by requiring it to transport voluminous records from some thirty-two establishments in twenty-nine cities to the place of hearing, with consequent disruption of its business; and that compliance with the subpoena would involve disclosure of confidential business information and trade secrets. Upon the defendant's refusal to comply, the Commission filed this application for the aid of the court in compelling production of the requested documents.

[*Power To Issue Subpoena*]

The first point of argument raises the question whether the Federal Trade Commission, or this court in its support, is empowered to order the defendant to produce any documents at all. The defendant urges that the only charge of any violation of law is directed against A. G. Spalding & Bros., and that the Wilson company is not being proceeded against. It follows, according to the argument, that the Wilson company, being neither a party nor a prospective party to any proceeding but only a potential witness, is not subject to a subpoena *duces tecum.* The argument rests upon the interpretation of Section 9 of the Federal Trade Commission Act, 15 U. S. C. § 49, which provides in part:

> "For the purpose of sections 41-46 and 47-58 of this title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. . . ."

[*Section 9, FTC Act*]

The word "such," in the defendant's reading of this section, incorporates all the limiting description of documentary evidence as used in the preceding clause. So construed, the act would authorize the Commission only "to require by subpoena . . . the production of all [such] documentary evidence *of any corporation being investigated or proceeded against* relating to any matter under investigation." In this view, if the Wilson company is not charged with the violation of any law administered by the Com-

mission, then the company is not "being investigated or proceeded against" within the meaning of the authorization, and no power is vested in the Commission to issue a subpoena *duces tecum.*

[*Section 6, FTC Act*]

It is unnecessary to decide whether the defendant's interpretation attaches more significance to the word "such" than it can reasonably be made to bear. The argument fails upon another ground. Conceding that the Wilson company is not being "proceeded against" within the meaning of the quoted portion of Section 9, the question remains whether the company is "being investigated" as that term is used in the Act. Section 6 of the Federal Trade Commission Act, 38 Stat. 721, 15 U. S. C. § 46, provides in part:

> "The commission shall also have power—
>
> "(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships."

[*Scope of Subpoena Power*]

Certainly the power to investigate so conferred is broad and sweeping. There is nothing to suggest that only corporations suspected of a violation of law are subject to the power. Nor is there any reason to import such a limitation. Assuming for purpose of argument the soundness of the defendant's contention that the production of documentary evidence can be required only of corporations being investigated or proceeded against, to limit the meaning of investigation to cases of suspected violation would mean that the Commission would be powerless to perform many of the duties which Congress enjoined upon it. Where necessary evidence was in the hands of a competitor of a corporation charged with a violation, the Commission would be able to discharge its responsibility for protecting the public interest only if the victimized competitor chose to cooperate by supplying the evidence. The Commission would be limited in effect to proceeding upon the complaint of the injured party, despite the availability of private civil remedies for the protection of such parties. Effective enforcement in the public interest would be foreclosed.

Moreover, as the defendant would have me read these sections, the Commission would have unlimited power to call witnesses who are not suspected of violation and to examine them orally, but would be bound by the witness's recollection and statements; production of the books and records which constitute the best evidence of the facts could not be compelled.

This suggested interpretation would not only severely hamper the Federal Trade Commission. It would also prejudice the corporation being proceeded against in the establishment of its defense. For if the Commission were unable to compel the production of documents from non-parties in support of its charges, it would equally be powerless to lend its authority to the party charged, where the crucial evidence of innocence lay in the records of another corporation.

This court has previously held that the subpoena power conferred upon the Commission is available to it in the discharge of its duties under the Clayton Act. *Federal Trade Commission v. Reed Candy Co.* [1956 TRADE CASES ¶ 68,551], N. D. Ill. No. 56 C 483 [843], decided June 12, 1956. The same conclusion was reached in *Federal Trade Commission v. Menzies* [1956 TRADE CASES ¶ 68,478], D. Md., decided August 30, 1956. In a proceeding under the anti-merger provisions of the Clayton Act, the share of the market affected by the merger and the effect on competitors engaged in the same line of commerce are crucial inquiries. The proceeding would be crippled if neither the Commission nor the party charged could produce by compulsory process the essential industry data.

[*Related Rulings*]

A related question was before the Court of Appeals for this Circuit in *Bowles v. Shawano Nat. Bank,* 151 F. 2d 749 (7 Cir. 1945). There the Administrator of the Office of Price Administration sought judicial enforcement of a subpoena to compel a bank to produce account records of four of its depositors who were connected with a company suspected of violating the act. The bank contended that "The Administrator cannot secure a court order directing subpoena against persons who were not parties to the instant (or any other) action." 151

F. 2d, at 750. The contention was rejected by the Court.

> "The Administrator, ex necessitate, needs investigatory powers both to promulgate rational orders and regulations, and to apprehend violations thereof. He can not intelligently make charges without knowing facts to substantiate them. The accused would vigorously and justly protest against unfounded charges. How is the Administrator to unearth such violations or to confirm information given him by aggrieved persons or alert loyal citizens? By investigation and checking, of course.
>
> "The statute granting him powers is inclusive and all embracive when it comes to investigation." (151 F. 2d at 751)

In interpreting Section 9 of the Federal Trade Commission Act as it is incorporated in the investigatory legislation for other administrative agencies, other courts have held that a subpoena *duces tecum* may issue against corporations not parties to any proceeding nor suspected of any violation. *United States v. C. & V. Poultry, Inc.,* 132 F. Supp. 945 (S. D. N. Y. 1955); *United States v. Woerth,* 130 F. Supp. 930 (N. D. Ia. 1955).

In a number of other cases, courts have reached decisions upon the basis of an assumed power to compel non-parties to produce documents, although without directly holding that the power exists. Thus in *Automatic Canteen Co. v. Federal Trade Commission* [1953 Trade Cases ¶ 67,503], 346 U. S. 61 (1953), Mr. Justice Frankfurter considered the power of the Commission to issue subpoenas *duces tecum* against corporations not parties to the proceeding as a factor justifying imposing the burden of proof on the question of cost justification upon the Commission rather than upon the corporation being proceeded against. He observed, "Certainly the Commission with its broad power of investigation and subpoena, prior to the filing of the complaint, is on a better footing to obtain this information than the buyer." 346 U. S., at 79. Similarly, in *E. B. Muller & Co. v. Federal Trade Commission* [1944-1945 Trade Cases ¶ 57,231], 142 F. 2d 511 (6 Cir. 1944), the Commission had issued a subpoena *duces tecum* at the request of the corporation being proceeded against, compelling a competitor to disclose certain information. The defendant complained that more information should have been disclosed. The Court held the Commission had acted within its discretion in not compelling the non-party to disclose all that the defendant demanded, but it assumed that the Commission had power to grant what the defendant sought and received in part. To the same effect is *Fleming v. Montgomery Ward & Co.,* 114 F. 2d 384 (7 Cir. 1940), a proceeding under the provision of the Fair Labor Standards Act incorporating the section here in issue. The respondent objected to supplying its records, claiming that the information should be obtained from other persons not parties to the proceeding. While apparently recognizing the availability of that source, the Court overruled the objection.

The decisions of the courts are not the only relevant authority upon a question of the interpretation of an act of Congress conferring powers upon an administrative agency. Interpretation by the agency itself is entitled to great weight. In *Alaska Steamship Co. v. United States,* 290 U. S. 256 (1953) [1933], the Court declared:

> "Courts are slow to disturb the settled administrative construction of a statute long and consistently adhered to. [Citations omitted.] This is especially the case where, as here, the declared will of the legislative body could not be carried out without the construction adopted." (290 U. S., at 262)

See also *Norwegian Nitrogen Products Co. v. United States,* 288 U. S. 294, at 315 (1933); *United States v. American Trucking Associations, Inc.,* 310 U. S. 534, at 543 (1940). For forty-two years the Federal Trade Commission has issued subpoenas *duces tecum* against corporations not parties to a pending proceeding. To upset this established interpretation would disrupt not only the operations of this Commission but of many other agencies operating under statutes which have incorporated this section of the Federal Trade Commission Act.

[*Cases Distinguished*]

The defendant relies primarily upon two decisions as supporting his position: *Federal Trade Commission v. Baltimore Grain Co.,* 284 Fed. 886 (D. Md. 1922), and *Federal Trade Commission v. W. W. Tuttle* [1956 Trade Cases ¶ 68,399], S. D. N. Y., Civil No. M-18-304, decided June 26, 1956. Neither case controls the question here presented. In the *Baltimore Grain* case, a general mandamus was sought to compel the respondent to open all its records to the Commission

for purposes of compiling information and reporting to Congress as required by a Joint Resolution. As the court observed, there was "no reason to believe that any violation of law has been committed" by any person or corporation. The Joint Resolution did not expand the investigatory power, it was held, and the mandamus was denied. The holding falls far short of establishing that the subpoena power may not be used against non-parties as an incident to a pending proceeding charging a specific violation of law. The *Tuttle* case is also distinguishable. There, in aid of this same proceeding against A. G. Spalding & Bros., the Commission sought to obtain documents from the accountants who serve this defendant and other companies engaged in the athletic goods business. In denying the subpoena the court relied primarily upon the accountant's claim that its business would be destroyed if it were obliged to disclose this information obtained in confidence. The court also noted, however, that the Commission conceded that the accounting firm was not being "investigated" within the meaning of Section 6 of the Act, and that the Commission had conceded that the information could be obtained from the companies, like the Wilson company, that were engaged in the business. The two questions thus left open and undecided in the *Tuttle* case are here ripe for decision.

[*Reasonableness of Subpoena*]

Concluding as I do that a subpoena *duces tecum* to this defendant is within the power of the Commission, I next turn to the defendant's argument that the subpoena is unreasonable and oppressive. It appears that compliance with the subpoena as drawn would require the production of a vast number of documents from scattered points throughout the United States. While the requested information is or may be relevant to the pending proceeding against A. G. Spalding & Bros., the imposition of a heavy burden upon a witness not a party to that proceeding should be avoided. Under the discovery provisions of the Federal Rules of Civil Procedure, the burden of collecting a large number of documents and of compiling information from them is a ground for an order limiting the duty to produce. See *Kainz v. Anheuser-Busch, Inc.* [1954 TRADE CASES ¶ 67,708], 15 F. R. D. 242 (N. D. Ill. 1954). Rule 81(a)(3) of those Rules provides:

". . . These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute . . . ."

In *Oklahoma Press Publishing Co. v. Walling,* 327 U. S. 186 (1946), in construing Section 9 of the Act here involved as incorporated by the Fair Labor Standards Act, the Court observed:

"The result therefore sustains the Administrator's position that his investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations. . . ." (327 U. S., at 216)

In *Walling v. American Rolbal Corporation,* 135 F. 2d 1003, 1005 (2 Cir. 1943), the Court remarked:

". . . Requiring records to be produced away from the place where they are ordinarily kept may impose an unreasonable and unnecessary hardship which in itself would make the issuance of the subpoena, otherwise proper, arbitrary and capricious. The district judge suggested in his opinion 'that the investigation be carried on at the premises of the respondent and so conducted as not to interfere unduly with the course of its business.' The order is affirmed but our mandate will make the above suggestion a part of it if the District Court so decides after due consideration."

A similar limiting order was imposed in *Application of Walling,* 47 F. Supp. 255 (E. D. N. Y. 1942). There the judge stated:

". . . It was suggested, and with reason as I believe, that if the petitioner could acquire the desired information without the interference with the conduct of the respondent's business that would be entailed by the production of an impressive array of its records at a comparatively distant office, the ends of justice to both the petitioner and the respondent would be served. . . ." (47 F. Supp., at 256)

The order to be entered herein will therefor provide that the defendant must produce any compilations already prepared by it reflecting the information requested, but that the Commission must bear the burden of making new compilations from the Wilson company's sales invoices, voucher files, and

other records. The defendant will be required to make available the necessary records, at the places of business where they are ordinarily kept, for examination by the Commission's agents at such times and places as will not unduly interfere with the conduct of business. Copies of specific single documents, such as compilations, catalogs, contracts, agreements, patents, and price lists, shall be produced at the place of hearing.

[*Trade Secrets*]

Finally, the defendant has objected to the disclosure of confidential business information that might prove beneficial to competitors if made public. The Federal Trade Commission Act itself recognizes the force of this claim. Section 6(f), 15 U. S. C. § 46(f), excepts trade secrets and names of customers from the Commission's general power to make public the information it gathers. In *Federal Trade Commission v. Menzies* [1956 TRADE CASES ¶ 68,478], D. Md., decided August 30, 1956, the court specified:

"No part of the documentary evidence should be made public and available to the competitors of the several respondent corporations unless it is necessary to do so in the proper enforcement of the law. If requested by the respondents, the Commission should follow its practice of placing the documents offered in evidence in a confidential file, in order to keep business secrets away from the sight and knowledge of the respondents' competitors so far as it is practicable to do so in the discharge of the Commission's responsibilities under the law."

A similar qualification will be included in the order of enforcement to be entered.

[*Order*]

Counsel are directed to confer and submit an order reflecting the views herein expressed on or before March 18, 1957.

[¶ 68,648] John T. Menzies, President of the Crosse & Blackwell Company; Charles P. McCormick, President of McCormick & Company, Inc.; and Samuel H. Hoffberger, President of Pompeian Olive Oil Corporation v. Federal Trade Commission.

In the United States Court of Appeals for the Fourth Circuit. No. 7352. Argued January 23, 1957. Decided March 7, 1957.

Appeals from the United States District Court for the District of Maryland, at Baltimore. THOMSEN, Chief Judge.

Clayton and Federal Trade Commission Acts

Federal Trade Commission Enforcement and Procedure—Access to Documentary Evidence—Subpoenas *Duces Tecum*—Power to Issue Subpoenas in Clayton Act Proceedings.—The Federal Trade Commission has the power to issue subpoenas *duces tecum,* under Section 9 of the Federal Trade Commission Act, in proceedings before the Commission based upon alleged violations of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act. The Federal Trade Commission Act and the Clayton Act were before Congress at the same time and were in *pari materia,* dealing with the same general subject matter. The FTC Act created the Commission as an administrative agency and conferred certain powers upon it, including the power to conduct investigations as to the organization and practices of certain corporations engaged in commerce. Authority to enforce compliance with the Clayton Act was conferred by Section 11 of that Act on the Federal Trade Commission. In carrying out this section, the Commission should exercise its powers with respect to investigations vested in it by the act of its creation. Among such powers is the power to examine documents and witnesses and issue subpoenas. The phrase "for the purposes of this act," contained in Section 9 of the FTC Act, does not limit the Commission's power to issue subpoenas to proceedings authorized by the FTC Act. If the Commission were conducting an investigation under Section 5 or 6 of the Federal Trade Commission Act into the alleged discriminatory practices of the corporations involved in the instant proceedings, it would have the power to issue subpoenas under Section 9 and to use information obtained in subsequent proceedings to enforce the Clayton Act. Certainly, the power of the Commission is not less

because of the fact that the corporations previously had been charged with violating the Clayton Act.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8741, 8801.870.

Federal Trade Commission Enforcement and Procedure—Access to Documentary Evidence — Subpoenas *Duces Tecum* — Reasonableness of Subpoenas — Confidential Information.—In a proceeding by the Federal Trade Commission for court orders enforcing subpoenas *duces tecum* issued by it in proceedings charging three corporations with violating Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, the corporations' contention that the subpoenas are violative of the provisions of the Fourth Amendment to the United States Constitution was rejected. The court held that the contention that the subpoenas authorize searches and seizures violative of the Fourth Amendment was so lacking in merit as not to warrant discussion. The subpoenas request records containing further information clearly relevant to the charges being investigated and describe the records as accurately as they can be described under the circumstances. Furthermore, the court order directed that none of the records be made public unless and until received in evidence, and that documents containing trade secrets be placed in a confidential file in accordance with the practices followed by the Commission in such cases. Also, there was further provision for the examination of records in the offices of the corporations and for the production before the Commission of only such records as were material to the matter under inquiry.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8741, 8741.70.

For the appellants: G. C. A. Anderson and James W. Cassedy (A. Adgate Duer; Niles, Barton, Yost & Dankmeyer; Anderson, Barnes & Coe; and Morton J. Hollander, on brief).

For the appellee: Robert B. Dawkins, Assistant General Counsel, Federal Trade Commission (Earl W. Kintner, General Counsel, and John T. Loughlin, Attorney, Federal Trade Commission, on brief).

Affirming orders of the U. S. District Court, District of Maryland, 1956 Trade Cases ¶ 68,478, enforcing Federal Trade Commission subpoenas in Dkts. 6463, 6468, 6470.

Before PARKER, Chief Judge, and HARRY E. WATKINS and GILLIAM, District Judges.

[*Enforcement of FTC Subpoenas*]

PARKER, Chief Judge [*In full text*]: These are appeals from an order enforcing subpoenas *duces tecum* issued by the Federal Trade Commission pursuant to section 9 of the Federal Trade Commission Act, 15 USC 49. The subpoenas were issued in proceedings before the Commission in which three corporations were charged with violation of section 2(d) of the Clayton Act as amended by the Robinson-Patman Act. The contentions on appeal are that the subpoenas are invalid on the ground that the Commission does not have power to issue subpoenas under section 9 of the Federal Trade Commission Act in proceedings had before it for enforcement of the Clayton Act and that, even if this power exists, the subpoenas are violative of the provisions of the Fourth Amendment to the Constitution of the United States.

[*Other Rulings*]

The facts are fully stated and the applicable statutory provisions are accurately set forth and analyzed in the opinion of the District Judge. See *Federal Trade Commission v. Menzies* [1956 TRADE CASES ¶ 68,478] 145 F. Supp. 164. We note that like action was taken in the case of Federal Trade Commission against Reed in the Northern District of Illinois, not yet reported, although not followed in *Federal Trade Commission v. Rubin in the Southern District of New York* [1956 TRADE CASES ¶ 68,505] 145 F. Supp. 171. With due respect to the opinion of the judge in the case last mentioned, which we have carefully read and considered, we entertain no doubt as to the correctness of decision of the District Judge in this case and feel that little need be added to his opinion.

[*Issuance of Subpoenas*]

It is not without significance that for more than forty years the Federal Trade Commission, in proceedings had before it under the Clayton Act, has issued subpoenas such as it issued here and has issued many

thousands of such subpoenas. While we agree that this is not conclusive as to its power to issue them, it is not reasonable to suppose that the power would have gone unchallenged for so long a period in such a sensitive field of the law, if there were any real doubt as to its existence.

[*FTC Subpoena Power*]

The Federal Trade Commission Act and the Clayton Act were before Congress at the same time and were in *pari materia,* dealing with the same general subject matter, restraints of trade and unfair competition. The Clayton Act (38 Stat. 730) laid down substantive rules of law and provided for their enforcement by courts and administrative agencies. The Federal Trade Commission Act created the Commission as an administrative agency and conferred certain powers upon it, among others the power to enter cease and desist orders upon a finding of unfair competition and to conduct investigations as to "the organization, business, conduct, practices and management of any corporation engaged in commerce, excepting banks and common carriers * * * and its relation to other corporations and to individuals, associations and partnerships". 38 Stat. 717-724. Authority to enforce compliance with the provisions of the Clayton Act, except as to banks and common carriers, was conferred by section 11 of that act on the Federal Trade Commission; and this could mean nothing else than that, in carrying out this provision, the Commission should exercise the powers with respect to investigations and hearing vested in it by the act of its creation. Among such powers, was the power to examine documents and witnesses and issue subpoenas. This was provided in section 9 of the Act, the pertinent portion of which is as follows:

"Sec. 9. That for the purposes of this Act the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence. * * *."

Contention is made that the language "for the purposes of this act" limits the power of examining witnesses and issuing subpoenas to proceedings and investigations authorized by the act creating the Commission and that the power may not be exercised in an enforcement provision which the Commission is authorized by the Clayton Act to conduct. This, we think, is an unreasonable and forced construction of the language used, the manifest purpose of which was to give the Commission the power of subpoena and examination in connection with any investigation or proceeding which it was authorized by law to conduct. The language in question is "for the purposes of this act;" and one of the purposes of the act was to vest the Commission with adequate powers to conduct investigations and proceedings with respect to restraints of trade and unfair competition. When duties of investigation or enforcement are imposed upon the Commission by another act or acts, the reasonable intendment is that it shall exercise the power conferred upon it by law in the discharge of such duties. As was well said in the opinion of the Commission:

"The Federal Trade Commission Act and the Clayton Act were enacted as remedial measures designed to correct apparent deficiencies in the Sherman Act through administrative proceedings. They are statutes in *pari materia* which were enacted in the same session of Congress and, therefore, are to be construed together so as to reinforce their common legislative purpose.

"The Federal Trade Commission was designated as a major agency for enforcement of sections 2, 3, 7 and 8 of the Clayton Act. That designation necessarily implied that the Commission was to be aided in the effective discharge of its duties in adversary proceedings by the compulsory processes which were being made available to it under its organic act. That Congress thus intended is clear because section 11 of the Clayton Act provides for quasi-judicial hearings culminating in findings as to the facts and orders, including orders to cease and desist, and, without the power to compel the production of evidence in the course of proceedings thereunder, the danger of improvident orders lacking bases in fact would be great. We hold, therefore, that there is sound legal basis for the issu-

ance and enforcement of the Commission's processes requiring the production of appropriate information in Clayton Act inquiries and adjudicative proceedings."

It is conceded that if the Commission were conducting an investigation under section 5 or section 6 of the Trade Commission Act into the discriminatory practices of the corporations here being investigated, it would have power to issue subpoenas under section 9 of the Act and to use the information thus obtained in a subsequent proceeding to enforce the provisions of the Clayton Act. Certainly the power of the Commission to issue subpoenas and conduct the investigation is not less because of the fact that it gives notice in advance that the information obtained is to be so used; and the filing of the complaint under the Clayton Act amounts to no more than this. To deny such power to the Commission would in large measure defeat the purpose which Congress manifestly had in mind in the enactment of these statutes; and we find nothing in the language or history of either statute which at this late day requires such a result.

[*Constitutional Objections*]

The contention that the subpoenas authorize searches and seizures violative of the Fourth Amendment is so lacking in merit as not to warrant discussion. See *United States v. United States District Court for the Southern District of West Virginia*, 4 Cir. [1956 TRADE CASES ¶ 68,540] 238 F. 2d 713; *Oklahoma Press Co. v. Walling*, 327 U. S. 186, 202-211; *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 510. As said in the case last cited:

"The subpoena power delegated by the statute as here exercised is so clearly within the limits of Congressional authority that it is not necessary to discuss the constitutional questions urged by the petitioner, and on the record before us the cases on which it relies are inapplicable and do not require consideration."

The subpoenas did not violate the rule of reasonableness laid down in *Hale v. Henkel*, 201 U. S. 43. They ask for records containing information clearly relevant to the charges being investigated and describe the records as accurately as they could be described under the circumstances. The order of the court below directed that none of the records be made public unless and until received in evidence and that documents containing trade secrets be placed in a confidential file in accordance with the practice followed by the Commission in such cases. There was further provision for the examination of records in the offices of the corporations being investigated and for the production before the Commission of only such as were material to the matter under inquiry.

[*Orders Affirmed*]

The orders appealed from will accordingly be affirmed, and, in order that there may be no more delay than necessary in the proceedings before the Commission, mandate will issue twenty days after entry of the judgment of this court and will not be further stayed unless the appellants shall in the meantime have filed applications with the Supreme Court of the United States for writ of certiorari to review the judgment.

Affirmed.

[¶ 68,649] United States v. International Boxing Club of New York, Inc., International Boxing Club, Madison Square Garden Corporation, James D. Norris, and Arthur M. Wirtz.

In the United States District Court for the Southern District of New York. Civil Action No. 74-81. Dated March 8, 1957.

Case No. 1122 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Practices—Acquisition of Control of Professional Boxers, Promoters, and Arenas—Legality—Restraint of Trade.—Two corporations engaged in the promotion of professional championship boxing contests, a corporation engaged in the operation of an arena, and two individuals controlling the affairs of the corporations were held to have engaged in a combination and conspiracy in unreasonable restraint of trade in the promotion of professional world championship boxing contests in the United States. The intent of the defendants and the necessary result of their

activities, including (1) their acquisition of contracts from champion boxers and leading contenders requiring them to box exclusively for the promotion corporations as a condition of participating in title bouts, (2) their acquisition of competing promoters of championship boxing contests, and (3) their acquisition of control of key arenas and stadia for the presentation of championship boxing contests, was to combine in order to obtain control of, and exclude others from, the promotion of championship boxing contests in the United States. Various agreements and understandings entered into by the defendants for the purpose of excluding others from promoting championship contests were found to have substantially lessened competition. During certain periods of time, the defendants controlled or participated in 81 per cent and 93 per cent of the championship boxing contests presented in the United States. Also, various contracts and understandings of the defendants with respect to the sale of television, radio, and motion picture rights to such contests were held to have unreasonably restrained trade.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.460, 2005.690.

Monopolies—Conspiracy to Monopolize—Acquisition of Control of Professional Boxers, Promoters, and Arenas—Intent.—Two corporations engaged in the promotion of professional championship boxing contests, a corporation engaged in the operation of an arena, and two individuals controlling the affairs of the corporations were held to have engaged in a combination and conspiracy to monopolize trade in the promotion of professional world championship boxing contests in the United States. The intent of the defendants and the necessary result of their activities, including (1) their acquisition of contracts from champion boxers and leading contenders requiring them to box exclusively for the promotion corporations as a condition of participating in title bouts, (2) their acquisition of competing promoters of championship boxing contests, and (3) their acquisition of control of key arenas and stadia for the presentation of championship boxing contests, was to combine in order to obtain control of, and exclude others from, the promotion of championship boxing contests in the United States. Various contracts and understandings entered into by the defendants were found to have substantially lessened competition and to have unreasonably restrained trade. During certain periods of time, the defendants controlled or participated in 81 per cent and 93 per cent of the championship boxing contests presented in the United States. The defendants, by their concert of action and agreements, were found to have intended to exclude others from the promotion of, exhibition of, or sale of television, radio, and motion picture rights to, championship boxing contests. A specific intent to monopolize must be proved to establish a conspiracy to monopolize.

See Monopolies, Vol. 1, ¶ 2520, 2610.120, 2610.300, 2610.800.

Monopolies—Monopolization—Acquisition of Control of Professional Boxers, Promoters, and Arenas—Power to Exclude Competition.—Two corporations engaged in the promotion of professional championship boxing contests, a corporation engaged in the operation of an arena, and two individuals controlling the affairs of the corporations were held to have monopolized trade in the promotion of professional world championship boxing contests in the United States. The court found that the intent of the defendants and the necessary result of their activities, including (1) their acquisition of contracts from champion boxers and leading contenders requiring them to box exclusively for the promotion corporations as a condition of participating in title bouts, (2) their acquisition of competing promoters of championship boxing contests, and (3) their acquisition of control of key arenas and stadia for the presentation of championship boxing contests, was to combine in order to obtain control of, and exclude others from, the promotion of championship boxing contests in the United States. The defendants, as a result of their activities, which included agreements and understandings in unreasonable restraint of trade, acquired the power to exclude competitors from the promotion of championship boxing contests. During certain periods of time, the defendants controlled or participated in 81 per cent and 93 per cent of the championship boxing contests presented in the United States. The defendants, by their concert of action and agreements, were found to have intended to exclude, and to have excluded, others from the promotion of, exhibition of, or sale of television, radio, and motion picture rights to, championship boxing contests.

To establish monopolization, it must be proved that the defendants were able, as a group, to exclude actual or potential competition from the field.

See Monopolies, Vol. 1, ¶ 2510.275, 2510.500, 2610.120, 2610.300, 2610.800.

Combinations and Conspiracies—Monopolies—Relevant Market—Promotion of Professional Championship Boxing Contests.—The exhibition of professional championship boxing contests was held to constitute a market separate and distinct from the exhibition of professional boxing contests, sporting events, and other forms of public shows, spectacles, and entertainment. Likewise, the sale of television, radio, or motion picture rights to professional championship boxing contests was held to constitute a market separate and distinct from the sale of such rights with respect to boxing contests and other forms of public entertainment. Non-championship boxing contests, in their promotion and exhibition, including the sale of tickets, television rights, movie rights, and radio rights, do not have a reasonable interchangeability with championship boxing contests as a financial proposition and as an entertainment media. In matters of public appeal as well as financial return, championship contests are on a plane which clearly distinguishes them from non-championship boxing contests. The promotion of chaimpionship boxing contests constitutes a distinct, unique, and relevant market for the purpose of testing violations of Sections 1 and 2 of the Sherman Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2005; Monopolies, Vol. 1, ¶ 2540.

Combinations and Conspiracies—Monopolies—Interstate Trade or Commerce—Promotion of Championship Boxing Contests.—The promotion of professional championship boxing contests, including the sale of radio, television, and motion picture rights thereto, constitutes trade or commerce among the several states within the meaning of the Sherman Act. While the business of staking and promoting championship boxing contests may formerly have been "purely local affairs," modern management has made them vehicles by which television and radio programs may be broadcasted and advertising presented with an attractive nationwide appeal. The promotion of such contests was on a multistate basis, and it was coupled with the sale of rights to televise, broadcast, and film the contests for interstate transmission. The contention that a broad attack upon all professional sports, except baseball, may develop as a result of the instant ruling was answered by the court as follows: (1) the promotion of professional championship boxing contests is a pure and simple money-making, profit-seeking business, and (2) the United States Supreme Court, in its baseball decisions, never held "that all businesses based on professional sports are outside the scope of the antitrust laws."

See Combinations and Conspiracies, Vol. 1, ¶ 2035.153, 2035.213, 2035.219.

For the plaintiff: Herbert Brownell, Jr., Attorney General; Victor R. Hansen, Assistant Attorney General; and Victor H. Kramer, Richard B. O'Donnell, John D. Swartz, William J. Elkins, Lawrence Gochberg, Frank D. Curtis, and Edward F. Corcoran, Attorneys, Department of Justice.

For the defendants: Simpson, Thacher & Bartlett (Whitney North Seymour, Benjamin C. Milner, Armand F. Macmanus, and Newell G. Alford, Jr., of counsel) for Madison Square Garden Corporation and International Boxing Club of New York, Inc.; and Reid & Priest, and Peabody, Westbrook, Watson & Stephenson (Charles H. Watson and Ralph M. McDermid, of counsel), for International Boxing Club, Inc., James D. Norris, and Arthur M. Wirtz.

For a prior opinion of the U. S. Supreme Court, see 1955 Trade Cases ¶ 67,941; and for a prior opinion of the U. S. District Court, Southern District of New York, see 1954 Trade Cases ¶ 67,758.

OPINION

[*Nature of Suit*]

SYLVESTER J. RYAN, District Judge [*In full text*]: This civil anti-trust suit was filed on March 17, 1952 by the United States under Section 4 of the Sherman Act (C. 647, 26 Stat. 209, 15 U. S. C. Sec. 4), as amended, to prevent and restrain violations by the defendants of Sections 1 and 2 of the Act. The amended complaint alleges, in substance, that the defendants

combined and conspired in restraint of, and to monopolize, and have monopolized, interstate and foreign commerce in the promotion of professional championship boxing contests, including the sale of radio, television and motion picture rights thereto.

[*Prior Proceedings*]

Defendants' motion to dismiss the complaint for lack of jurisdiction over the subject matter, i.e., for lack of interstate commerce and for failure to state a claim upon which relief can be granted, was granted on February 8, 1954. The United States appealed directly to the Supreme Court, which reversed the judgment of dismissal and remanded the suit for trial (*United States v. International Boxing Club of New York, Inc.* [1955 TRADE CASES ¶ 67,941], 348 U. S. 236 (1955)). This determination was a holding that accepting the allegations of the complaint, a claim was stated entitling the Government to some form of relief and that ". . . the Government is entitled to an opportunity to prove its allegations . . ."

I note, with gratitude and appreciation, that I have had the utmost cooperation from counsel both in the pre-trial hearings and at trial. This expedited the presentation of the evidence and shortened the trial.

1.

THE ISSUES PRESENTED

[*Complaint*]

The complaint alleges that the defendants, beginning in 1949, combined and conspired in restraint of and to monopolize interstate trade and foreign commerce in the promotion, exhibition, broadcasting, telecasting and motion picture production and distribution of professional championship boxing contests in the United States. The Government contends that the combination and conspiracy resulted in a monopolization, and that it consisted of a concert of action among the defendants to exclude others from the promotion and exhibition of and the sale of radio, television and motion picture rights in professional championship boxing contests in the United States.

The acts alleged to have been committed by the defendants, pursuant to the conspiracy and combination, are: (1) purchasing of promotional control of certain championships, (2) acquiring the assets of competitors, (3) acquiring the exclusive use of principal stadia and arenas, and (4) requiring each of certain contenders for a title, as a condition of being afforded an opportunity to engage in a championship contest, to enter into a contract pursuant to which the contender, if he won the contest and thereby became champion, was required to engage in title bouts only under the promotion of defendants for a period of from three to five years.

The complaint alleges that defendants have promoted, or participated in the promotion of, 80% of all championship contests presented in the United States during the period between January 1, 1949 and May 15, 1953.

Specifically, then, the complaint alleges that the trade and commerce involved in suit is the business of promoting championship boxing contests on a multi-state basis, which includes the staging of the boxing contest in a suitable arena, the sale of tickets of admission, and the negotiations and sale of rights to broadcast, televise and to make and distribute motion pictures of such contests. This, the Supreme Court has held, "constitutes 'trade or commerce among the several states' within the meaning of the Sherman Act" (*U. S. v. International Boxing Club, supra* p. 240). The complaint further alleges that, in addition to monies received from the sale of tickets of admission, a substantial portion of the total revenue from championship fights comes from the sale of rights involving radio, television and motion pictures.

[*Defenses*]

The answers deny that defendants have unlawfully conspired or combined, or that they have, either individually or collectively, a monopoly within the meaning of the Sherman Act. The main thrust of the defense lies in the contention that championship boxing contests are not independent of and would not exist without non-championship contests and, therefore, the promotion of championship boxing contests does not constitute a relevant "market" for purposes of testing violations of Sections 1 and 2 of the Sherman Act.

The Government argues that the promotion and exhibition of, and the sale of radio, television and motion picture rights in professional championship boxing con-

tests constitute a "market" for purposes of determining whether there were restraints of trade and monopoly as alleged. The defendants urge that the relevant market is the entire entertainment field (or, at the very least, the promotion of all boxing contests). They contend that if the sale of radio, television and motion picture rights with respect to championship bouts have material significance, such a finding would serve only to establish that the correct and relevant market is the entire entertainment field.

[*Burden of Proof*]

The Government, charging the defendants, as it does, with having violated Sections 1 and 2 of the Act, has the burden of establishing the relevant market as well as the elements of the offense as set forth in the Act. Thus, to sustain its charge that the defendants conspired to monopolize, the Government must prove that the defendants had a specific intent to monopolize (*Swift & Co. v. United States,* 196 U. S. 375, 396 (1905)); and to establish that the conspiracy charged was successfully consummated, that the defendants did in fact monopolize the relevant market, that they were ". . . able, as a group, to exclude actual or potential competition from the field" (*American Tobacco Co. v. United States* [1946-1947 Trade Cases ¶ 57,468], 328 U. S. 781, 809 (1946)).

[*Basic Issues*]

The basic issues presented for determination as they have been framed and submitted by the defendants are:

1. Were the activities of defendants in connection with the promotion and exhibition of championship boxing contests interstate trade and commerce within the meaning of Sections 1 and 2 of the Sherman Act? and

2. If the defendants' activities were interstate trade and commerce, was Section 1 or Section 2 of the Sherman Act violated by them?

[*Evidence*]

The Government called eight witnesses and introduced 268 exhibits; defendants called seven witnesses and offered 13 exhibits. On consideration of all this evidence, I make the following findings of fact.

2.

FINDINGS OF FACT

I. Description of Defendants and Others.

1. Defendant International Boxing Club of New York, Inc. (hereinafter referred to as IBC(NY)), is a New York corporation with offices and principal place of business in New York, New York. It was formed on March 14, 1949. From about July 1949 to May 15, 1953, the end of the period covered by the Amended Complaint (hereinafter referred to as Complaint), about 80% of its voting stock was substantially equally divided between defendants Wirtz and Norris and the defendant Madison Square Garden Corporation, while the remaining approximate 20% was owned by Joe Louis or Trustees for his benefit. It has been engaged in the promotion of professional boxing contests including professional world championship contests. During the period July 1949 to the present it has held a license to promote boxing matches in New York issued by the New York State Athletic Commission. It is found and transacts business in this District.

2. Defendant International Boxing Club, Inc., an Illinois corporation (hereinafter referred to as IBC(Ill.)), has offices and principal place of business in Chicago, Illinois. It was formed on March 1, 1949. From about July 1949 to May 15, 1953, about 80% of its voting stock was substantially equally divided between defendants Wirtz and Norris and the defendant Madison Square Garden Corporation, while the remaining approximate 20% was owned by Joe Louis or Trustees for his benefit. It has been engaged in the promotion of professional boxing contests including professional championship boxing contests. During the period July 1949 to the present it has held a license to promote boxing contests in Illinois issued by the Illinois State Athletic Commission.

3. Defendant Madison Square Garden Corporation (hereinafter referred to as Garden), is a New York corporation with offices and principal place of business in New York, New York. It was organized to own and operate the arena building in New York City known as Madison Square Garden which was built in 1925-6. Throughout the period covered by the Complaint, it has engaged, among other things, in the management and operation of the Madison Square Garden Arena including the promo-

tion of various spectacles and contests held there. It is the foremost indoor sports arena in New York City and is utilized for various indoor sports events, including professional boxing contests and other events and spectacles. It is found and transacts business in this District.

4. Defendant James D. Norris, a resident of Chicago, Illinois, was president and a director of IBC(Ill.) and IBC(NY) from March 24, 1949 and July 8, 1949, respectively, and thereafter throughout the period covered by the Complaint and since. He has been a director of IBC(Mich.) since its incorporation and the president of that corporation since August 11, 1949. He has also been the president and a director of IBC(Mo.). He has been a director of the Garden since December 19, 1950, and has been its president since June 9, 1955. At all times mentioned in the Complaint he had a substantial stock interest in the Garden.

5. Defendant Arthur M. Wirtz, a resident of Chicago, Illinois, was a director of IBC(Ill.), of IBC(NY), and of the Garden from March 24, 1949, July 8, 1949, and December 19, 1950, respectively, and thereafter throughout the period covered by the Complaint and since. He has been a director of IBC(Mich.) since its incorporation; he has also been a director of IBC (Mo.) since September 26, 1950, and vice-president and secretary since January 12, 1950. At all times mentioned in the Complaint he had a substantial stock interest in the Garden.

6. The International Boxing Club, Inc., a Michigan corporation (hereinafter referred to as IBC(Mich.)), was organized under the laws of the State of Michigan on July 12, 1949 to promote professional boxing matches in Michigan. It was a wholly owned subsidiary of IBC(Ill.) until December 28, 1950, and thereafter throughout the period covered by the Complaint, it was jointly controlled by the Defendants Wirtz and Norris.

7. The International Boxing Club, Inc., a Missouri corporation (hereinafter referred to as IBC(Mo.)), was organized under the laws of the State of Missouri. From October 23, 1950 and thereafter throughout the period covered by the Complaint, it was jointly controlled by defendants Wirtz and Norris.

8. The defendants Norris and Wirtz participated in the direction and management of the defendants IBC(NY), IBC(Ill.), IBC(Mich.), IBC(Mo.) and, since December 19, 1950 of the defendant Garden, and particularly in those affairs, policies, and acts of the said corporations described more fully in these Findings of Facts. Each of the individual defendants has authorized, ordered, or done some or all of the acts hereinafter described.

II. Professional Boxing.

9. Professional boxing is a legalized sport which has become a business and which is conducted as a form of public entertainment. All who engage in it, either as boxer participants, managers or promoters are motivated to some extent by the desire of profit or monetary gain. It consists of a contest between two individuals each of whom uses his fists, bandaged, taped and encased in padded gloves, to attack his adversary with blows above the waist line and to ward off his adversary's blows. The winner is the boxer who either renders his adversary unable to continue, or failing that, receives the decision of the official judges at the end of the contest. A boxer may also win by the disqualification or default of his adversary.

10. The contest takes place on a square, covered, platform, enclosed by ropes, located in an arena to which members of the public are admitted upon presenting tickets of admission, which may be purchased at the gate.

11. The contestants are matched according to weight classes. There are eight recognized weight classes: flyweight (to 112 lbs.); bantamweight (to 118 lbs.); featherweight (to 126 lbs.); lightweight (to 135 lbs.); welterweight (to 147 lbs.); middleweight (to 160 lbs.); light heavyweight (to 175 lbs.); and heavyweight (over 175 lbs.). In the United States the two lightest classes have little practical importance. No flyweight championship bout has been held in the United States since 1935, and no bantamweight championship has been held in the United States since 1947.

12. In each weight class there is at any one time ordinarily one recognized world champion. Recognition as a world champion is a lucrative asset to any professional boxer and attaining the world championship is generally sought by all professional boxers in the division in which they compete. It places the individual so recognized in a position to obtain more for his services

than those who have not been so recognized. Contests in which these champions participate have greater box-office appeal, arouse greater public interest, have larger audience participation and bring in more revenues from sale of admission tickets, or "gate," and sale of other rights to the contest. There are other emoluments which come to the recognized world champion by way of commercial endorsements and advertising programs.

13. The champion becomes such either by defeating the existing champion in a recognized title contest, or, if the champion has retired or his title is declared vacated, by engaging with one or more recognized top contenders in a contest, or series of contests, recognized as title, or title elimination contests by authorities such as the New York State Athletic Commission and the National Boxing Association (an association of the state and municipal boxing commissioners, hereinafter referred to, from time to time, as NBA). Although there are sometimes differences of opinion as to who is the champion, such differences are infrequent. The field of champions and potential champions is limited by reason of the prowess of the few who have gained the public recognition of those who are "fans" or followers of the contests. It is reasonable to say that, at any one time, there are at most only six or so professional boxers who can defend a world championship title.

14. A boxing contest is a single bout between two boxers. Depending upon the circumstances it may be scheduled for 4, 6, 8, 10, 12 or 15 rounds of three minutes duration with rest periods of one minute between rounds.

15. A boxing contest is not staged in an arena except as part of a program or series of boxing contests, known as a boxing card. Each boxing card includes a main event. The professional championship boxing contests are generally staged with a number of "preliminaries," minor or insignificant contests, usually five or six in number. The minor contests have little or no interest to those who attend the championship contests; they have no drawing power or box-office appeal, and are staged only that the main or championship event may be orderly presented and allow for the entrance and exist of the spectators with a minimum of confusion.

16. Promoting professional boxing contests includes negotiation and execution of contracts with the boxers, the arranging of details necessary to the exhibition of the contest, the selling of tickets of admission, the staging of the contest, and the sale, if any, of radio, television, or motion picture rights to such contents.

III. State and Municipal Regulation of Professional Boxing.

17. Professional boxing is conducted in many of the states and localities under rules and regulations of governmental authorities; in many instances under a licensing system by which control and supervision is exercised over the boxers and their managers, promoting corporations, the referees, judges, match-makers, time-keepers and those in charge of the sale and distribution of admission tickets. This governmental regulation ofttimes extends to specific proposed boxing contests and boxing cards. Under the law of New York and Illinois, and in certain other states in which professional boxing is permitted, a promoter's license may be issued only to a corporation organized under the laws of that State.

18. In New York the governing authority is the State Athletic Commission which is a Division of the Department of State. In Illinois that authority is the State Athletic Commission.

19. In New York the boxers and their managers, promoting corporations, the referees, judges, match-makers, timekeepers, box office employees, ticket takers, trainers, and announcers, among others, must be licensed by the Commission. The proposed boxing card must be submitted to the Commission for approval by it. From time to time the Commission disapproves proposed boxing contests.

20. In New York, the rules and regulations provide, among other things, for: the filing and some of the terms of the contracts between boxers and the promoter, and between boxers and their managers; the printing and handling of tickets; the actual conduct of the bout; the rules governing the functioning of officials, including the judges, referee, and timekeeper; the manner of scoring the contest; the classification of contestants on a weight basis; and medical examinations of the contestants. The rules and regulations in Illinois are similar and apply to the same subjects generally.

21. In New York all judges and referees must be assigned by the Commission. In any principal or main bout the contestants must be paid on a percentage basis and the licensed promoting corporation, without advance approval of the Commission, cannot pay the contestants an amount in excess of 50% of the net proceds of the boxing program after the State tax and the compensation of the ring officials have been deducted.

22. Licensed promoting corporations are not allowed to conduct more than one program per week without the special permission of the Commission, and no such program may be called off or adjourned without the consent of the Commission.

23. It does not lie within our jurisdiction, to interfere with or attempt to modify or dictate the conditions under which those engaged in this professional boxing business shall operate on a local basis. It is our sole concern to inquire into such activities only insofar as they affect the interstate trade and commerce which has grown up and become an integral part of these activities; to that extent our jurisdiction is limited and by that limitation our inquiry is bound.

IV. The Trade and Commerce Involved.

24. The trade and commerce involved in this suit is the promoting and holding of professional championship boxing contests and all the commercial activities, which are an important and integral part of a successful and complete operation of such business. This includes the staging of such championship boxing contests in a suitable arena or stadium; the sale of tickets of admission; the negotiation and sale of rights to broadcast and to telecast through home television consumption or closed circuit theatre television consumption:; and to make and distribute motion pictures.

25. Each of these business phases of the professional championship boxing contests provides substantial sources of revenue for the promoters and participants; not the least of which are the payments received from the sale of rights involving broadcasts by radio and television and the distribution and exhibition of motion pictures of the events.

26. The efficient promotion of these professional boxing contests includes the negotiation and execution of contracts with the boxers, the arranging of details necessary to the exhibition of the contests, the selling of tickets of admission, the staging of the contests, and the sale, if any, of radio, television or motion picture rights to such contests.

V. The Interstate Character of This Trade and Commerce.

27. The defendants IBC (NY) and IBC (Ill.), in promoting professional world championship boxing contests, have made frequent use of the mails, the telephone, telegrams, cablegrams, radiograms, and their officers and agents have travelled across state lines and, in some cases, to foreign nations, to negotiate between themselves, with other promoters, and with boxers and managers. The defendant IBC (NY), in promoting championship contests, has sold a substantial number of admission tickets to professional world championship contests through the use of the mails to customers located in states other than those states in which the contests were held. A substantial number of people who purchased tickets in that manner crossed state lines to be present at such professional boxing contests.

28. Likewise, the defendants IBC (NY) and IBC (Ill.) have negotiated and executed contracts for the sale of rights to broadcast and telecast championship contests. Such negotiations have involved the frequent use of the mails, telephone and telegrams, and means of personal travel across state lines. The purchasers of such rights have broadcast and telecast, or caused to be broadcast and telecast, descriptions and views of such professional world championship boxing contests to private homes located throughout the United States and in the case of some radio broadcasts, in foreign countries.

29. The telecasting of championship contests is of such significance and importance that championship contests held outside the Eastern time zones are staged at unusual times, sometimes as early as 7 p.m. in order to be seen on television in the East at the traditional time of 10 p.m.

30. The locality in which a championship contest is presented is frequently "blacked out," i.e., the contest is not televised in such particular locality.

31. The defendants IBC (NY) and IBC (Ill.), in promoting professional world championship boxing contests, have, in some instances, negotiated and entered into contracts to sell the right to telecast professional world championship boxing contests, under which the contract purchaser agreed to

arrange for the exhibition of such telecasts in motion picture theatres located in various states throughout the United States.

32. The defendants IBC (NY) and IBC (Ill.), in promoting professional world championship boxing contests, have, in some instances, negotiated and entered into contracts to sell the rights for the distribution of motion picture films of such contests, under which the contract purchaser agreed to arrange for the distribution of motion pictures of such contests for exhibition in theatres located throughout the United States and in foreign countries.

33. The thirty-six championship boxing contests which defendant promoted or had an interest in during the period June 1, 1949 through May 15, 1953, were held in the States of New York, Illinois, Michigan, Missouri, Massachusetts, Florida, Pennsylvania, Ohio and California.

34. The defendants, as promoters of championship contests, derive substantially all of their revenue from the sale of tickets of admission and from the sale of radio, television and motion picture rights to such contests, on the occasions when such rights are sold. The sale of tickets of admission and of the radio, television and motion picture rights are in the control of the promoter.

35. The gross gate receipts plus monies received from the sale, if any, of rights to television, radio and motion pictures for the 44 professional championship boxing contests held in the United States during the period June 1, 1949 to May 15, 1953, were $8,759,326. Of that amount $6,347,594 or 72.4% was attributable to ticket sales and $2,411,740 or 27.6% was attributable to sale of said rights. In arriving at this gross receipts figure, and in making this comparison, gate receipts before payment of federal admission tax figures have been used because the price on the tickets includes such taxes.

36. The revenues derived from sales of tickets of admission to those 44 contests varied between $27,166.56 and $768,719.32.

37. The revenue derived from the sale of television, radio and motion picture rights to those 44 contests varied between $4,650 and $386,413.92 in the 29 bouts in which one or more of these rights were sold.

38. The 36 championship contests which the defendants promoted or had an interest in during the period June 1, 1949 through May 15, 1953, produced a total revenue of $7,100,944.92, of which $2,391,740.92 was derived through the sale of radio, television and motion picture rights.

39. During 1949 four championship contests promoted by the defendants, or from which defendants received income, produced total revenues of $569,859.73, of which $59,650.00 or about 10% was attributed to the sale of radio, television and motion picture rights to such contests.

40. During 1950 seven championship contests promoted by the defendants, or from which defendants received income, produced total revenues of $856,752.72, of which $215,000 or about 25% was derived from the sale of radio, television and motion picture rights.

41. During 1951 thirteen championship contests promoted by the defendants, or from which defendants received income, produced total revenues of $2,365,536.37, of which $946,531.92 or 40% was derived from the sale of radio, television and motion picture rights to such contests.

42. During 1952 nine championship contests promoted by defendants, or from which defendants received income, produced total revenues of $2,398,030.89, of which $863,558.00 or about 36% was derived from the sale of radio, television and motion picture rights to such contests.

43. The sale of television and radio broadcast rights to championship contests plays an important role in the promotion and staging of these contests, and is a matter of prime business importance. This is evidenced by the fact that the revenue from the sale of home television and radio rights to the Maxim-Murphy light-heavyweight championship contest, promoted by IBC (NY) in the Garden on August 22, 1951, was two and a half times greater than the revenues from the gate receipts after deduction of federal admission taxes, and in the Gavilan-Graham welterweight championship bout, promoted by IBC (NY) at the Garden Arena on August 29, 1951, the revenue from the sale of home television and radio rights produced approximately twice as much revenue as the sale of tickets of admission after deduction of federal admission taxes.

44. The telecasting of championship contests is of such significance and magnitude to the promoter that the presentations of such contests in New York City have become fewer because of the fact that with so

many home television receivers in the New York metropolitan area, that area cannot be blacked out without materially reducing the value of the television rights to the sponsors.

45. The business of promoting championship contests is substantially dependent upon revenue from the sale of radio and television rights thereto and that fact is responsible, in great measure, for the manner in which the business is presently conducted.

46. The revenue received by defendants through the sale of motion picture rights to six championship contests presented between June 16, 1949 and May 15, 1953 and their participation in the filming and distribution as described in Finding 33, amounted to $616,560.19.

47. The income of the defendants from such a film usually depends on the amount of revenue derived from the distribution of the film in theatres located throughout the United States in foreign nations.

48. The income of the defendants from the sale of rights to televise a championship contest through closed channels in moving picture theatres is based on a royalty for each seat in each theatre to which the bout may be transmitted or on the number of tickets sold to each such theatre.

49. A professional championship boxer, directly, or through his managers, negotiates with promoters on a bout-by-bout basis for a percentage of the gate receipts, plus a share of the revenue, if any, from the sale of radio, television or motion picture rights.

50. The revenues received by such boxers from the sale of radio, television and motion picture rights to the contests in which they engage represent a substantial part of the revenues received by the boxers from such contests.

VI. The Promotion of Championship Contests—a Separate Part of This Interstate Commerce.

51. The gross income from gate receipts (less federal admission taxes) and from the sale of radio and television rights, and the distribution of motion pictures from all championship bouts promoted by the defendants from June 1, 1949 to March 17, 1952, averaged, as to each bout, $154,000. The gross income, computed in the same manner, from non-championship bouts promoted by defendants at the Garden Arena, Chicago Stadium, Yankee Stadium, and the Polo Grounds, all important stadia, between June 1, 1949 and March 17, 1952, averaged, as to each bout, $40,000.

52. The Charles-Maxim heavyweight championship bout held in the Chicago Stadium on May 30, 1951 was promoted by IBC (Ill.) and radio and home television rights to this bout were sold to Pabst Brewing Company for $100,000. However, similar rights to a non-championship heavyweight bout between these same contestants held about seven months later on December 12, 1951 were purchased by Pabst from defendant IBC (Ill.) for less than half of that price, i.e., for $35,000 in addition to a payment made on a series contract of about $10,000, or a total of $45,000.

53. The Nielsen Average Audience rating is a percentage which purports to show the number of residential television sets that were tuned in to the program expressed as a percentage of the total residential television sets, whether turned off or on, which were in areas into which the program was telecast.

54. The average "Nielsen Share of the Audience ratings" (which are generally accepted by sponsors of television programs as accurate) for the non-championship contests presented beginning September 27, 1950 through May 15, 1953 by IBC (NY), IBC (Ill.), or by any promoter in connection with either of the IBCs, and on which a "Nielsen" rating was made, is 57.7%, while the same average for championship contests presented during the same period is 74.9%.

55. The preceding Finding and the other "Nielsen" average ratings reflect that several million more television viewers watch championship contests than watch major non-championship contests.

56. The televising of championship boxing contests has a particular demand and peculiar qualities in contradistinction to the televising of non-championship boxing contests.

57. The defendants recognized the special attractiveness and peculiar qualities incident to the promotion of championship contests, and in the agreement between Wirtz-Norris and the Garden to promote boxing contests jointly, they specifically allocated the promotion of championship contests between them.

58. The defendants expressly limited their contingent, exclusive contracts with con-

tenders for championships to championship contests, making it clear that they were not interested in obtaining exclusive rights to the promotion of non-championship bouts.

59. The intent of the defendants to confine such exclusive agreements to only championship contests was made clear by IBC (NY) reassuring Gavilan that his exclusive agreement was to become operative only if he won his contest with the then champion and thereby became champion himself and that the contract thereafter would not relate to any boxing contest other than championship contests.

60. Sponsors of televised boxing contests recognize that the televising of a championship contest has a unique advertising value for a sponsor in contradistinction to the televising of a non-championship contest.

61. A particular and special demand exists among radio broadcasting and telecasting companies for the rights to broadcast and telecast championship contests in contradistinction to similar rights to non-championship contests

62. A particular and special demand exists among moving picture companies for the rights to make and distribute films of championship contests in contradistinction to similar rights to non-championship contests.

63. Although during the period June 1, 1949 through May 15, 1953 one or more of the defendants sold motion picture rights to 6 of the 44 championship contests presented, for amounts varying between $500.00 and $272,892.42 and for a total of $616,560.19, during the same period no full-length motion picture rights were sold to a non-championship contest.

64. A particular and special demand exists among promoters for championship contests in contradistinction to non-championship contests.

65. A substantial number of persons purchase tickets of admissions to attend profesional championship contests who do not do so to attend non-championship contests.

66. A particular and special demand exists among spectators for championship contests in contradistinction to non-championship contests. Spectators pay substantially more for tickets of admissions to professional championship boxing contests than they pay for tickets to non-championship contests.

67. A separate, identifiable market exists for professional world championship boxing contests among boxers, spectators, sponsors of radio and television programs, owners of radio broadcasting and telecasting stations, moving picture companies, and promoters of professional boxing contests.

68. Professional boxing contests are staged or presented in arenas or stadiums.

69. A large variety of events can be and are staged, presented or held in arenas, where professional boxing contests are presented.

70. In a typical year there are about 2,000 professional boxing shows presented in arenas in the United States, of which approximately 9 to 13 are professional championship boxing contests.

71. There is a number of arenas in the United States where sporting events including boxing contests are presented in which none of the defendants has an interest.

72. The exhibition of professional championship boxing contests does constitute a market separate and distinct from the exhibition of professional boxing contests, sporting events, and other forms of public shows, spectacles and entertainment.

VII. The Sale of Television and Broadcast Rights to Championship Contests Is a Separate Part of This Interstate Commerce.

73. The fact that a professional boxing contest is a show staged for public entertainment presents those who have an immediate financial interest in the contest, including the boxers, their managers, and the promoter, with the opportunity, if purchasers are available, to sell the right to come upon the premises, with the necessary equipment, and pick-up or describe the contest for ultimate transmission to the public through various media of communication.

74. The most commonly sold rights during the period June 1, 1949 through May 15, 1953 and since, were television rights. Radio rights have been sold with television rights on a number of occasions. Theatre television rights and motion picture rights have also been sold.

75. The right to pick-up through cameras and telecast electronic reproductions of professional boxing contests, when sold, is sold to sponsors, or to advertising agencies for the account of their clients, who are sponsors,

or to telecasting corporations for a resale to sponsors.

76. The sponsor is a commercial organization which uses advertising media to strengthen and increase public awareness and acceptance of its product or services.

77. Sponsors who have used the telecasting of boxing contests for advertising have, at the same time, used other advertising media. There is a large variety of shows and events available for television advertising sponsorship. Various sponsors choose various types of television programs as the most satisfactory competitive instrument to interest the public.

78. The general market that the sponsor seeks to reach is the television viewer who is free to watch its program and other programs which are being telecast at the same time.

79. There is a separate audience for championship contests as distinguished from the sports audience that is interested in viewing non-championship contests and other sporting events regularly or from time to time.

80. It is desirable for successful television advertising that the sponsor establish in the television user a continuity of viewing habit, if at all possible.

81. Continuity of viewing habit is established by making the viewing public aware that if it turns to a particular television channel at a particular time each week, it will see a television show of a kind and type which it will prefer to other programs available at the same time.

82. The sponsors who have purchased the television rights to the regular Friday night series of boxing contests of IBC(NY) and the regular Wednesday night series of boxing contests of IBC(Ill.), have purchased their telecasting time on a 52 week a year basis.

83. With infrequent exceptions, weekly boxing contest television shows have non-championship bouts as the main event. All championship boxing contests held in a given year if broadcast alone would not provide continuity to a television advertising program

84. The sponsor of a boxing contest television show program has great interest in sponsoring the televising of a world championship boxing contest but endeavors to have such contest brought within its regular weekly series of boxing shows.

85. The purpose of including championship boxing contests among those shown on a regular television series is to bolster the viewing audience, by presenting to the public a special show which appeals to an additional separate audience in the hope that it will attract the attention of that separate group to the other programs regularly broadcast.

86. The sale of television, radio, or motion picture rights to professional championship boxing contests does constitute a market separate and distinct from the sale of such rights with respect to boxing contests and other forms of public entertainment.

VIII. The Defendants' Position in the Professional Boxing Business in 1949.

87. Madison Square Garden is the foremost sports arena in New York City and is the best known arena of its kind in the United States, if not the world. It was built in 1925 and succeeded to the name and tradition of old Madison Square Garden.

88. The Garden building is located in the hotel and theatrical district of mid-town Manhattan. It contains a very large arena with an exhibition hall in the basement. The arena's seating capacity is 18,000 for boxing shows, meetings and rallies; 15,000 for basketball and hockey, and 14,000 for the circus and rodeo.

89. The Garden has the facilities for the staging of a great variety of sports events, spectacles, meetings and rallies. Approximately 500 employees are employed at the Garden on a full or part time basis of whom about 50 are engaged in promotional activities including activities relating to the promotion of boxing. It is necessary for successful operation of the Garden that it have available each year a large number of events of outstanding quality which will maintain its prestige and attract adequate publicity and patronage.

90. Continuity in scheduling events is a vital part of the operation of the Garden. Sports events, in season, are held on particular nights of the week. Sunday and Wednesday nights are hockey nights, Thursday is basketball night, and Friday boxing night. Annual events which interrupt the regular schedule are known well in advance as to season and period of interrup-

tion. This continuity is maintained so that people can become accustomed to it.

91. The net income of the Garden from all events including boxing, reached a peak in 1947 and has declined steadily since that year. The net income for the fiscal year ending May 31, 1947 was $1,246,000. The net income for the fiscal year ending May 31, 1950 was $646,000. The net income for the fiscal year ending August 31, 1955 was $311,000. During the years 1950-1953 inclusive, IBC(NY) operated at a loss; in 1954 its net income was $37,000 and in 1955, $32,000.

92. Television was a major factor which accounted for the Garden's decline in income in the period 1947-1955. The advent of television affected unfavorably the gate receipts at the Garden as, indeed, it has many other forms of public entertainment. The Garden was able to offset this loss in patronage, to some extent, by the sale of television rights. This income began in 1947 and 1948 and reached a peak in 1952.

93. In 1935 Norris and Wirtz first acquired their interests in Chicago Stadium. The Stadium was completed in 1929 and has a seating capacity slightly larger than that of the Garden. The problem of getting profitable events into the Stadium is similar to the problem of getting such events for the Garden except that it has to finance a greater percentage of its attractions than the Garden. The entertainment provided by television as with the Garden has adversely affected the Stadium operation.

94. In 1933 Norris and Wirtz first acquired their interests in the Detroit Olympia which has a seating capacity of 12,000-14,000. Its operations are somewhat similar to the Garden but on a substantially reduced scale. It has about one-third as many bookings as the Garden, including hockey and ice shows and an occasional boxing match. Since 1954 Wirtz has had no stock interest in the Detroit Olympia.

95. In 1946 Norris and Wirtz first acquired their interest in the property of which the St. Louis Arena is a part. The property comprises 70 acres of ground on which there is the Arena, an amusement park, and two industrial buildings. The Arena operation is secondary in this acquisition. The Arena has seating capacity of 14,000 or 15,000. It is not profitable. There are not over six boxing shows a year there. The Arena has not more than 30 or 35 dates a year of any kind.

96. For many years prior to April 1949, the Garden had been in effect a partner of the promoter, Michael S. Jacobs, and of his corporation Twentieth Century Sporting Club, Inc. (hereinafter referred to as Twentieth Century), in the promotion of professional championship, as well as non-title boxing contests, and the Garden had shared in the profits of those promotions on a 50-50 basis.

97. During the period from 1937 to 1949 Jacobs through Twentieth Century promoted professional boxing contests, including a number of championship boxing matches, in the Garden Arena.

98. In 1946 the Garden had extended its existing agreement leasing its arena exclusively to Jacobs and Twentieth Century for boxing contests, and such agreement was effective in accordance with its terms until May 31, 1951.

99. Jacobs in early 1947 suffered a severe illness, and thereafter the Garden's income from boxing declined. Jacobs was unable thereafter to take personal and active charge of the management and direction of Twentieth Century. Jacobs spent much time in Florida in 1948 and in January 1949 cut the salaries of his staff at Twentieth Century.

100. By January 1949, the defendants Wirtz and Norris for many years had, among their varied business enterprises, been engaged in the operation of the following indoor arenas: Chicago Stadium, Detroit Olympia, and St. Louis Arena, all of which were then owned and controlled by them jointly with Norris' father, James Norris. The investments of Wirtz, Norris and Norris' father in these arenas amounted to more than ten million dollars.

101. From time to time, prior to January 1949, corporations owned by Wirtz and Norris had been associated with the promotion of an occasional professional boxing contests for exhibition in one of the said arenas. Prior to January, 1949 Wirtz and Norris had also rented the Chicago Stadium from time to time to persons who wished to promote professional boxing contests. The results of these ventures had not been successful and comparatively few boxing contests had been staged there.

102. In January 1949 and prior thereto, defendants Wirtz and Norris directly and

indirectly owned more than 50,000 shares of the stock of Madison Square Garden Corporation.

103. In 1948 Wirtz had been informed that the Columbia Broadcasting System was prepared to lose a substantial sum of money in order to obtain control of boxing television, and Wirtz and Norris were concerned that television companies might control the broadcasting of boxing events to the detriment of the indoor arenas in which they were interested.

104. In and after 1948 Wirtz and Norris were also aware of the increasing difficulties of the Garden, in connection with its boxing events, resulting from the impairment of Jacobs' health.

105. Prior to January 1949, Wirtz and Norris had, on several occasions, proposed in general terms to the Garden management a working program. The Garden management, however, refused to discuss such proposals because of the Garden's long term commitment to Jacobs.

IX. The Unlawful Combination and Conspiracy.

a. The defendants combine and conspire.

106. In 1948, Joe Louis Barrow (hereafter Joe Louis), was the Heavyweight champion of the world. He began to make plans for his retirement from the field and in this he was counselled and advised by Truman K. Gibson, Jr. and Harry Mendel. It was part of the plan ultimately formulated by Gibson that Louis, on his retirement as Heavyweight champion, should endeavor to obtain a continuing financial interest and source of income by the formation of an organization which would promote future professional championship boxing contests. It was further contemplated that the success and continuity of operation of this organization should be achieved by obtaining exclusive options on the professional championship boxing engagements of all reasonably qualified contenders for the title Louis held. To accomplish this, Gibson and Mendel approached Norris to discuss the matter generally. At Norris' suggestion, they later met with Wirtz in Chicago. This occurred in January 1949.

107. In about late January of 1949, Wirtz and Norris entered into an agreement with Louis, then Heavyweight Champion of the World, under which—

(a) Joe Louis or his practically wholly-owned company Joe Louis Enterprises, Inc. (hereinafter referred to as Enterprises) agreed to sign the four leading heavyweight contenders to agreements which would vest in Louis, or his assignee, the exclusive right to promote their professional boxing matches, and all radio, television, and motion picture rights to such contracts.

(b) Joe Louis would then resign as Heavyweight Champion.

(c) Joe Louis would assign the four exclusive contracts to a corporation to be formed by Wirtz and Norris for the purpose of promoting professional boxing matches.

(d) Joe Louis would be employed by this corporation, at a salary of $15,000 a year and would receive $150,000 and part of the stock in the promoting corporation to be formed by Wirtz and Norris, for assigning the exclusive contracts with the said contenders and resigning as Heavyweight Champion.

(e) The said contenders were to engage in contests to determine, with approval of the National Boxing Association, the new Heavyweight Champion.

108. A condition precedent to consummation of this agreement and to the $150,000 obligation of Wirtz and Norris was that the National Boxing Association recognize the winner of the first contest engaged in by the said contenders as the new Heavyweight Champion of the World.

109. In or about February 1949, Enterprises entered into contracts with the four contenders Ezzard Charles, Joe Walcott, Lee Savold and Gus Lesnevich.

110. Each of the four contracts provided, in substance, that the boxer concerned would render services as a professional boxer exclusively to Enterprises or its assignee and would not during the term of the contract engage in any professional boxing contest or boxing exhibition for others without the consent of Enterprises; that, subject to the approval of the boxer concerned or his manager and to the approval of the athletic commission or governing body of boxing of the state, county, city or place where any such boxing contest was held, each opponent of the boxer in all of his contests and exhibitions would be designated by Enterprises or its assignee; that the boxer concerned would receive for his services in each contest engaged in under the agreement a percentage of the gate receipts

not less than 25% and not less than 25% of any revenue from the sale of motion picture, radio, or television rights to such contest, if such rights were sold; that Enterprises would stage and conduct all boxing contests and exhibitions in which the boxer concerned should be matched during the term of the agreement, the time and place of each such contest or exhibition to be fixed by Enterprises subject to the approval of the boxer or his manager; that Enterprises guaranteed that the earnings of the boxer concerned during the term of the agreement would be at least $5,000 per year; that Enterprises would have the exclusive radio, television and motion picture rights to all contests of the boxer concerned during the term of the agreement; that the term of each agreement was for a period of two years from February 14, 1949, subject to an option to renew the contract for a period of two years and for further two year periods thereafter on the expiration of that term to which the agreement might be extended; and, the four contracts taken together provided for three specific boxing contests between the four boxers concerned, each boxer agreeing especially to engage in such match and Enterprises agreeing to stage and conduct each such match, provided that each such match should receive the National Boxing Association's designation as a contest for the world heavyweight championship.

111. On March 1, 1949, Joe Louis resigned his title as heavyweight champion of the world, and the National Boxing Association announced that it had approved the plans offered by Louis and had agreed to recognize the winner of the first elimination contest between contenders Charles and Walcott as the new heavyweight champion of the world provided that Savold and Lesnevich should each have an opportunity to fight for the title within a reasonable time thereafter.

112. Wirtz and Norris, as a result of the agreement described in Finding 107 and the execution thereof, caused IBC(Ill.) to be organized on March 1, 1949 for the purpose of promoting professional boxing contests in Illinois.

113. On or about March 24, 1949, Enterprises assigned its exclusive contracts with Charles, Walcott, Savold and Lesnevich to IBC(Ill.) and received, in pursuance of the agreement with Wirtz and Norris $150,000.

114. On March 24, 1949, at a Board of Directors meeting of IBC(Ill.) plans were made for the promotion of championship boxing contests in Michigan and Missouri. Thereafter, on July 12, 1949 Wirtz and Norris caused the formation of the International Boxing Club, Inc., a Michigan corporation, and on October 23, 1950, caused the name of an existing Missouri corporation to be changed to International Boxing Club, Inc., for the purpose of promoting championship boxing contests as well as other boxing contests in those States.

115. In order to promote championship contests in New York, Wirtz and Norris caused the formation of IBC(NY) on March 14, 1949.

116. As the result of the consummation of their agreement with Joe Louis, Norris and Wirtz in March 1949 were in a position to promote boxing contests in which the heavyweight championship title would be at stake.

b. The Garden joins the combination and conspiracy.

117. During a twelve-year period, from 1937 through 1948, about 45% of all championship contests presented in the United States were held in New York City and, of these, about 75% were held in the Garden Arena.

118. The existence and operation in 1948 and through March 1949 of Tournament of Champions, Inc. (a promoter of professional boxing contests of which the Columbia Broadcasting System, an operator of a radio and television network, was part owner) caused Wirtz and Norris to be concerned about CBS obtaining control of championship boxing matches.

119. In 1948 both Wirtz and Norris conferred with John R. Kilpatrick, then president of the Garden, and suggested a joint program between them that would prohibit Columbia Broadcasting System from obtaining control of the promotion of championship boxing contests. A few months thereafter a representative of Wirtz stated to an officer of the Garden that the televising of a championship contest from the Garden in early 1949 had seriously affected attendance at professional boxing contests presented by Wirtz and Norris in their arenas in Chicago and Detroit.

120. Shortly after the arrangements between Wirtz-Norris and Joe Louis were made, Wirtz proposed by letter of March

13, 1949 to the Garden that he and Norris, and the Garden "should work together now and keep the events for our buildings and not create a competitive situation that would be harmful to all."

121. It was arranged that Jacobs should come from Florida to discuss with the Garden management a possible termination of his lease, and on April 5, 1949, the Garden received Jacobs' consent to enter into discussions with Norris and Wirtz.

122. In mid-April 1949, Wirtz and Norris and the Garden negotiated regarding their jointly owning corporations to conduct boxing contests in their respective arenas and outdoors. Thereafter, Wirtz and Norris, and the Garden, on or about May 5, 1949, arrived at an agreement to combine and join forces.

123. Pursuant to this agreement, common boards of directors, consisting of Wirtz, Norris, Louis, Kilpatrick, and Irish an official of the Garden, were designated for both IBC(NY) and IBC(Ill.). The personnel of these boards of directors remained the same from about July 1949 and thereafter throughout the period covered by the complaint, except that Joe Louis was replaced by Truman K. Gibson, a trustee for his benefit, in about August 1950.

124. Prior to this agreement, Wirtz and Norris, through their promoting corporation IBC(Ill.), were in a position to compete with the Garden in the promotion of championship contests.

125. The terms of this agreement included the following:

(a) Wirtz and Norris would be entitled to 80% of the profits of IBC(Ill.); the Garden would be entitled to 80% of the profits from IBC(NY); and Joe Louis would be entitled to 20% of the profits from each;

(b) Championship contests would be allocated between the IBCs—two-thirds of them to IBC(NY) and one-third to IBC(Ill.); and

(c) Garden would contribute to the venture an amount substantially equal to the payment by Wirtz and Norris of $150,000 to Joe Louis for the assignment of the exclusive contracts which Louis had obtained from Charles and Walcott.

126. A prerequisite to the Garden joining in the agreement with Wirtz and Norris was that it obtain a cancellation of its lease to Jacobs and Twentieth Century, and on May 5, 1949 the Garden entered into an agreement with Jacobs and Twentieth Century, under which it agreed to pay $100,000 to Jacobs or his estate, over a period of five years for the cancellation of the lease held by Jacobs and Twentieth Century on the Garden Arena, which agreement was subsequently formalized on May 27, 1949.

127. One of the purposes of the defendants in the making of these agreements was to acquire and retain for the defendants' joint control of the promotion of championship contests and to exclude others, particularly telecasting companies, from promoting championship contests.

X. The Conspiracy Afoot.

a. Elimination of competitors.

128. Aside from any of the defendants, the only significant promoters of professional championship boxing contests in the United States existing in early 1949 were Michael S. Jacobs and a corporation with which he was associated, Twentieth Century; and Tournament of Champions and its wholly-owned subsidiary, Sporting Events, Inc.

1. Michael S. Jacobs and Twentieth Century Sporting Club, Inc.

129. In addition to the lease arrangement with the Garden, Jacobs and Twentieth Century in May, 1949 had exclusive leases on the Yankee Stadium and St. Nicholas Arena for the presentation of professional boxing contests. These leases were for terms expiring on December 31, 1950 and September 14, 1949, respectively.

130. Jacobs and Twentieth Century also were parties to a contract for the exclusive services in title contests of the then Welterweight Champion, Ray Robinson.

131. On May 5, 1949, for a consideration of $10,000, Jacobs and Twentieth Century agreed on or before June 1, 1949 to assign to the Garden the exclusive leases for professional boxing in the Yankee Stadium and St. Nicholas Arena, to sell to the Garden his aluminum ring and other equipment for outdoor bouts, and to assign or make available the contract between Jacobs and the Welterweight Champion Robinson, and any other contracts with professional boxers or leases for professional boxing sites as the Garden might request.

132. In this same agreement Jacobs and Twentieth Century agreed that for a period

of ten years neither of them would engage in the promotion of any professional boxing matches in the United States, nor at any time thereafter cause or permit or consent to the use of the name of Michael S. Jacobs or Twentieth Century in connection with professional boxing matches without the written consent of Garden.

133. Jacobs and Twentieth Century were thus eliminated as competitors in the promotion of championship contests. The agreements between the defendant Garden and Jacobs and Twentieth Century were made for the purpose of eliminating competition in the promotion of championship boxing contests and did substantially lessen competition in the promotion of championship boxing contests.

2. *Tournament of Champions, Inc., Sporting Events, Inc., and Columbia Broadcasting System.*

134. Tournament of Champions, Inc., was formed on December 29, 1947, as a New Jersey corporation, and was licensed to promote boxing in New Jersey. In 1948, a New York affiliate of Tournament of Champions, ultimately named Sporting Events, Inc., was licensed to promote boxing matches in New York.

135. TofC promoted two championship contests in New Jersey prior to October 1948 and sold moving picture rights to one of them for $25,000 and to the other for $22,500, and sold radio rights to each for $45,000, but it had lost over $30,000 on these promotions.

136. On November 26, 1948 Columbia Broadcasting System, Inc. (CBS), Management Corporation of America (MCA) and Allied Syndicates, Inc. each invested $25,000 to obtain a 25% stock interest in TofC. Thereafter until May 27, 1949, these three corporations, together with George Kletz, whose stock interest was also 25%, remained the owners of TofC.

137. The principal business and business experience of Kletz had been and remained in plastics manufacturing. The principal business and business experience of CBS had been and remained the operation of a radio and television network. The principal business and business experience of Allied Syndicates had been and remained in the field of public relations.

138. The purpose of Columbia Broadcasting System, in purchasing an interest in the TofC, was to obtain radio and television rights to a series of weekly boxing contests and to good fights including championship contests.

139. On March 15, 1949, TofC obtained an exclusive lease on the Polo Grounds in New York City for the promotion of boxing contests for a term expiring on July 1, 1950.

140. For some months prior to March 15, 1949 the TofC had an agreement with the then Middleweight Champion, Cerdan, giving it the right to promote his next two middleweight championship contests.

141. TofC shortly after March 15, 1949 began negotiations to stage two championship contests at the Polo Grounds during the Summer of 1949. TofC intended that one of these bouts would be between Sugar Ray Robinson, the then welterweight champion and Kid Gavilan. On April 7, 1949, Kletz secured Robinson's signature to a contract for such a contest although Robinson at that time had an exclusive service contract with Jacobs. Kletz was unable to get Gavilan to agree to this contest and on May 8, he asked Robinson's manager to accept another opponent. Robinson's manager asked that the proposed bout be called off. TofC intended that the other of these bouts would be between Cerdan and Tony Zale, but by May 9, 1949 had been unable to complete arrangements for the bout.

142. Wirtz, Norris and Garden, in April 1949, recognized the threat of Tournament of Champions as a competitor in the promotion of professional championship boxing contests.

143. TofC had sustained increasing financial losses in its operations. By April 7, 1949 MCA had indicated to CBS that it was interested in getting out of TofC. Kletz had earlier indicated his discouragement with the enterprise and had resigned as president and director on January 14, 1949. On April 7, 1949 Lawrence Lowman, the CBS executive closest to the operation of TofC, suggested to the President of CBS that CBS should consider getting out of TofC. Thereafter, Lowman began negotiations with the Garden looking toward the sale of the assets of TofC.

144. These negotiations were carried on and in accordance with an understanding reached with Wirtz and Norris, on May 27, 1949, the Garden, acting for IBC(NY),

purchased from CBS, MCA, Allied Syndicates and Kletz all the stock and certain notes of TofC for $100,000 and 25% of the net profits of the next two middleweight championship contests promoted by IBCs or those associated with them.

145. In connection with the purchase of TofC, the Garden entered into a separate agreement with CBS in which the Garden agreed that CBS, for a term of 5 years beginning June 1, 1949, should have a right of first refusal of the purchase of radio and television rights to a series of boxing contests to be presented weekly on a night other than Friday from September to May of each year during the term of the agreement and should also have a right of first refusal of the purchase of radio and television rights to 50% of all outdoor boxing contests and indoor boxing contests not presented as part of a weekly series during such term. The Garden was not obligated either to promote any such contest or to sell such rights, and CBS was required to exercise its right of refusal within a reasonable time after the rights to each annual series or single contest, as the case might be, had been offered to it. In return CBS agreed that it would not, during the five year term of the agreement, invest in any professional boxing matches or in the promotion or staging thereof, or have any proprietary interest therein, except with the Garden's consent. The agreement did not bar CBS from purchasing television or radio rights to boxing contests not promoted by the defendants nor did it require CBS to purchase such rights from the defendants.

146. CBS broadcast an annual series of boxing contests promoted on Wednesday nights by the defendants up to 1955 and at that time CBS discontinued its broadcasting of boxing.

147. The defendants' purchase of TofC's stock and indebtedness from Kletz, CBS, MCA and Allied Syndicates was made with the intent of, and for the purpose of, eliminating competition in the promotion of professional boxing contests and did result in substantial lessening of such competition. As a result of the acquisition of the assets of Tournament of Champions and the procurement of the agreement not to compete from Columbia Broadcasting System, both of them were eliminated as competitors in the promotion of championship contests.

b. Defendants' control of important stadia and arenas.

148. For many years prior to 1949, and during the complaint period defendants Wirtz and Norris were in effect proprietors of and controlled the Chicago Stadium, the St. Louis Arena, and the Detroit Olympia, and defendant Garden owned and controlled Madison Square Garden.

149. One reason which prompted the Garden to join with Wirtz and Norris in promoting boxing contests was the importance of the arenas controlled by Wirtz and Norris.

150. On September 1, 1949, IBC(NY), lessee, and St. Nicholas Sports Center, Inc., lessor, entered into a lease for a term commencing September 15, 1949 and ending September 14, 1950 under which IBC(NY) was granted use of St. Nicholas Arena for at least 42 nights during that year for professional boxing matches and the exclusive right to conduct such matches at the said Arena during the term of lease. In 1950, 1951 and 1952 similar leases for one year terms were thereafter entered into between IBC(NY) and St. Nicholas Sports Center, Inc. for the years 1950-1951, 1951-1952 and 1952-1953.

151. On July 15, 1949, IBC(NY), lessee, and the New York Yankees, Inc., the owners of the Yankee Stadium and National Exhibition Company, the owners of the Polo Grounds, lessors, entered into a lease under which IBC(NY) was licensed to use those arenas for not more than 4 professional boxing matches a year and was granted the exclusive right to hold boxing matches at those arenas during the term of the lease. The term of the lease commenced January 1, 1950 and ended December 31, 1952.

152. The City of New York has the largest concentration of population in the United States. It is the most important site in the United States for the staging of championship boxing contests.

153. The City of Chicago, Illinois, in which the Chicago Stadium is located, has the second largest concentration of population in the United States and Detroit, Michigan, and St. Louis, Missouri, respective sites of the Detroit Olympia Arena, and the St. Louis Arena, also have large concentrations of population. These arenas

are also important sites of championship contests.

154. St. Nicholas Arena is the only indoor arena other than the Garden in New York City which was used for the promotion of a championship boxing contest during the period from 1937-1948.

155. The Yankee Stadium and the Polo Grounds are the most suitable outdoor stadia for the presentation of professional championship boxing in the United States.

156. Fifty percent of all championship contests held in the United States from 1937 to 1948, inclusive, were held in the Garden Arena, Yankee Stadium, Polo Grounds, St. Nicholas Arena, Chicago Stadium, Detroit Olympia, and St. Louis Arena.

157. During the period from January 1, 1937 to 1948, inclusive, forty-five percent of all the championship contests presented in the United States were held in New York City, and, of these, seventy-five percent of them were held in the Garden Arena. Of the remaining bouts held in New York City, all were held at the Yankee Stadium, St. Nicholas Arena, and Polo Grounds, with but a single exception.

158. Beginning in about May 1949 and continuing throughout the period covered by the Complaint, the defendants had control of the Garden Arena, Yankee Stadium, Polo Grounds, St. Nicholas Arena, the Chicago Stadium, the Detroit Olympia, and the St. Louis Arena, which are key stadia and arenas for the presentations of championship boxing contests in the United States.

159. The defendants in March 1949 considered that the pooling of these stadia and arenas would be instrumental and effective in excluding other promoters from the promotion of championship contests.

160. As a result of the control exercised by the defendants over their own arenas and the exclusive leases of other arenas and stadia, all other promoters have been excluded from promoting championship boxing contests in said arenas and stadia during the period June 1949 through May 15, 1953.

c. Defendants' exclusive contracts with contenders for championship.

161. A term of the agreement between defendants was that they would require from each contender in a championship contest, over which defendants had promotional control or had an exclusive contract with the existing champion, a contract providing that, if he won and thereby became champion, he would engage in championship contests for a period of three, or sometimes five, years, solely under the promotion of one of the defendant IBC's or its designees. This term of the agreement between defendants was effectuated and consistently followed by them in the vast majority of instances.

162. The contingent, exclusive contracts between the defendants and a contender provided that if he won a championship title in a specific contest which IBC(NY) or IBC(Ill.) planned to promote or to have promoted between such contender and the champion, the contender would be employed exclusively by the defendants in all his matches, or in all matches in defense of his title, for a period of 3 years. Subject to the approval of the boxer and his manager and to that of the local boxing commission concerned, the employer was to select the boxer's opponents. The right to dispose of radio, television and motion picture rights was given exclusively to the defendants. A minimum annual compensation was guaranteed to the boxer.

163. These contracts were obtained by defendants from the contender as a condition precedent to such contender having the opportunity to win a title by engaging in a championship contest.

164. The defendants' practice of so obtaining such contingent, exclusive contracts from the contenders served as a device for perpetuating their control of professional world championship contests as the title passed from one boxer to another.

165. From time to time, IBC(NY) and IBC(Ill.) have made advances and loans to professional boxers and their managers. Such advances and loans outstanding at any one time have amounted to approximately $39,000 for IBC (NY) and about the same amount for IBC(Ill.). Such advances and loans are sought by the boxers and managers to meet financial emergencies, to pay taxes and hospital bills, to pay training expenses in advance of boxing contests and for related purposes, and they are made by the defendants.

166. There is no evidence that such advances or loans were used by the defendants

to exert economic pressure on any boxer or manager.

XI. The Results of Defendants' Conspiracy.

167. The intent of the defendants and the necessary result of their activities during the period covered by the Complaint as set forth in these Findings, including their acquisition of the contracts with the four heavyweight contenders from Joe Louis; their elimination from the promotion of championship contests of Jacobs, Twentieth Century, Tournament of Champions and Columbia Broadcasting System; their control of key stadia and arenas for the presentation of boxing contests and their procurement of the exclusive contracts with champions and contenders in championship contests, was to combine in order to obtain control of, and exclude others from, the promotion of championship boxing contests in the United States.

168. The defendants, as a result of their activities acquired power, during the period covered by the Complaint, to exclude competitors from the promotion of championship contests in the United States.

169. Beginning June 16, 1949, the date of the first championship contest promoted by defendants through May 15, 1953, the end of the period covered by the complaint, there were 44 professional championship boxing contests promoted in the United States. The defendants promoted 25 of the said 44 professional world's championship bouts.

170. As to 11 of the other 19 championship contests, *viz*:

Charles-Valentino of October 1949
Charles-Beshore of August 1950
Charles-Barone of December 1950
Walcott-Charles of July 1951
Carter-Aragon of November 1951
Gavilan-Dykes of February 1952
Salas-Carter of May 1952
Walcott-Charles of June 1952
Gavilan-Turner of July 1952
Marciano-Walcott of September 1952
Carter-Collins of April 1953

one of the defendants had an agreement in effect at the time of each such contest with the Champion involved, which required the Champion to engage in world championship contests only under the promotion of a defendant or its designee.

171. As to each championship contest referred to in Finding 170, the contender, prior to engaging in such contest, executed an agreement which provided that if he won, and thereby became Champion, he would engage in world championship contests only under the promotion of a defendant or its designee.

172. One or more of the defendants received revenue from the promotion of all but one of the contests referred to in Finding 170. As to this single exception, the defendant IBC(NY) permitted another promoter, Dewey Michaels of Buffalo, New York, to promote the contest on the condition, however, that the said Michaels pay 5% of all monies received from the sale of tickets, and radio, television, and motion picture rights, if any, to IBC(NY), and this defendant made a strong effort to collect the said 5%. Because of the refusal of the said promoter Michaels to pay 5% of all monies received to IBC(NY), this defendant threatened not to permit Michaels to promote any other contest over which it had promotional control.

173. One or more of the defendants had control of the promotion of each of the eleven championship contests referred to in Finding 170.

174. Of the 44 professional championship contests presented in the United States between June 16, 1949, the date of the first championship contest promoted by defendants, and May 15, 1953, the defendants promoted, or controlled the promotion of 36, or approximately 81% of them.

175. The defendants exercised this promotional control by either promoting the contests themselves or by permitting another promoter to do so in consideration of one or more of the defendants receiving part of the revenue from the promotion of such contests.

176. From January 1951, eighteen months after the defendants promoted their first championship contest, to May 15, 1953, the end of the period covered by the Complaint, 27 championship contests were presented in the United States, and as to 25 of such contests, or about 93% of them, the defendants controlled the promotion of them, and either promoted or participated in the revenues from the promotion of them.

177. The defendants did by their concert of action and agreement intend to, and did in fact exclude others from the promotion of, exhibition of, or sale of television, radio

and motion picture rights to, professional championship boxing contests.

178. The defendants did combine and conspire to acquire and secure and did in fact acquire and secure unto themselves the power to exclude others from the promotion of, exhibition of, or sale of television, radio and motion picture rights to, professional championship boxing contests.

179. The contracts, agreements, and understandings of and between the defendants with respect to the promotion, exhibition or sale of television, radio, and motion picture rights to championship boxing contests have unreasonably restrained trade or commerce.

With these findings made, we come to consideration of the Conclusions of Law to be drawn from them.

3.

THE LAW APPLICABLE TO THE FINDINGS OF FACT

[*Defense*]

The defendants argue that (1) the promotion of championship boxing contests does not constitute the "relevant market" for purposes of determining monopoly power; (2) they have not in fact combined and conspired in restraint of or to monopolize, trade in violation of Sections 1 and 2 of the Sherman Act; and (3) their activities are not in interstate trade or commerce.

[*Relevant Market*]

Defendants' first point relating to the relevant market is predicated almost exclusively on the recent decision in *United States v. E. I. DuPont de Nemours and Company*—the so-called *Cellophane* case—[1956 TRADE CASES ¶ 68,369] 351 U. S. 377. That case is the Supreme Court's latest exposition on the subject of the relevant market for Sherman Act consideration. Although the prevailing opinion did not command the assent of a majority of the Court (it being divided 4-3, with two Justices not participating), nevertheless, it is the precedent upon which both sides in this case have relied.

In the *Cellophane* case, the Court, following earlier precedents, ruled that:

> "a party has monopoly power if it has over 'any part of the trade or commerce among the several States', a power of controlling prices or unreasonably restricting competition. . . . Monopoly power is the power to control prices or exclude competition."

The Supreme Court made clear that *price* and *competition* both must be considered in finding monopoly power. However, the "relevant market" for monopoly power considerations.

> "will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered."

This determination, as the Court points out, is basically a factual one, which is resolved by the "varying circumstances of each case." In *DuPont,* the Supreme Court found the defendant's factual argument sustained by the evidence; here we do not.

Cellophane was proved to be but a part of the market for flexible package materials which included other products that had *reasonable interchangeability* for the purposes for which they were produced. The question here comes down to this: Do non-championship boxing bouts, in their promotion and exhibition, including the sale of tickets, television rights, moving rights, radio rights, have a reasonable interchangeability with championship boxing contests both as a financial proposition and as an entertainment media? Based upon the factual findings we have made in this case, it is established that this query must be answered in the negative.

The defendants themselves by concentrating their activities in the sphere of championship fights have recognized the unique qualities of these bouts which generate a special demand for them by boxing enthusiasts. A world championship in any of the recognized classifications is clearly the peak sought by the many boxers in each class. When attained, the champion has an asset which gives him not only the epitome of prestige, but also a most lucrative future so long as he wears the championship crown.

In matters of public appeal as well as financial return, championship contests are on a plane which clearly distinguishes them from non-championship fights. The great public interest in a championship match was shown to generate a separate and distinct public demand which attracts many

spectators who do not patronize non-championship fights.

Defendants do not seriously challenge the financial facts adduced by the Government. The average gross revenue of a championship fight promoted by defendants was almost four times that of an ordinary fight. Breaking down these overall figures, it appears that a championship contest generates three times the television, radio and movie revenues, and five times the box office receipts of non-championship fights.

Qualitatively, a championship boxing bout is so different from a non-championship fight as to establish an identity of the one distinguished from the other. Defendants themselves demonstrated their awareness of this by exacting their contingent exclusive contracts from championship contenders limited to future championship fights. Similarly, championship bouts were treated as outside the agreements with television sponsors for the regular weekly fight series. Indeed, the substantially higher prices paid by such sponsors and broadcasters for the right to broadcast or televise a championship bout is manifest evidence of their special audience appeal, and serves to explain why defendants concentrated their activities in this sphere.

The Court concludes that the promotion of championship boxing contests does constitute a distinct, unique and relevant market for Sherman Act consideration.

[*Conspiracy—Monopoly*]

The second point urged by defendants is strictly a factual argument to the effect that they have not combined or conspired in restraint of or to monopolize trade or commerce. Having found the factual allegations of the complaint sustained by the proof submitted on trial, more need not be said here except to observe that the Supreme Court in this case has stated:

> "And the defendants do not deny that the allegations state a cause of action if their business is subject to the Sherman Act." (*United States v. International Boxing Club of New York, Inc.* [1955 TRADE CASES ¶ 67,941], 348 U. S. 236 at page 240.)

[*Interstate Commerce*]

We turn, then, to defendants' final argument that their activities were not engaged in interstate trade or commerce. Based on my factual findings, this contention has been answered with finality by the Supreme Court.

While the business of staging and promoting these championship boxing contests may formerly have been "purely local affairs" (*Federal Club v. National League,* 59 U. S. 200, 208 (1921)), modern management has made them vehicles by which television and radio programs may be broadcast and advertising presented with an attractive nationwide appeal. The Government has established, and I have found, that the promotion of professional championship boxing contests was had by the defendants on a multistate basis, and that it was coupled with the sale of rights to televise, broadcast and film the contests for interstate transmission. This, the Supreme Court has held, "constitutes 'trade or commerce among the several states' within the meaning of the Sherman Act" (*United States v. International Boxing Club* [1955 TRADE CASES ¶ 67,941], 348 U. S. 236, 240). More recently, the Supreme Court in *Radovich v. National Football League et al.* [1957 TRADE CASES ¶ 68,628], decided February 25, 1957 had occasion to say:

> "We did not extend them (the baseball decisions) to boxing or the theatre because we believed that the volume of interstate business in each—the rationale of Federal Baseball—was such that both activities were within the act."

My factual findings here justify and sustain this view.

Defendants seek refuge in the argument that the "far-reaching implications of this case . . . may well be the opening skirmish of a broad attack upon all professional sports, except organized baseball." The answer to this is two-fold: (1) the promotion of professional championship boxing contests is a pure and simple money-making profit-seeking business, and (2) the Supreme Court, in the so-called "baseball cases," has never held "that all businesses based on professional sports are outside the scope of the anti-trust laws." *United States v. International Boxing Club of N. Y., Inc., supra.* The Supreme Court went on to say:

> "it would be sufficient, we believe, to rest on the allegation that over 25% of the revenue from championship boxing is derived from interstate operations through the sale of radio, television and motion picture rights."

As I have found in the factual findings, the Government has sustained the allegations of the complaint relating to the sale of radio, television and motion picture rights to championship boxing fights. This, the Supreme Court has held, without considering their many other interstate aspects, is sufficient to bring the business of promoting championship boxing contests within the Sherman Act's trade and commerce concept.

4.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the defendants.

2. Beginning sometime in 1949 and continuing thereafter, the defendants have been engaged in a combination and conspiracy in unreasonable restraint of trade and commerce in the promotion of professional world championship boxing contests among the several states of the United States, and were parties to contracts, agreements, arrangements, and understandings in unreasonable restraint of such trade and commerce, all in violation of Section 1 of the Sherman Act.

3. Beginning sometime in 1949 and continuously thereafter, the defendants have been engaged in a combination and conspiracy to monopolize trade and commerce in the promotion of professional world championship boxing contests among the several states of the United States in violation of Section 2 of the Sherman Act.

4. Beginning sometime in 1949 and continuing thereafter, the defendants have been monopolizing trade and commerce in the promotion of professional world championship boxing contests among the several states of the United States in violation of Section 2 of the Sherman Act.

5. The plaintiff is entitled to relief by appropriate decree of this Court.

Proposed decrees may be filed within thirty days from the date of the filing of this opinion and thereafter all will be heard on due notice.

[¶ 68,650] Charles Walder, et al. v. Paramount Publix Corporation, et al.

In the United States District Court for the Southern District of New York. Civil 69-217. Filed March 12, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Who May Bring Suit—Lessor-Owner of Motion Picture Theatre.—On a motion for reargument, a trial court adhered to its original decision that (1) a corporation, as the lessor-owner of a motion picture theatre, had no standing to maintain a treble damage action because it was only incidentally and not directly injured by alleged antitrust violations, and (2) although the corporation, as the lessor-owner of the theatre, might be in a position to maintain an action under the antitrust laws to recover for the alleged loss of a reasonable rental during a period of time when there were direct dealings between the corporation and an alleged co-conspirator, the corporation suffered no damage during this period because it admittedly received a fair rental for its theatre. The court ruled that its ruling did not conflict with an earlier ruling in the action, that it correctly construed the rulings of two other courts, and that the testimony of the president of the corporation as to the reasonableness of the theatre's rental was both relevant and competent.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.55.

For the plaintiffs: Claudia Pearlman, in care of Edgar A. Buttle, New York, N. Y. (Claudia Pearlman and Edgar A. Buttle, of counsel).

For the defendants: Louis Phillips for Paramount Pictures Inc. (In Dissolution), Paramount Pictures Corporation, and Paramount Film Distributing Corporation. J. Miller Walker for RKO Radio Pictures, Inc. Robert W. Perkins for Warner Bros. Pictures Distributing Corporation. Herbert B. Lazarus for American Broadcasting-Paramount Theatres, Inc. (formerly named and referred to in the complaint as United Paramount Theatres, Inc.). Robert W. Perkins for Warner Bros. Pictures Distributing Corporation.

Dwight, Royall, Harris, Koegel & Caskey for Twentieth Century-Fox Film Corporation, a New York corporation (In Dissolution). Schwartz & Frohlich for Columbia Pictures Corporation. E. Compton Timberlake, John F. Caskey, Myles J. Lane, and Everett A. Frohlich, of counsel. All of New York, N. Y.

Denying a motion for reargument of a decision of the U. S. District Court, Southern District of New York, 1956 Trade Cases ¶ 68,572; for prior opinions of the Court, see 1956 Trade Cases ¶ 68,275 and 1955 Trade Cases ¶ 68,170, 68,097.

[*Summary Judgment*]

LEIBELL, District Judge [*In full text*]: On January 26, 1957, The Walwal Corporation filed a motion for leave to reargue a motion of March 12, 1956, which had been made by the defendants for summary judgment against The Walwal Corporation. The grounds of the defendants' motion were (1) that "The Walwal Corporation has not suffered legal injury to its business or property within the meaning and intent of the anti-trust laws"; and (2) "Any claims for damages prior to January 27, 1952 asserted by The Walwal Corporation are barred by the Federal four (4) year statute of limitations." I granted the motion for summary judgment on the first ground. It was unnecessary to consider the defense of the statute of limitations. The motion to reargue was referred to me by Judge Weinfeld on January 31, 1957.

[*Prior Opinion*]

In an opinion dated December 14, 1956 [1956 TRADE CASES ¶ 68,572], I considered the three alleged damage periods involved in the claim of The Walwal Corporation, to determine whether The Walwal Corporation has been directly injured in its business or property within the meaning of the Federal anti-trust laws. The three damage periods were: 1931 to 1937, while Tivoli Theatre, Inc. was the lessee-operator; 1937 to 1947, while Tivoli Operating Corporation, was the lessee-operator; and 1947 to date, during which time Tivoli Amusement Company, Inc., has been the operating lessee.

In the opinion of December 14, 1956, I stated: For the periods 1931 to 1937, and 1947 to the present, "The Walwal Corporation as lessor-owner of the Tivoli Theatre, has no standing to sue, because at best it was only incidentally and not directly injured". For the remaining period of 1937 to 1947, I held that because "there was direct dealing between one of the alleged co-conspirators, Paramount Enterprises, Inc. and The Walwal Corporation" in relation to the lease for this period, The Walwal Corporation might be in a position to maintain an action to recover for loss of a reasonable rental, if any loss was actually sustained. However, the depositions, admissions and affidavits before me showed that there was "no genuine issue as to what constituted a reasonable rental for the years 1937 to 1947, and that admittedly The Walwal Corporation received a fair rental from Tivoli Operating Corporation, and suffered no damage." I accordingly granted defendants' motion for summary judgment as against The Walwal Corporation for all three periods.

[*Re-argument*]

In an affidavit sworn to January 21, 1957, attached to the moving papers, the attorney for The Walwal Corporation, sets forth the following grounds on which the present motion for re-argument is based:

"1. That annexed hereto are a copy of an opinion previously rendered by Hon. Edward Weinfeld, a Judge of this Court on the 24th day of June, 1955, and a copy of a judgment signed and entered thereon on the 12th day of September, 1955.

"That it is respectfully submitted that examination of these documents discloses that judgment has already been made and entered denying a previous motion of the defendants for summary judgment against the plaintiff Walwal Corporation.

"2. Furthermore, deponent respectfully prays that permission to re-argue be granted, since oral argument was not heard on the original motion."

On January 31, 1957, representatives of the attorneys for the parties visited by Chambers to apprise me of the present motion. At the time, the motion papers on the reargument had not yet been forwarded to me. The defendants submitted a memorandum in opposition to the motion in Chambers, but the plaintiff did not have any memorandum ready to submit at that time. It was then agreed that the plaintiff would submit a memorandum in the nature of an answer to defendants' memorandum by

February 8, 1957 and that the defendants would serve a reply thereto by February 15, 1957. This has been done.

Although the moving papers of the plaintiff set up the claim of "law of the case doctrine" and failure to grant and hear oral argument on the original motion, the brief submitted by the plaintiff states "that the Court has overlooked salient facts in granting the defendants' motion for summary judgment as to the Walwal Corporation"; has "inaccurately appraised * * * the holding * * * of *F. E. Harrison v. Paramount Pictures, Inc.,*" [1953 TRADE CASES ¶ 67,568], 115 F. Supp. 312, aff'd [1954 TRADE CASES ¶ 67,721], 211 F. 2d 405, cert. denied 348 U. S. 828; that the Court "has completely overlooked the case of *Camrel Co. Inc. v. Paramount Film Distributing Corporation et al.,* CCH 1944-1945 TRADE CASES par. 57,233, which is the ruling law in the Second Circuit"; and finally that

> "The Court inaccurately states that the testimony of Mr. Charles Walder indicates that the rent paid the Walwal Corporation was fair. * * * Mr. Walder merely indicated that he was not sure that the rent paid was fair. * * * In any event, since Mr. Walder is not a real estate expert, * * * he would be entirely incompetent to testify as to the fair and reasonable rental value of the premises involved".

There is nothing in plaintiff's brief on this motion for a reargument which discusses the grounds urged in its moving papers.

[*Timeliness of Motion*]

The defendants in opposing plaintiff's motion for a reargument put in issue the timeliness of the motion seeking leave to reargue, citing *F. & M. Schaefer Brewing Co. v. United States,* 2 Cir., 1956, a hearing *en banc,* reported in 236 F. 2nd 889 [a petition for certiorari filed February 8, 1957] and *United States v. Wissahickon Tool Works,* 2 Cir., 1952, 200 F. 2d 936.

Defendants contend that plaintiff's time to appeal (and similarly the time for seeking a reargument) should run from the date my opinion was filed, December 17, 1956, and not from the date of the order dismissing the Walwal claim was signed and filed, January 10, 1957. My opinion of December 14, 1956 contained a direction to "Seattle orders in accordance with the conclusions set forth in this opinion disposing of both motions of the defendants". The cases cited by the defendants and the recent case of *Matteson v. United States of America,* 2 Cir., decided December 31, 1956, are distinguishable on the facts. In each of those cases the trial judge made no direction for the submission of a proposed order, or for the settlement of an order by counsel. Our Local Rule 10(a) provides that "the memorandum of the determination of a motion, signed by the judge, shall constitute the order * * *." In the present case my opinion of December 14, 1956, called for a settlement of an order by counsel thereby bringing into play the latter part of Local Rule 10(a) "but nothing herein contained shall prevent the court from making an order, either originally or on an application for resettlement in more extended form." See *United States v. Roth,* 2 Cir., 1953, 208 F. 2d 467 (cited with approval in the *Schaefer Brewing Co.* case, *supra*) wherein the Court of Appeals for this Circuit, in a Petition for Rehearing, held on page 470:

> "In seeking a rehearing * * * petitioner-appellant attempts to show by an analysis of all the cases on our current docket that we have gone against the current practice of the judges in the Southern District of New York in making effective their decisions on motions. It finds 39 appeals from such decisions in the Southern and Eastern Districts of New York and makes its deductions from those cases. * * * Of the cases thus collected, the greater number were those wherein the deciding judge called for the submission of a proposed order, or directed settlement of an order, as is, of course, his undoubted right and power. See F. R. 58. Indeed, district judges have it in their control to remove all doubt by making explicit and beyond misunderstanding their directions either for immediate judgment or for later settlement of a formal decree."

My opinion of December 14, 1956, called for a later settlement of a formal order.

Plaintiffs' attorney of record died in March 1956. Final briefs were not submitted until late October 1956. An order on the decision of December 14, 1956 was not submitted until January 1957 and was signed January 10, 1957. From that date plaintiffs' time to appeal or seek a reargument began to run. Therefore, plaintiff's motion seeking leave to reargue, served on January 22, 1957, was timely within Local Rule 9(h). The notice was not filed until January 26,

1957. But Local Rule 9(h) speaks of "service" and not of "filing" the notice of motion for a reargument.

[*Decision Not Erroneous*]

I will therefore entertain plaintiff's motion seeking leave to reargue and consider the application on its merits. It is not necessary that the case be reargued orally. See Rule 9(h) of our Local General Rules. The court is of the opinion that its decision of December 14, 1956 is not erroneous on either of the grounds advanced in the notice of motion herein. Nor was the decision of December 14, 1956, erroneous for any of the reasons advanced in the brief submitted by plaintiff on this motion for leave to reargue.

[*Prior Summary Judgment Motion*]

Plaintiffs claim that my order of January 10, 1957, granting summary judgment in favor of the defendants as against the plaintiff, The Walwal Corporation, in effect overrules the prior order of Judge Weinfeld, dated July 22, 1955, which denied an earlier motion for summary judgment as against The Walwal Corporation, is without merit.

On July 19, 1954, the defendants moved on motion papers for summary judgment against all the plaintiffs herein. As against The Walwal Corporation, defendants claimed (1) that its action was completely barred by the Statute of Limitations, and (2) because The Walwal Corporation, on August 17, 1948, had executed a general release in favor of Paramount Enterprises, Inc., one of the alleged co-conspirators.

The motion was heard by Judge Weinfeld on April 19, 1955. He filed an opinion dated June 24, 1955 [1955 TRADE CASES ¶ 68,097] [132 F. Supp. 912] denying defendants' motion with respect to The Walwal Corporation, holding as to both contentions, that there existed substantial and disputed issues of fact which required the denial of the motion for summary judgment as against The Walwal Corporation.

On September 13, 1955, the defendants continued to take the deposition of Mr. Charles Walder, president of The Walwal Corporation. The deposition in final form was signed by Mr. Walder on September 30, 1955.

On November 7, 1955, the defendants filed another motion seeking summary judgment, part of which was directed against The Walwal Corporation. The defendants claimed that "The Walwal Corporation has not suffered legal injury to its business or property within the meaning and intent of the antitrust laws". As stated above, that motion was referred to me on consent of the attorneys, because the pretrial conference in this case had previously been assigned to me.

The first pretrial conference was held on November 18, 1955. At that session the Court was apprised of all the factual issues present in the case, which would require consideration by the Court. A second conference was held on December 2, 1955. At that session the attorneys for the respective parties were given an opportunity to present orally their arguments on the defendants' motion of November 7, 1955.

On the third session, December 16, 1955, I ruled from the Bench that, as to The Walwal Corporation, it had no legal claim which was enforceable under the Federal Antitrust Laws. After that ruling was made, The Walwal Corporation moved for a reargument of the motion of November 7, 1955, which I granted. Further argument was permitted and received at the fourth pretrial session held on January 13, 1956, and at that conference I stated to the attorneys that I intended to file an opinion in which I would discuss all the contentions of the respective parties.

On January 17, 1956, I filed my first opinion in this matter, holding "that the complaint herein does not allege any claim on which The Walwal Corporation would be entitled to any relief". However, in order to give The Walwal Corporation another opportunity to amend its pleading, I permitted it to serve an amended complaint, and that was done on January 27, 1956.

On February 3, 1956, a fifth pretrial conference was held. At that session the defendants made oral motions with respect to the amended complaint of January 27, 1956. They renewed their motion as against The Walwal Corporation. After hearing arguments of both counsel it was agreed that counsel for the defendants would serve formal motion papers in the motion part of the Court and that the motion would be referred to me.

On March 12, 1956, the defendants filed a motion seeking summary judgment against

The Walwal Corporation on the grounds made in their motion of November 7, 1955, and in addition on the ground that any claims for damages by The Walwal Corporation arising prior to January 27, 1952, were barred by the new Federal four year statute of limitations. That motion was referred to me on March 30, 1956. A disposition of that motion was delayed for reasons stated above.

In a second opinion dated December 14, 1956, I granted summary judgment against The Walwal Corporation as to all three periods of its claim, 1931 to 1937, 1937 to 1947, and 1947 to date. An order to that effect was filed on January 10, 1957.

The grounds upon which I granted summary judgment as against The Walwal Corporation for the 1937 to 1947 period were not before Judge Weinfeld, and some of them could not have been before Judge Weinfeld because the deposition of Mr. Walder was not completed until after Judge Weinfeld had filed his opinion. Nowhere in Judge Weinfeld's opinion is there any holding that The Walwal Corporation was a proper plaintiff under the provisions of Section 15 of Title 15, U. S. C., or that it had suffered a loss of a reasonable rental for the periods in question, particularly the period of 1937 to 1947. He considered only the statute of limitations and the general release. His decision was not the law of the case on the points advanced on the motion before me. For a recent discussion of "the law of the case" doctrine, as applied in this Second Circuit, see *Dictograph Products Company v. Sonotone Corporation*, 1956, 230 F. 2d 131.

[*Oral Argument*]

Plaintiff's second contention, failure to permit oral argument on the original motion, is without merit. A reading of the above chronological history will indicate that the court extended ample opportunity to all counsel to present their arguments fully to the Court.

[*Harrison Case*]

Plaintiff next contends that the Court inaccurately construed the holding of the *Harrison* case, *supra,* in that "the Court has overlooked the fact that the [*Harrison*] rule * * * applies where no direct dealing is involved." Assuming the plaintiff is correct in its interpretation of the *Harrison* case, I applied its doctrine only with respect to the alleged damage periods of 1931 to 1937, and of 1947 to date, wherein there were no direct dealings between The Walwal Corporation and any of the alleged co-conspirators. As to those periods I held that The Walwal Corporation was at best "only incidentally and not directly injured." I did not apply the *Harrison* doctrine to the period of 1937 to 1947, because I held "there was direct dealing between one of the alleged co-conspirators, Paramount Enterprises and The Walwal Corporation" for that period which "may make inapplicable the holding of the *Harrison* and *Productive Invention, Inc.,* cases and might put The Walwal Corporation in a position to maintain an action for this particular period * * *." It was not because of the *Harrison* doctrine that I granted summary judgment as against The Walwal Corporation for the period of 1937 to 1947, but because, as I stated, the "depositions, admissions and affidavits before me show that there is no genuine issue as to what constituted a reasonable rental for the years 1937 to 1947, and that admittedly The Walwal Corporation received a fair rental from Tivoli Operating Corporation, and suffered no damage."

[*Camrel Case*]

It is also urged by plaintiff that the Court in granting summary judgment against The Walwal Corporation, has completely overlooked the holding of the unreported case of *Camrel Co., Inc. v. Paramount Film Distributing Corporation, et al., supra.* On page 23 of my first opinion dated January 16, 1956, I discussed the *Camrel* holding and held it to be inapplicable.

Plaintiff further contends that paragraph 79 of the amended complaint alleges injury not only to rental value but also to market value, credit and capital, and that the Court in considering rental value only has completely disregarded injury to market value, and impairment of credit and capital.

It will suffice to state that paragraph "Seventy-Ninth" of the amended complaint speaks of alleged injuries incurred by The Walwal Corporation for the period 1931 to 1937, and does not deal with the period of 1937 to 1947. I held that for the period 1931 to 1937, The Walwal Corporation has no standing to sue. When I discussed the issue of "reasonable rental" I was referring to the alleged damage period of 1937 to 1947

only. For that period The Walwal Corporation did not allege any injury to its credit or capital, and no discussion of any such element of damage was necessary. However, even if The Walwal Corporation had alleged injury to market value and impairment of credit and capital for the period of 1937 to 1947, it would be entitled to no relief on these elements of damage, because it suffered no such damage. It appears from the testimony of Mr. Walder, president of The Walwal Corporation, that for this period The Walwal Corporation, as lessor of the Tivoli Theatre, received a fair rental therefor from the Tivoli Operating Corporation. If the rental paid to The Walwal Corporation was admittedly fair, how could the making of the lease injure the market value of the realty or impair the credit or capital of the corporation?

[*Relevancy of Testimony*]

Plaintiff's final contention is that the Court erred when it considered admissions made by Mr. Walder, president of The Walwal Corporation, that the rent paid under the agreement of February 10, 1937, was fair, as showing the lack of a genuine issue as to what constituted a reasonable rental for the years 1937 to 1947. Plaintiff's attorney argues that Mr. Walder is not a real estate expert, so that his testimony in this respect would be "entirely incompetent."

The Walwal Corporation in its amended complaint alleged that because of "economic duress" imposed upon it by the defendants, it executed the agreement of February 10, 1937, which fixed the amount of rental The Walwal Corporation was to receive from Tivoli Operating Corporation, as lessee-operator of the Tivoli Theatre. The Walwal Corporation further alleged that "in a free market unhampered by defendants' conspiracy and illegal acts" it could have received as a reasonable rental approximately $20,000 per year, and therefore sought to recover in this action the difference between what it could have received under normal conditions and what it actually received under the agreement of February 10, 1937.

The testimony of Mr. Charles Walder, who had personal knowledge of all the preliminary negotiations leading to the execution of the February 10, 1937 agreement, as president of The Walwal Corporation, was both relevant and competent on this issue as to rental value. He had been operating the Tivoli Theatre since 1930. He testified that the rental his corporation received for the 1937-1947 period was fair.

The Court did not inaccurately state the testimony of Mr. Charles Walder. The voluntariness of the act on the part of The Walwal Corporation, in executing the agreement of February 10, 1937, is readily seen in the light of the following statement made by Mr. Charles Walder when he was examined by the defendants on whether $800.00 rental per month was a fair return:

> "Offhand it is hard to me to answer, but I will tell you what I did do. I did eventually accept $800, then reduced to $700 when I made a deal with Paramount—I mean when we formed this Tivoli Operating Corporation against a percentage—*because we felt that that was what it was about worth,* * * *." [Italics added.]

Mr. Walder owned almost all the stock of Walwal and of the Tivoli Theatre Corporation which had operated the theatre up to the time in 1937 when he made a deal with Paramount for a 50-50 ownership of a new operating corporation, Tivoli Operating Corporation. He, as president of The Walwal Corporation, believed he was receiving as a rental what a lease of the theatre was worth. Hence there was no damage suffered by The Walwal Corporation, the lessor.

[*Motion Denied on Merits*]

For the reasons above stated, although the motion of The Walwal Corporation seeking leave to reargue, is entertained by the Court as timely made, it is denied on the merits.

I again direct counsel's attention to the decision of the United States Court of Appeals in the *Roth* case, 208 F. 2d 467. This opinion shall constitute the order of this Court denying the motion of The Walwal Corporation. The Clerk of the Court shall promptly call the attention of the attorneys to the filing of this opinion and to the provisions of this last paragraph.

[¶ 68,651] Clarence Ryan v. The California Company, J. M. Foster, Phillips Petroleum Company, Continental Oil Company, Standard Oil Company, Carter Oil Company, The Texas Company, and The Union Oil Company of California.

In the United States District Court for the District of Montana, Helena Division. No. 686. Dated March 5, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Proof of Damages—Relation Between Antitrust Violation and Damages—Refusal to Sell—Demand.—Where a service station operator charged that oil companies and a distributor conspired to prevent him from selling their nationally advertised brands of gasoline because he sold one brand of such gasoline at less than the prices allegedly fixed by the oil companies, the oil companies and the distributor were granted summary judgments. The operator's deposition indicated that he was supplied with all of the unbranded gasoline of one of the companies he ordered from the defendant-distributor of such oil company, and that he never sought to purchase gasoline from any of the other oil companies. Since the gravamen of the operator's complaint was that his damage resulted from the alleged conspiracy to prevent him from selling nationally advertised brands of gasoline, he had to show that he requested the companies to supply him with gasoline in order to recover any damage alleged to have been caused by the alleged conspiracy. The operator failed to show that he made such a request.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785; Private Enforcement and Procedure, Vol. 2, ¶ 9011.

Combinations and Conspiracies—Construction of Sherman Act—Interstate Commerce—Direct Restraint of Commerce—Effect upon Commerce.—A service station operator's complaint charging that oil companies conspired to prevent him from selling their nationally advertised brands of gasoline because he sold one brand of such gasoline at less than the prices allegedly fixed by the oil companies sufficiently alleged the involvement of interstate commerce. The Sherman Act extends to restraints on transactions which are themselves in the stream of interstate commerce and to restraints on intrastate commerce which have a substantial effect on interstate commerce. The operator alleged that he was engaged in interstate commerce, and it appeared that the dealer might be able to show that he was a link in the chain of interstate transactions involving the shipment of gasoline and the use of cutsomer credit cards. Also, the operator alleged that the acts done in furtherance of the conspiracy have had an effect on interstate commerce.

See Combinations and Conspiracies, Vol. 1, ¶ 2035.153.

Private Enforcement and Procedure—Suit for Civil Damages—Proof of Damages—Loss of Profits and Customers.—Where a service station operator charged that oil companies conspired to prevent him from selling their nationally advertised brands of gasoline because he sold one such brand of gasoline at less than the prices allegedly fixed by the oil companies, the motions of the oil companies for summary judgments on the ground that the operator did not show that he was injured or damaged were denied. Although the operator's sales and gross profits increased during the existence of the alleged conspiracy when he was selling unbranded gasoline, such increases resulted from the decreased price at which he sold such gasoline and not from the fact that he was selling unbranded gasoline. If the operator had been selling a nationally advertised brand of gasoline at such decreased prices, he would have sold more gasoline than he actually did. To the extent that he would have sold more nationally advertised gasoline than he actually sold of unbranded gasoline, the operator was injured and would be entitled to recover if he was deprived of the sale of the nationally advertised brands of gasoline in violation of the antitrust laws. Also, the operator claimed that he lost 30 customers who traded with him before the removal of a credit card service he had had with one of the companies.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.200.

For the plaintiff: Leif Erickson, Charles V. Huppe, and Jerrold R. Richards, Helena, Mont.

For the defendants: Ralph J. Anderson and Stanley P. Sorenson, Helena, Mont., for The California Co.; Toomey & Hughes, Helena, Mont., for Standard Oil Co.; Keller & Magnuson, Helena, Mont., for J. H. Foster; Corette, Smith & Dean, and James O. Sullivan, Butte, Mont., for The Texas Co.; Jardine, Stephenson, Blewett & Weaver, Great Falls, Mont., for Union Oil Co.; and Coleman, Jameson & Lamey, Billings, Mont., for Continental Oil Co., Phillips Petroleum Co., and Carter Oil Co.

Order

[*Summary Judgment*]

W. D. Murray, District Judge [*In full text*]: Plaintiff brings this action to recover treble damages for injury alleged to have been suffered by him as the result of an alleged conspiracy by the defendants to prevent him from advertising and selling through his service station in Helena, Montana, Chevron or any other nationally advertised brand of gasoline, in violation of the Anti-Trust laws of the United States (Sections 1-7, 12, *et seq.,* Title 15, U. S. C. A.). Defendants separately answered and separately moved for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure. The motions for summary judgment are based upon the complaint, the deposition of plaintiff, taken by defendants, and the deposition of C. E. Tedrow, District Manager for the defendant The California Company, taken by the plaintiff.

Plaintiff filed a purported affidavit in opposition to the motions for summary judgment. This affidavit utterly fails to to comply with the provisions of Rule 56(e) F. R. C. P. requiring that such affidavits be made on personal knowledge, set forth facts that would be admissible in evidence, and show affirmatively that affiant is competent to testify to the matters stated therein. The rule further requires that sworn or certified copies of all papers or parts thereof referred to in the affidavit shall be attached thereto or served therewith, and the affidavit likewise fails to meet this requirement, nor does it show that the document referred to therein is unavailable to the affiant as required by Rule 56(f). Therefore the purported affidavit is of no assistance to the Court and the motions for summary judgment will be considered upon the complaint and depositions of Ryan and Tedrow.

[*Alleged Conspiracy*]

Plaintiff alleges in his complaint, which is far from a model pleading, that he operates a retail service station, in Helena, Montana, where he sells gasoline, oil and allied products, and that as operator of such service station, he is engaged in interstate commerce. He further alleges that because of the small margin of profit at which he sold his merchandise, he depended for the successful maintenance of his business upon his ability to sell nationally known brand gasoline in large volume, including the Chevron gasoline of the defendant The California Company. Then appears allegations to the effect that through newspaper advertising and otherwise, plaintiff had developed a large and lucrative business in the sale of Chevron gasoline, and that but for the acts and facts alleged he would have continued to enjoy such business and increased his profits and prospered accordingly.

The corporate existence of the corporate defendants is then alleged, followed by the allegation that they comprise the major oil companies doing business in Helena, Montant, and that they sold over 90% of the petroleum products sold in the area.

There are then allegations to the effect that the defendants combined and conspired together to fix and control the resale and retail prices of their gasoline, oil and allied products in restraint of free trade and enterprise; that on April 13, 1955, plaintiff announced to the public generally and advertised Chevron gasoline for sale at 3¢ a gallon less than the established rates in Helena; and that the defendants thereupon entered into a conspiracy to prevent the plaintiff from advertising and selling Chevron gasoline or any other nationally advertised brand of gasoline.

Plaintiff further alleges that he was advised by the defendant The California Company that unless he brought his price of gasoline up to the regular price in the County in which he operated, they would remove all Chevron signs from his property, take away Chevron credit cards, refuse plaintiff the usual and normal profits given to gasoline retail dealers selling Chevron gasoline and deprive plaintiff of other services, supplies and advertising media; that upon plaintiff's refusal to raise his price of gasoline, the defendant The California

Company, pursuant to said conspiracy, removed its credit card service and refused to extend credit on the sale of gasoline and other merchandise by plaintiff, and removed the Chevron signs from his premises and deprived him of other services, supplies and advertising media.

It is further alleged that these acts have damaged plaintiff to the extent of $90,000, and have resulted in the restraining of interstate commerce in the City of Helena, in the County of Lewis and Clark, in the State and District of Montana, and elsewhere, and have tended to and actually created a monopoly in the line of interstate commerce within that district, all in violation of the Anti-Trust laws.

[*Motions*]

The facts disclosed by the depositions of the plaintiff and C. E. Tedrow, District Manager of the defendant The California Company, in the district in which plaintiff operates, will be referred to hereafter in the course of the discussion concerning the motions for summary judgment.

The motion of the defendant The Texas Company for summary judgment was argued orally to the Court and a brief in support thereof was filed. The motions of the other defendants for summary judgment were submitted upon the argument and brief of The Texas Company.

Is There Sufficient Involvement of Interstate Commerce to Sustain Action

[*Scope of Sherman Act*]

One of the principal grounds urged for the granting of summary judgment is that from the complaint and the depositions, it affirmatively appears that interstate commerce is not sufficiently involved to warrant a recovery by the plaintiff herein under the Anti-Trust Laws.

Upon this basis the motions for summary judgment are not good.

The Anti-Trust laws extend to (1) restraints on transactions which are themselves in the stream of interstate commerce, and (2) to restraints on intrastate transactions which have a substantial effect on interstate commerce. *Myers v. Shell Oil Co.* [1950-1951 Trade Cases ¶ 62,816], 96 Fed. Supp. 670; *Brenner v. Texas Co.* [1956 Trade Cases ¶ 68,314], 140 Fed. Supp. 240; *Las Vegas Merchant Plumbers Ass'n. v. U. S.* [1954 Trade Cases ¶ 67,673], 210 Fed. (2d) 732; *Mandeville Farms v. Sugar Co.* [1948-1949 Trade Cases ¶ 62,251], 334 U. S. 219.

As noted before, the complaint in this case is not a model pleading. It is either inartfully drawn, or so artfully drawn as to make it difficult for the Court to understand clearly whether plaintiff has intended to allege a conspiracy directly affecting interstate commerce, or conspiracy affecting intrastate commerce, which in turn has a substantial effect on interstate commerce or both. The defendants not having seen fit to attack the complaint, we are faced with it as it exists, and regardless of what type conspiracy plaintiff intended to allege, the Court feels that under the allegations proof of either or both types of conspiracies would be admissible, and further that there is nothing disclosed by the depositions which forecloses such proof.

[*Direct Restraint*]

With respect to a conspiracy directly restraining interstate commerce, the plaintiff alleges that in operating his gas station, he is engaged in interstate commerce. If this be so, the alleged price fixing conspiracy directed at plaintiff is a violation of the Sherman Act *per se* (*U. S. v. Chrysler Corp., etc.* [1950-1951 Trade Cases ¶ 62,576], 180 Fed. (2d) 557; *Las Vegas Merchant Plumbers Ass'n. v. U. S., supra; U. S. v. Socony-Vacuum Oil Co.* [1940-1943 Trade Cases ¶ 56,031], 310 U. S. 150), and if plaintiff proved damage as a result thereof, he would be entitled to recover. The possibility of plaintiff proving this allegation is not foreclosed by any facts appearing in the depositions. It appears from his deposition that he was buying and selling gasoline from the California Company distributor in Helena, Montana, and from the deposition of Mr. Tedrow, it appears that The California Company gasoline in Helena, Montana, came via pipeline from Billings, Montana, but that is as far as the testimony goes. For all that appears, the gasoline which plaintiff was buying and selling may have been refined in another state, shipped to Billings, Montana, by a method other than pipeline, and thence in a continuous movement to Helena, Montana, via pipeline, and then distributed to plaintiff. Likewise, insofar as the record here shows, the crude oil from which the gasoline was refined may have been brought to Montana from

other states by The California Company, refined by that company and distributed in a continuous flow to plaintiff. These possibilities considered in connection with the credit card process, under which the plaintiff sold gasoline on credit, to a customer locally and the invoices showing such sale were sent to The California Company in Denver, Colorado, and the customer was billed for such sale from Denver, Colorado, by The California Company, might be sufficient to establish that plaintiff was a link in the chain of interstate transactions, under the definition of interstate commerce found in *U. S. v. Swift & Co.,* 122 Fed. 531.

> "Commerce, briefly stated, is the sale or exchange of commodities. But that which the law looks upon as the body of commerce is not restricted to specific acts of sale or exchange. It includes the intercourse—all the initiatory and intervening acts, instrumentalities and dealings—that directly bring about the sale or exchange. Thus, though sale or exchange is a commercial act, so also is the solicitation of the drummer, whose occupation it is to bring about the sale or exchange. *Brennan v. Titusville,* 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719. The whole transaction from initiation to culmination is commerce.
>
> "When commerce, thus broadly defined, is between parties dealing from different states—to be effected so far as the immediate act of exchange goes by transportation from state to state—it is 'commerce between the states', within the meaning of the constitution, and the statute known as the Sherman Act. But it is not the transportation that constitutes the transaction interstate commerce. That is an adjunct only, essential to commerce, but not the sole test. The underlying test is that the transaction, as an entirety, including each part calculated to bring about the result, reaches into two or more states; and that the parties dealing with reference thereto deal from different states.
>
> "An interstate commercial transaction is, in this sense, an affair rising from different states, and centering in the act of exchange, each essential part of the affair being as much commerce as is the center."

That case was modified and affirmed by the Supreme Court in *Swift & Co. v. U. S.,* 196 U. S. 375, but the modification did not touch the above quoted definition. See also with respect to what constitutes interstate commerce the discussion in *Toulmin's Anti-Trust Laws,* Vol. 1, Sections 7.2 *et seq.*

Defendants rely on the cases of *Myers v. Shell, supra,* and *Brenner v. Texas Co., supra,* as authority for the proposition that the allegation in the complaint that plaintiff is engaged in intertsate commerce is not true. However, the credit card feature did not appear in those cases.

[*Effect upon Commerce*]

In addition, the complaint contains the following allegations, in effect, which would bring the case under the Anti-Trust laws on the basis of conspiracy involving intrastate commerce which affects interstate commerce (*Mandeville Farms v. Sugar Co., supra*); it alleges a conspiracy to fix and maintain gasoline prices in the Helena area, and further alleges that the acts done in furtherance of that conspiracy have had an effect on interstate commerce.

There is nothing in the depositions which forecloses plaintiff from proving these allegations. Indeed the evidence in Tedrow's deposition as to his conversations with officials of certain of the other defendant companies, concerning the "price situation" in Helena brought about by plaintiff's reduction of prices, and his assurance to them that the situation would be brought under control, is some evidence that a conspiracy to maintain the retail price of gasoline in the Helena area did exist. If such a conspiracy to fix and maintain the retail price of gasoline in the area of Helena, Montana, did exist there is nothing now before the Court which would preclude proof that the fixing of retail gasoline prices in the entire Helena area would have a substantial effect on retail prices in other states.

By the above discussion, the Court does not intend to rule that the evidence now before the Court proves either a restraint on interstate commerce, or a restraint on intrastate commerce substantially affecting interstate commerce, nor has the Court any opinion as to whether either or both of such restraints could in fact be proved upon a trial. The only purpose of the discussion is to point out that in the Court's view under the complaint as it stands, the plaintiff would be entitled to offer such proof, and that nothing in the depositions before the Court would foreclose such proof.

Is Plaintiff Foreclosed from Proving Injury and Damage to His Business

[*Necessary Proof*]

In an action brought, as this one is, under the Anti-Trust laws, the plaintiff must allege and prove damage to himself resulting from a violation of the Anti-Trust laws, injury and damage to the public alone not being sufficient. *Peller v. International Boxing Club* [1955 Trade Cases ¶ 68,080], 135 Fed. Supp. 942, affirmed [1955 Trade Cases ¶ 68,202] 227 Fed. (2d) 593, *Revere Camera Co. v. Eastman Kodak Co.* [1948-1949 Trade Cases ¶ 62,317], 81 Fed. Supp. 325, *Westor Theatres v. Warner Bros.,* 41 Fed. Supp. 757.

As another ground for granting summary judgment, defendants urge that by reason of plaintiff's testimony in his deposition it is affirmatively shown he has suffered no injury or damage to his business caused by the alleged acts of defendants in violation of the Anti-Trust laws.

[*Profits*]

From the plaintiff's deposition it appears that prior to the time when the alleged acts of defendants took place, plaintiff had sold through his service station an average of 2700 gallons of gasoline per month at an average gross monthly income of $202.50, and that after that time his average monthly sales increased in 10,600 gallons and his average monthly gross income increased to $508.80.

It is apparent, however, that this increase in sales and gross profits, resulted from the decrease in price which plaintiff made, and not from the fact that he was then selling an unbranded gasoline. Indeed, had plaintiff been selling gasoline under the Chevron or any other nationally advertised brand at the same price he was selling the unbranded gasoline, it is obvious that he would have sold far more gasoline than he did. To deny this is to deny the efficiency of modern advertising, and defendants would be among the last to question the benefits of advertising.

To the extent that he would have sold more Chevron or other nationally advertised brand of gasoline than he actually sold of unbranded gasoline, plaintiff has been damaged and would be entitled to recover therefor, if he was deprived of the sale of Chevron or [any] other nationally advertised brand in violation of the Anti-Trust laws. The amount of such damage may be uncertain and difficult to prove, but the fact of such damage is certain, and that is sufficient. *Bigelow v. RKO Radio Pictures, Inc.* [1946-1947 Trade Cases ¶ 57,445], 327 U. S. 251, *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U. S. 555, *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.* [1952 Trade Cases ¶ 67,218], 194 Fed. (2d) 846.

[*Loss of Customers*]

There is in addition, evidence in plaintiff's deposition of the loss of some 30 customers who traded with him before the removal of the credit card service and who ceased to trade with him after the service was removed.

[*No Refusal to Sell*]

However, the gravamen of plaintiff's complaint is that his damage resulted from the conspiracy, in violation of the Anti-Trust laws, to prevent him from selling Chevron or any other nationally advertised brand of gasoline. In order for him to recover any damage alleged to have been caused by such conspiracy, he must show he requested the defendants to supply him with such gasoline. *Milwaukee Towne Corp. v. Lowe's, Inc.* [1950-1951 Trade Cases ¶ 62,891], 190 Fed. (2d) 561, Cert. denied 342 U. S. 909; *J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp.* [1954 Trade Cases ¶ 67,757], 212 Fed. (2d) 840; *Vilastor Kent Theatre Corp. v. Brandt* [1955 Trade Cases ¶ 68,102], 18 F. R. D. 199.

It appears from the deposition of the plaintiff that ever since the alleged acts of the defendants in violation of the Anti-Trust laws, he has been supplied with all of the gasoline that he has ordered by the defendant J. H. Foster, The California Company distributor; that such gasoline is delivered to him in tank wagons bearing the signs "Chevron" and that he is billed for the same on invoices bearing the word "Chevron."

It further appears from his deposition that he has continued to purchase for resale The California Company's oil and other lubricating products; it likewise appears that since the alleged wrong complained of, the plaintiff has never sought to purchase a nationally advertised brand of gasoline from any of the other corporate defend-

ants, nor has he sought to purchase from any of the other corporate defendants, except the Texas Company, any products, and that with regard to the Texas Company, he has from time to time ordered kerosene, and it has always been delivered to him.

In view of this testimony by the plaintiff, it affirmatively appears that he will be unable to meet the requirement laid down in *Milwaukee Towne Corp. v. Loew's Inc., supra, J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp., supra,* and *Vilastor Kent Theatre Corp. v. Brandt, supra,* and for that reason summary judgment must be granted.

[*Summary Judgment Granted*]

While the motions are granted for the reason just mentioned, the Court has endeavored to rule upon and discuss all the points presented so that in the event an appeal is taken all the points may be decided.

[*Other Motions*]

There are presently pending before the Court in this case at this time, numerous interrogatories propounded to defendants, motions of several defendants with respect to said interrogatories, and a motion of the plaintiff to strike from the answer of defendant Standard Oil Company. In view of the Court's ruling herein with respect to the motions for summary judgment, the other matters pending have become moot. Nothing in the interrogatories or motions could furnish the demand for nationally advertised gasoline of the other defendants which plaintiff failed to make.

The defendants and each of them are ordered to prepare forms of judgment and submit the same to the Court.

[¶ 68,652] Herren Candy Company v. The Curtiss Candy Company, Raymond G. Wiggins, James W. Lowe, Joseph D. Fields, and Aubrey H. Wood.

In the United States District Court for the Northern District of Georgia, Atlanta Division. Civil Action No. 5413. Filed March 8, 1957.

Sherman Antitrust Act

Combinations and Conspiracies—Termination of Distributorship—Refusal to Deal—Conspiracy Between Corporation and Its Agents.—A candy company, one of its sales managers, and three of its route-salesmen did not unlawfully terminate a company's distributorship of the candy company's products pursuant to a conspiracy to fix prices and to allocate territories. The candy company had no monopoly in the trading area, and the purpose of the company in terminating the distributorship was in furtherance of a policy which it deemed necessary in order to promote and increase the sale of its products. Neither the fixing of the policy which led to the termination of the distributorship nor the termination itself constituted an antitrust violation, and there was no evidence of a conspiracy to fix prices or to allocate territories. The candy company had the right as a single manufacturer to select its customers and to refuse to sell its goods to anyone, for any reason. Also, the sales manager and the route-salesmen were the agents of the candy company, and the company could not conspire with itself.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.400, 2005.785.

For the plaintiff: Gambrell, Harlan, Russell, Moye & Richardson, Atlanta, Ga.

For the defendants: Spalding, Sibley, Troutman, Meadow & Smith, Atlanta, Ga.

[*Complaint*]

BOYD SLOAN, District Judge [*In full text*]: In the complaint here, in brief, plaintiff partnership seeks to recover damages claimed to have been sustained by it as a result of the alleged violation by defendants of § 1 of the Sherman Act.[1] Plaintiff alleges that it is engaged in the business of distributing confections to retailers for resale and that the defendant Curtiss Candy Company is engaged in the manufacture and distribution of confections and that the transactions between plaintiff and said candy company were in interstate commerce; that the de-

[1] 15 U. S. C. A. § 1.

fendants Lowe, Fields and Wood are independent dealers who distribute the products of said candy company to retail dealers in competition with plaintiff and that defendant candy company, through its agent, defendant Wiggins, and the defendants Lowe, Fields and Wood entered into a conspiracy and combination to maintain and fix prices on said confections and to lessen competition in interstate commerce through allocation of territories, such conspiracy consisting of an agreement between them to accomplish such ends by securing the termination of plaintiff as a jobber of the confections manufactured by such candy company and that as a result thereof the public generally has been injured and plaintiff has been damaged. The defendants deny the material allegations of the amended petition.

[*Stipulation*]

The parties to this cause have stipulated the evidence consisting of summaries of the depositions of a number of witnesses, a stipulation of facts and a stipulation of documents and have agreed that the Court may make findings of fact and conclusions of law from the evidence contained therein and enter its judgment in accordance therewith as to the question of liability.

From such evidence, the Court makes the following:

Findings of Fact

[*Plaintiff*]

Plaintiff herein is engaged in the sale of confections to retailers in 17 Georgia counties, selling to approximately 750 retail dealers.

Plaintiff purchased from Curtiss Candy Company certain items of the products manufactured by it continuously from prior to 1942 up to about March, 1955, except for the period during World War II when the candy company discontinued shipping to all jobbers because of war shortages.

[*Route-Salesmen System*]

Prior to 1938 the principal method of distribution of its products by Curtiss Candy Company was through chain stores and jobbers throughout the country, but about that time it began experimenting with a system of distribution through route-salesmen who are now denominated by it as "Curtiss Food Service Distributors." Shortly after the end of World War II, Curtiss, having found the route-salesmen system to be a more successful method of distribution, developed such system throughout the country, covering all states east of the Rocky Mountains except three New England States.

[*Jobbers*]

In 1950 the management of the defendant candy company decided that there was some outlets which were not being adequately covered by the route-salesmen system of distribution and it was determined to selectively take on jobbers who would give emphasis to its products and add to the better distribution thereof. As a result of this decision quite a number of jobbers were placed on the "direct" selling list among which was the plaintiff, Herren Candy Company.

[*Conflict Between Route-Salesmen and Jobbers*]

Plaintiff was one of a number of jobbers who distributed the products sold by it through "wagon distribution" and shortly after Curtiss resumed selling to jobbers it became apparent to it that there was a conflict in the distribution of its products between its route-salesmen and those jobbers who sold by wagon distribution, by reason of the fact that these jobbers were using its product, Baby Ruth and other leaders, to give support to their own or other allied lines in competition with the full Curtiss line, the Curtiss route-salesmen carrying the Curtiss products exclusively, whereas the other wagon distributors carry a great number of products in lines competing with Curtiss products. The Curtiss route-salesmen found that customers assigned to them were getting such leaders through other distributors, such as plaintiffs, foreclosing them from sales to such customers, not only on these products but of the full Curtiss line. Because of this, the route-salesmen made complaints to Curtiss. This was not a localized condition but was one found to exist in other sections of the country.

[*Partial Termination of Jobbers*]

After resumption of sales to jobbers a substantial turnover in the employment of route-salesmen developed in the Atlanta District and because of this turnover and the dissatisfaction among the route-salesmen, it was determined by the management of

Curtiss Candy Company that this duplication of effort should be eliminated, and following a policy of selective determination of which jobber accounts should be retained, and which should be terminated, many wagon jobbers were terminated. This termination was not wholesale, but was accompanied by a thorough examination of each jobber account as to his contribution to the overall distribution of the products of Curtiss Candy Company. Plaintiff was not the only jobber whose account was terminated. All wagon jobbers in the Atlanta vicinity were terminated, as well as in several other cities in the Southeast, and Curtiss retained in Atlanta only four jobbers who take orders and deliver later.

[*Procedure for Removal of Jobbers*]

The evidence shows that the normal procedure for the removal of jobbers which had been previously set up by Curtiss Candy Company was followed with reference to the plaintiff here. Under this procedure a standard printed form is used in connection with adding, cutting off or reinstating jobbers. It is required that two of these forms be filled out, one of which clears through the district manager and the other through the regional direct sales manager, and both forms, after such clearance, are forwarded to Chicago, Illinois to Mr. Phillip Schnering, who is vice-president in charge of sales for the entire domestic and foreign market for Curtiss Candy Company, and any discontinuance or adjustment of a district account must have his final approval. The procedure followed with reference to Herren Candy Company was as follows:

The conflict in the method of distribution of Curtiss products in the Atlanta territory was brought to the attention of Mr. Raymond C. Wiggins who was district sales manager for Curtiss Candy Company through complaints to him by the route-salesmen, and early in March, 1955, after having discussed the matter with Mr. J. H. McInteer, division sales manager, Mr. Wiggins went to the place of business of plaintiff for the purpose of advising, and did advise, Mrs. Herren that there was a duplication of service and a conflict in the method of distribution of the products of Curtiss Candy Company and that they would have to withdraw the account of Herren Candy Company. Mr. Wiggins thus initiated the decision to withdraw the account of plaintiff as a jobber and initiated the request for termination of the account by requesting that Mr. George Mobley, the special accounts salesman who called on Mrs. Herren, fill out the forms. Mr. Mobley did so and recommended thereon that Herren Candy Company be reinstated. One copy of the form was then sent to Mr. Wiggins, the district sales manager, and the other to Mr. Ed Turner, regional direct sales manager. Mr. Turner also recommended on the copy of the form sent to him that plaintiff be reinstated and retained and gave as his reason that the extra volume Curtiss was receiving from plaintiff at that time. After Mr. Wiggins and Mr. Turner had entered their recommendations on the forms, they were forwarded to Mr. Phillip Schnering, the vice-president of Curtiss Candy Company at Chicago, Illinois. Mr. Schnering took them along with him to a company meeting at Asheville, North Carolina and the matter was discussed there, and after such discussion, Mr. Schnering concluded that plaintiff's account was not needed and that Curtiss Candy Company would benefit by terminating the account. The senior regional manager of Division Four and Division Eight, Mr. Perry N. Kasson, who was also present at the Asheville meeting, and with whom the matter was discussed, also agreed that it would be to the best interest of the company that Herren Candy Company should remain cut off as a jobber.

[*Purpose of Termination*]

The purpose of Curtiss in terminating plaintiff as a jobber was in furtherance of a policy which it deemed necessary in order to promote and increase the sale of Curtiss products.

[*Salesmen*]

The salesmen defendants here involved are employed by the defendant Curtiss Candy Company under contracts which can be terminated at will by either party. Under these contracts they are required to devote their full time to the sales of Curtiss products and are prohibited from dealing in other products, and agree upon termination of the contract not to engage in a business competitive to Curtiss for a period of two years in the territory in which they worked while so employed. The contract provides that such "Curtiss Food Service

Distributors" shall operate exclusively in the territory assigned to them and that any customer lists developed by them shall be the property of Curtiss.

The contract provides that Curtiss will sell to such food distributors their requirements of its products and that title to such merchandise passes to the distributors at the time of delivery, and that the merchandise bought is to be paid for at the end of the week in which purchased, Curtiss to pay such distributors a commission of 15% on all money remitted to it. Under the contract Curtiss furnishes to its food distributors a truck for their use in selling and delivering such merchandise and pays all expenses incident to the operation of such truck except for gas. It is required that such truck have Curtiss advertising thereon and the distributors are required to place with customers not less than 25 pieces of Curtiss advertising per week as instructed by it. It is required that each distributor execute a bond to indemnify Curtiss, and Equipment Finance Company, the owner of the trucks, against damage to the truck on account of the distributors' negligent operation thereof.

After employment each such distributor is given at least a week's training by a supervisor. No definite hours of work are required of them, but the territories assigned and the customer lists are so set up as to require five or five and one-half days per week to fully cover such territory and each salesman is expected to call upon all of the customers in his territory at least once a week. While it is suggested that he sell at the prices charged him, he may, and such distributors sometimes do, sell for less in order to get a large order, but when he does so, the discount he gives to such customers necessarily comes out of his 15% commission.

Sales meetings for such distributors in the Atlanta territory are held once a month by Mr. Wiggins, and if a distributor fails to attend a meeting, he attempts to find out the reason therefor.

Each distributor is required to make weekly reports to the company showing his calls and sales for each day and the totals for the week and they are also required to make a monthly inventory report to the supervisor which is subject to audit by such supervisor periodically. They are required to put out Curtiss advertising in retail stores and to hold special promotions at stores in their territory. Income taxes are withheld from their commissions by Curtiss and they participate in the company's group insurance plans and are covered by workmen's compensation, and all but one of the distributors here involved participate in the company's profit sharing plan.

[*No Monopoly*]

Curtiss Candy Company has no monopoly in the candy market in the Atlanta area and gets only 11% of the local candy dollar. It sells about 90% of its merchandise through its route-salesmen or Food Service Distributors as compared to jobbers, and the average route-salesman sells about six times the annual sales volume which plaintiff produced for Curtiss Candy Company.

[*No Conspiracy*]

From a careful consideration of the evidence in this case, the Court finds that it fails to show, by a preponderance thereof, that there was any conspiracy or agreement between any of the defendants to fix or maintain prices or to allocate markets for the sale of its products in violation of § 1 of the Sherman Act, as alleged in the complaint.

Conclusions of Law

This being an action against defendants to recover damages allegedly sustained by plaintiffs as a result of alleged violation of § 1 of the Sherman Act (15 U. S. C. A. § 1) by defendants, this Court, by virtue of the provisions of Title 15 U. S. C. A. § 15, has jurisdiction of the case.

Neither the fixing of the policy which led to the termination of plaintiff as a jobber nor the termination itself was under the evidence in this record a violation of the antitrust laws. See *Hudson Sales Corp. v. Waldrip*, 5 Cir. [1954 TRADE CASES ¶ 67,694], 211 F. 2d 268, 272.

A corporation has the right as a single manufacturer to select its customers and to refuse to sell its goods to any one, for any reason, and does not violate § 1 of the Sherman Act prohibiting conspiracy when it exercises that right through its own officers and agents.

The individual defendants were the agents of the corporate defendant and the cor-

poration could not conspire with itself. See *Nelson Radio & Supply Co. v. Motorola,* 5 Cir. [1952 TRADE CASES ¶ 67,386] 200 F. 2d 911.

No conspiracy to violate the antitrust laws has been shown and no violation of such laws has been established.

The plaintiff can not recover.

A judgment in conformity with the findings and conclusions here reached may be prepared and presented.

[¶ 68,653] Gerald B. Waldron, individually and doing business as Consolidated Brokerage v. British Petroleum Co., Ltd., Cities Service Co., Gulf Oil Corp., Socony Mobil Oil Co., Inc., Standard Oil Co. of California, Standard Oil Co. (New Jersey), The Texas Co.

In the United States District Court for the Southern District of New York. Civil 110-223. Filed March 18, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Where Suit May Be Brought—Proper Judicial District—Corporations—Transacting Business Through Subsidiaries.—An integrated oil company, which did little, if any, business directly in the Southern District of New York, was held to be transacting business in the District by reason of the activities of two of its wholly-owned subsidiaries in the District, and, therefore, a private antitrust action could be brought against the company in the District under Section 12 of the Clayton Act. The activities of the two subsidiaries in the District were activities which in another less elaborate corporate set-up would be conducted directly by branch offices or agents within the District. The fact that the company decided to fragmentize its operations into numerous corporate subsidiaries does not make the resulting operations of the subsidiaries any the less a part of transaction of business by the company. "A corporation may be a fiction of the law but there is no reason to carry the fiction to the extreme of saying that a corporation which has wholly owned subsidiaries performing services in the local jurisdiction which ordinarily would be performed by service employees, or making sales which ordinarily would be made by a sales department, is in fact not transacting business in that jurisdiction, particularly when the entire corporate set-up of the defendant shows that it is designed to operate to a substantial degree through separate corporate entities responding to the wishes and directions of the parent and providing the revenues sought by the parent."

The court also noted that officers and employees of the company frequently found it necessary to come within the District on business. However, the court rejected the plaintiff's contention that many acts of the company in furtherance of the conspiracy alleged in the complaint were committed in the District, and, therefore, venue is established in the District. "The mere allegation of conspiracy would hardly seem sufficient to establish venue in the absence of some showing that the defendant was found in the District or was transacting business in the District."

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.210.

Private Enforcement and Procedure—Suit for Civil Damages—Where Suit May Be Brought—Corporations—Service of Process Outside of District.—Where an integrated oil company was found to be transacting business in the Southern District of New York by reason of the activities of two of its wholly owned subsidiaries in the District, service of process upon an officer of the company in California, where the company's principal place of business was located, was valid. Section 12 of the Clayton Act provides that in an action under the antitrust laws, all process may be served in the district of which the defendant is an inhabitant or wherever the defendant may be found. The company was found in the district where the service of process was made, and under Section 12, process can be validly served in a district other than that in which the action is pending.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.350.

For the plaintiff: Casey, Lane & Mittendorf (Samuel M. Lane and Robert P. Beshar, of counsel), New York, N. Y.

For the defendant (Standard Oil Company of California, appearing specially): Dwight, Royall, Harris, Koegel & Caskey (John F. Caskey, William W. Owens, John R. McCullough, and Herbert C. Earnshaw, of counsel), New York, N. Y.

[*Motions*]

DAWSON, District Judge [*In full text*]: These motions seek (1) an order dismissing this private anti-trust action on the ground of improper venue, and (2) an order vacating the purported service of process.

[*Issue*]

The issue is primarily whether the defendant, an integrated oil company, which does little, if any, business directly in this District, is subject to jurisdiction in this District in an anti-trust action, under the provisions of § 12 of the Clayton Act (15 U. S. C. 22) by reason of certain activities in this District of its wholly owned subsidiaries.

[*Defendants—Complaint*]

The movant, Standard Oil Company of California (hereinafter referred to as "Socal") is one of seven defendant oil companies against whom this treble damage, private anti-trust action has been brought by Gerald B. Waldron, doing business as Consolidated Brokerage. The other defendants are British Petroleum Co., Ltd., Cities Service Co., Gulf Oil Corp., Socony Mobil Oil Co., Inc., Standard Oil Co. (New Jersey), and The Texas Co. The complaint alleges that the defendants' actions in regard to the production and distribution of Middle East oil have violated §§ 1 and 2 of the Sherman Act as well as § 73 of the Wilson Tariff Act.

[*Clayton Act*]

The principal issue now before the Court is one of venue. Section 12 of the Clayton Act, reading as follows, states the districts in which an action under the anti-trust laws can be brought against a corporate defendant:

> "Any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business . . ."

In support of its motion, Socal contends that it (1) is not an inhabitant of this District, being incorporated in Delaware, (2) was not and could not be found here, and (3) does not transact business here.

[*Defendant's Business*]

Socal is a large integrated company in the petroleum industry. In certain of the Western States it operates directly, but it is also a holding company, owning numerous subsidiaries which produce and market petroleum products in various areas of this country and in foreign countries. The company, in a map which is included in its 1955 Annual Report, referred to the area which encompasses the Southern District of New York as one of its "principal marketing areas." The Annual Report also points out that during the year 1955 the company and its subsidiaries had engaged in exploratory and drilling activities in thirty-three States and Alaska, in six Canadian provinces and territories, and in fifteen countries of Latin America. In its exploration, drilling and marketing activities the company operated to a substantial extent through wholly owned subsidiaries.

[*Subsidiaries in District*]

Socal has two wholly owned subsidiaries admittedly doing business in the Southern District of New York. They are the California Commercial Company, Inc. and the California Oil Company.

The California Commercial Company, Inc. (hereinafter referred to as "Commercial") is a New York corporation having its principal place of business within the Southern District of New York at 30 Rockefeller Plaza. Commercial is described in the 1955 Annual Report of Socal as a "Service Company" operating principally in New York and Washington, D. C. All of its capital has been provided by Socal which has continuously owned all of its stock. Commercial occupies substantially the same business suite, retains the same telephone number, and uses the same office equipment as that occupied and used by Socal prior to the organization of Commercial in January 1940. However, Commercial maintains its own books of account, has its own employees and its own bank accounts. It at-

tempts to preserve, from a corporate standpoint, an identity of its own separate and apart from the parent company. Nevertheless, its inter-connection with Socal is active insofar as business operations are concerned.

[*Listings*]

The door at Commercial's main office in New York City currently bears this legend:

California Commercial
Company, Inc.
A Subsidiary of
Standard Oil Company
of California

And on the tenants' directory in the main concourse of the building appears: "Standard Oil Company of California. See California Commercial Company, Room 4507". Furthermore, in addition to listings under its own name in the New York City telephone directory, Commercial has also maintained this listing: "Standard Oil Co. of California. Call California Coml. Co. Inc.—CIrcle 6-4043". Socal's President and Chairman of the Board are directors of Commercial.

[*Services Rendered*]

Although the certificate of incorporation of Commercial includes the power to engage in a wide variety of business activity, including the manufacture, mining, pumping, drilling, refining and distribution of petroleum, Commercial has in fact done none of these. Instead it receives almost $400,000, its entire revenue exclusive of income from securities, for services rendered to Socal and its subsidiaries. By contract, Commercial is compensated for its facilities and services at the rate of cost plus 25%. In each of the last five years, Socal's payments under this contract have aggregated over 95% of the revenue earned by Commercial. Conversely, over 95% of the time expended by Commercial's officers and employees has been consumed in rendering services on behalf of Socal.

As indicated by the papers, the services rendered by Commercial under the contract with Socal may be described as follows:

1. From time to time Commercial receives inquiries from prospective purchasers looking toward the purchase of Socal petroleum products to be delivered almost entirely outside of the Southern District of New York. These inquiries are forwarded to Socal's principal office located in San Francisco, California.

2. Commercial maintains contact with the executive offices of certain business enterprises to which Socal sells petroleum products for delivery and use outside of the Southern District of New York. Customer good will is cultivated by the President and Secretary-Treasurer of Commercial who call at the New York City offices of these business enterprises. These ambassadors of good will possess severely circumscribed power as neither is authorized to accept any order on behalf of Socal or to commit it in any way whatsoever.

3. Responsibility for the distribution of Socal news releases to the Eastern daily and trade press rests upon Commercial which also services all inquiries made by the press regarding the operations of Socal and its subsidiaries. Some of these inquiries are transmitted to Socal's public relations department in San Francisco. In addition, for the use of this department, Commercial maintains a clipping service of New York newspapers on items relating to Socal and the oil industry in general.

4. Infrequently, Commercial ascertains and forwards credit information about a prospective customer. But these inquiries, however, do not relate to purchases ultimately delivered in this district.

5. When Socal's eastern customers erroneously address orders to Commercial, the practice is for Commercial to transmit them to Socal for acceptance or rejection. Occasionally Commercial returns these orders to the customer for proper readdressing. On no occasion, however, would Commercial accept an order.

6. When in New York the employees of Socal and its subsidiaries are assisted by Commercial. It arranges itineraries, purchases transportation and other accommodations, and obtains necessary reservations. In addition, telephone service, office space and secretarial assistance are made available by Commercial.

7. As to four Socal affiliates having offices in New York, Commercial acts as liaison with respect to operational activities in the Middle East. These affiliates are the California Texas Corporation (known as "Caltex"), Bahrein Petroleum Company, Arabian American Oil Company (known as "Aramco"), and Trans-Arabian Pipe Line Co. (known as "Tapline").

[*Sales Subsidiary*]

While Commercial does not directly engage in petroleum marketing, another wholly owned subsidiary does. California Oil Company (hereinafter referred to as "California

Oil") is a Delaware corporation all of whose capital stock is owned by Socal. While California Oil maintains an office in this District at 45 Rockfeller Plaza and is qualified to do business in New York State, its principal place of business is in Perth Amboy, New Jersey. Engaged in the business of processing and selling petroleum in the eastern part of the United States, California Oil sells petroleum products to wholesalers in the State of New York.

Often such sales are made in bulk, with the wholesaler receiving authorization to resell the product under the trademark "Calso." Consequently "Calso" trade-marked petroleum products are warehoused by wholesalers in the Southern District of New York, where retail sales are made by filling station operators. In the aggregate the sales volume in this District of "Calso" petroleum products is substantial. The "Calso" trade-mark is registered with the United States Patent Office by Socal, which has authorized California Oil to use the registered trade-mark. With the permission of Socal, California Oil has also registered the trade-mark "Calso" in accordance with the laws of the State of New York, as well as other States in which it operates. Although owned by Socal, "Calso" is not the trade-mark used by Socal in the sales of gasoline which it makes directly in the Western States.

To aid sales, California Oil distributes certain advertising materials which are forwarded by the wholesalers to retailers for public display and distribution. This material includes calendars, maps, porcelain signs, cardboard placards, as well as other appropriate items, promoting the sale of "Calso" gasoline and RPM lubricating oils.

[*Other Activities in District*]

In addition to its subsidiaries, Socal has other contacts with this District. While the headquarters of Socal is in San Francisco, its officers and employees find it necessary frequently to come within the District on business. During 1955 the principal representatives of Socal made eleven trips, during which a total number of thirty-two business days were spent in the Southern District of New York. The term "principal representative" is limited to the Chairman of the Board, President, Directors, Vice-Presidents, Secretary, Treasurer and Controller.

To establish that venue is in this District, plaintiff, by his attorney, also urges that many acts in furtherance of the conspiracy alleged in the complaint were committed in this District.*

A person would have to be blind to the economic facts of business life if he did not recognize that the activities of Commercial and California Oil in this District are activities which is another less elaborate corporate set-up would be conducted directly by branch offices or agents within the District. It is Socal, and not the subsidiaries, which is the defendant in the present action. What is Socal? It is a large aggregation of invested capital which transacts its business through officers, agents, employees, and through subsidiaries, which in the drilling, production and marketing of oil operate as agents, employees or branch offices would operate. Does the fact that this large business entity, for tax reasons or otherwise, decides to fragmentize its operations into numerous corporate subsidiaries, make the resulting operations of the subsidiaries any the less a part of transaction of business by Socal?

[*Early Rule*]

In the early days of the anti-trust laws it was held that for a corporation to be sued in a district in which it did not reside required that it be present in the district by its officers and agents carrying on the business of the corporation in that district, this being the only way in which it could be said to be "found" within the district; that to make it amenable to service of process in the district, the business must be of such nature and character as to warrant the inference that it had subjected itself to the local jurisdiction, and was present in that district by its duly authorized officers or

* The mere allegation of conspiracy would hardly seem sufficient to establish venue in the absence of some showing that the defendant was found in the District or was transacting business in the District. "Support for the plaintiff's contention that the allegation of conspiracy is sufficient to bring a conspirator under this court's aegis cannot be found in the applicable statutes." Knox, J. in *Hansen Packing Co. v. Armour & Co.* [1932-1939 TRADE CASES ¶ 55,127], 16 F. Supp. 784, at p. 787 (S. D. N. Y. 1936). See to the same effect *Independent Productions Corporation v. Loew's Incorporated* [1957 TRADE CASES ¶ 68,615], — F. Supp. — (S. D. N. Y. McGohey, J., Feb. 5, 1957) but *cf. United States v. Watchmakers of Switzerland Information Center* [1955 TRADE CASES ¶ 68,145], 134 F. Supp. 710, 712 (S. D. N. Y. 1955).

agents. *People's Tobacco Co. v. American Tobacco Co.,* 246 U. S. 79 (1918).

[*Rule Under Clayton Act*]

However, by the Clayton Act, which supplemented the earlier anti-trust laws, the local jurisdiction of the district courts was materially enlarged with reference to suits against corporations. Thus § 12 of the Clayton Act provides that a suit, action or proceeding under the anti-trust laws against a corporation, may be brought not only in the judicial district whereof it was an inhabitant, but also in any district wherein it may be found or *transacts business.* The United States Supreme Court has pointed out that this amendment broadened the venue provisions for anti-trust actions so that even if the corporation was not present by agents carrying on the business for such parent in the sense that it is "found" therein, it would nevertheless be subject to jurisdiction if in the ordinary and usual sense it "transacts business" therein of any substantial character. *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U. S. 359 (1927).

This still left open the question as to whether a corporation could be deemed to be transacting business through the instrumentality of a wholly owned subsidiary in the local jurisdiction. In cases outside the area of the anti-trust laws, the rule had long been established that a foreign corporation which had a wholly owned subsidiary in the local forum which engaged in local activities of soliciting, selling and distributing products, was not amenable to suit in the local forum, provided the separate identity of the two corporations was maintained. *Cannon Mfg. Co. v. Cudahy Packing Co.,* 267 U. S. 333 (1925). See *Berkman v. Ann Lewis Shops,* 142 F. Supp. 417 (S. D. N. Y. 1956).

The amendment to the anti-trust laws brought about by the adoption of § 12 of the Clayton Act resulted in a more liberal venue provision in anti-trust actions than in most other types of action, and this liberality was intentionally sought by Congress. See discussion of the Congressional history in *United States v. National City Lines* [1948-1949 Trade Cases ¶ 62,259], 334 U. S. 573, at 583-588 (1948). The Supreme Court gave effect to this liberality of venue by holding that the "transacting business" test was fulfilled if the corporate defendant were engaged "in any substantial business operations" in the local jurisdiction. *United States v. Scophony Corp.* [1948-1949 Trade Cases ¶ 62,238], 333 U. S. 795, 807 (1948). The Supreme Court indicated that "practical, business conceptions" should be substituted "for the previous hair-splitting legal technicalities encrusted upon the 'found'—'present'—'carrying on business' sequence." *Id.* at 808. See Note, *Doing Business as a Test of Venue,* 56 Colum. L. Rev., 394, 416 (1956).

A corporation may be a fiction of the law but there is no reason to carry the fiction to the extreme of saying that a corporation which has wholly owned subsidiaries performing services in the local jurisdiction which ordinarily would be performed by service employees, or making sales which ordinarily would be made by a sales department, is in fact not transacting business in that jurisdiction, particularly when the entire corporate set-up of the defendant shows that it is designed to operate to a substantial degree through separate corporate entities responding to the wishes and directions of the parent and providing the revenues sought by the parent. We would be exalting fiction over fact if we were to conclude that under those circumstances the parent company was not in fact transacting business in this District through the instrumentality of its wholly owned subsidiaries.

[*Prior Decisions*]

There have been two occasions in the past where Socal has successfully contested venue in this jurisdiction. *Amtorg Trading Corp. v. Standard Oil Company of California,* 47 F. Supp. 466 (S. D. N. Y. 1942), was an action in admiralty started by a libel by Amtorg Trading Corporation. The court held that doing of business by a foreign corporation through a subsidiary does not constitute doing business within the State, so as to make the foreign corporation amenable to process in this State in such an action.

The other action was one brought under the anti-trust laws. *Winkler-Koch Engineering Co. v. Universal Oil Products Co.* [1946-1947 Trade Cases ¶ 57,500], 70 F. Supp. 77 (S. D. N. Y. 1946). In that case it was contended that Socal was transacting business in this District through California Commercial Company, Inc., its subsidiary. The court in that case held that the word "found" is synonymous with "doing busi-

ness" under § 12 of the Clayton Act, and held that the transaction of business in a district by a subsidiary does not constitute business done by the parent if the subsidiary maintains separate legal entity. Hence it was held that Socal was not subject to jurisdiction in the action.

[*Scophony Case*]

Subsequent to the decision in that case the United States Supreme Court had occasion to consider the meanings of the words "found" and "transacting business" in § 12 of the Clayton Act. *United States v. Scophony Corp.* [1948-1949 TRADE CASES ¶ 62,238], 333 U. S. 795 (1948).

The Supreme Court pointed out that § 12 of the Clayton Act is an enlargement of § 7 of the Sherman Anti-Trust Act, which had provided for suit in the district in which the defendant "resides or is found." The Court held that the question to be determined was whether the corporation in fact transacted business in the district where venue was sought. It said that this was to be determined by substituting practical business conceptions for the hair-splitting legal technicalities encrusted upon the "'found'—'present'—'carrying on business' sequence."*

It is doubtful if a court today, guided as it must be by these later opinions of the United States Supreme Court, could reach the same conclusion as Judge Bright did in the *Universal Oil Products* case.

[*Transacting Business*]

It is the conclusion of the Court that Socal is transacting business in the Southern District of New York and that therefore the instant action may be brought against it in this District under the provisions of § 12 of the Clayton Act.

Nor can Socal properly contend that it would be a violation of due process to find that it is subject to jurisdiction in this District. Certainly Socal has more than "minimum contact" with this jurisdiction which due process might require as a basis for asserting jurisdiction over it. See *International Shoe Co. v. Washington,* 326 U. S. 310, at p. 316 (1945); nor should the maintenance of the action here offend traditional notions of fair play and substantial justice. See *Milliken v. Meyer,* 311 U. S. 457, at p. 463 (1940).

[*Related Actions*]

Currently Socal is a defendant in this court in two pending cases which have some relationship with the subject matter of this action:

(1) *United States v. Standard Oil Company of California,* Civil Docket No. 78-152;

and

(2) *United States v. Standard Oil Company (New Jersey) et al.,* Civil Docket No. 86-27.

In the first mentioned action, the United States seeks to recover from Socal and others certain overcharges alleged to have been made in connection with the purchase of Middle Eastern oil under the ECA and MSA Economic and Military Aid Programs. Defendant did not contest the jurisdiction or venue of this Court in that case.

In the second case, the Government has charged the Standard Oil Company of California and four other American oil companies with monopoly and conspiracy to restrain trade in oil production, refining, transportation and marketing in foreign areas, the major one of which is the Middle East area. The action was originally filed in the District of Columbia. Socal joined in defendants' motion to transfer that action to this court on the basis of trial convenience. The trial court found that the vast preponderance of the documentary evidence and principal witnesses were located here and hence granted the motion. Defendant's moving papers contained an affidavit by a Socal Vice-President providing a geographic self-portrait:

> "In statistical terms, San Francisco is the headquarters for companies in which Socal's interest in net assets represents less than 25 per cent of our overseas investments, and New York, New York, is the United States headquarters for companies in which our interest in net assets represents more than 75 per cent of such overseas investments. In terms of our equity in income rather than net assets, San Francisco is the United States headquarters for companies producing about 10 per cent of such overseas income, and New York, New York, the United States headquarters for companies producing 90 per cent of such income."

[*Service of Process*]

The second motion presented is a motion to vacate and set aside the service of process

* "The practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character' became the test of venue." (p. 807.)

upon Socal resulting from the service of process upon G. M. Foster, an officer of said company, in San Francisco, California. The argument is made that extra-territorial service of process is void unless plaintiff can establish that venue is properly laid in this District. As the Court has held that venue is properly laid in this District this argument falls of its own weight. The motion papers show that process was served upon an officer of Socal in San Francisco, California. The papers also show that Socal is a Delaware corporation whose principal place of business is in the State of California. Section 12 of the Clayton Act (15 U. S. C. 22) provides that in an action under the anti-trust laws "all process . . . may be served in the district of which it [the defendant] is an inhabitant, or wherever it may be found." The papers show that Socal is found in the district where the service of process was made and under § 12 process can be validly served in a district other than that in which the action is pending. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 357 (1927). Therefore the service of process was properly made.

[*Motion Denied*]

The motions to dismiss this action on the ground of improper venue and to vacate the purported service of process are denied. So ordered.

[¶ 68,654] Sunbeam Corporation v. Hess Bros.

In the Court of Common Pleas of Lehigh County, State of Pennsylvania. September Term, 1956. No. 14. In Equity. Dated March 11, 1957.

Pennsylvania Fair Trade Act

Fair Trade—Enforcement of Fair Trade Prices—Suit for Injunctive Relief—Defenses —Enforcement Policy.—In an action to enjoin a retailer from selling a fair trader's products at less than their established prices by accepting trade-ins which were not permitted under the fair trader's contracts, the retailer was held to be entitled to a list of the fair trader's known retail outlets in the trading area and to learn what notices of violations have been reported to the fair trader and what action has been taken by the fair trader pursuant to such notices. However, shopping reports and any communications between officials of the fair trader or with other retailers made or secured in anticipation of litigation did not have to be produced. Also, it was held that where the defense of non-enforcement set forth in the Pennsylvania Fair Trade Act is asserted, specifications of persons and dates must be made. However, the general defense of lack of enforcement can be pleaded without the specification of details.

See Fair Trade, Vol. 1, ¶ 3440.40.

Fair Trade—Enforcement of Fair Trade Prices—Suit for Injunctive Relief—Defenses —Antitrust Violations.—In an action to enjoin a retailer from selling a fair trader's products at less than their established prices by accepting trade-ins which were not permitted under the fair trader's contracts, the retailer was not entitled to the production of documents of the fair trader for the purpose of establishing its defense that the fair trader was violating the Sherman Act, the Clayton Act, and the McGuire Act. The retailer contended that the fair trader sold its products direct to chain stores at the same price at which it sold to distributors, and, therefore, it violated provisions against "horizontal" agreements against competition and treating differently persons in competition with each other. The court ruled that the question of whether or not the fair trader has violated any federal laws need not be determined because any such violations, if they do exist, bear no relation to the fair trade agreement in the suit. Also, the question whether there is unlawful discrimination as to wholesale costs between chain stores and other retailers did not have to be decided because the retailer could not complain that chain stores enjoyed a higher margin of profit.

See Fair Trade, Vol. 1, ¶ 3428.

Fair Trade—Enforcement of Fair Trade Prices—Suit for Injunctive Relief—Defenses—Trade-in Policy.—Where a fair trade agreement allowed for no trade-ins upon certain articles, the trade-in policy on other articles was held to be irrelevant unless there is evidence of lack of enforcement against known violators of trade-in restrictions. The fact that distributors did not probe retailers and that the fair trader did not probe wholesalers to determine whether or not trade-ins were received in accordance with the fair trade agreement was irrelevant, since each had the right to assume that there were no violations of the trade-in restrictions.

See Fair Trade, Vol. 1, ¶ 3292, 3440.40.

Fair Trade—Enforcement of Fair Trade Prices—Suit for Injunctive Relief—Proof of Damage.—In a fair trade enforcement action for injunctive relief, the question whether or not the fair trader lost business in the trading area by reason of a retailer's violations of the fair trader's contract was held to be irrelevant. The public policy of the state in enacting the fair trade act supplies the proof of loss.

See Fair Trade, Vol. 1, ¶ 3362.40.

For the plaintiff: Butz, Hudders, Tallman & Rupp, by Donald E. Wieand, Allentown, Pa.

For the defendant: Orrin E. Boyle, Allentown, Pa.; and Schnader, Harrison, Segal & Lewis, Philadelphia, Pa.

Opinion

[*Fair Trade Action*]

JAMES F. HENNINGER, President Judge [*In full text*]: Sunbeam has brought this complaint in equity to enjoin Hess Bros. from selling Sunbeam products at less than listed fair trade prices, namely, by accepting the trade-in of an electric shaver against the purchase price of products, for which trade-ins are not permitted under Sunbeam's published price lists.

A preliminary injunction was issued and continued and the case set for final hearing beginning February 26, 1957. When this hearing date was fixed, it was discovered that two essential witnesses, Blackburn and Ploner, officials of Sunbeam could not be present at that time because of previous compelling commitments.

I. APPLICATION FOR PROTECTIVE ORDER

[*Depositions—Production*]

On January 4, 1957, Hess filed notice of depositions of these witnesses at Allentown, Pa., on January 14, 1957 under Pennsylvania Rule of Civil Procedure 4003 relating to depositions for use at trial and Pennsylvania Rule of Civil Procedure 4007, depositions for discovery. On January 14, 1957, Hess applied for production by Sunbeam on January 30, 1957 of

(a) correspondence, reports and records relating to shoppings of plaintiff's products between June 1954 and the present date and

(b) books, invoices, correspondence and other records showing shipments of Sunbeam products by plaintiff in or to the Allentown-Bethlehem trading area since January 1955 until the present date;

(c) list of retailers selling plaintiff's products in the Bethlehem trading area;

(d) list of retailers to whom direct sales are made;

(e) schedules of prices to distributors;

(f) correspondence and records concerning allegations of fair trade violations;

(g) plaintiff's instructions to and correspondence with distributors and retailers concerning trade-ins.

[*Protective Order*]

Sunbeam has asked for a protective order under Pa. R. C. P. 4012(a) averring (1) depositions sought in bad faith for irrevelant information (2) unreasonable expense to the witnesses, residents of Illinois to come to Allentown (3) if permitted, the depositions ought to be taken in Illinois (4) if in Illinois, plaintiff should receive reasonable attorney fees (Pa. R. C. P. 4008) or (5) pay the witnesses traveling expenses to Allentown (6) determine whether the depositions are to be taken under Pa. R. C. P. 4003 or 4007 (7) that depositions be limited to fair trade and trade-in policies.

Simultaneously with the filing of the notice for taking depositions, defendant's answer was filed to which plaintiff filed preliminary objections. This made it impos-

sible to hold the final hearing beginning February 26th because the preliminary objections had not been disposed of. Since the original purpose of the depositions was to take the testimony of witnesses who could not personally attend Court on February 26th and since presumably these witnesses will be able to attend a future hearing in person, the necessity of taking their depositions for trial no longer exists. If at a later date plaintiff states that it does not intend to produce these witnesses at trial, a renewed application can be made to take their testimony by deposition for use at trial.

[*Witnesses*]

We take it then that the application for depositions as it stands today is for purposes of discovery under Pa. R. C. P. 4007 and no longer under Pa. R. C. P. 4003. Under these circumstances, we believe that defendant cannot compel plaintiff to produce these witnesses within the jurisdiction of this Court and defendant has produced no authority to indicate any obligation on the part of a litigant to produce his witnesses for discovery purposes at the behest of the adverse party. It is enough that the litigant informs his adversary of the identity and whereabouts of witnesses. The procuring of the witnesses under Pa. R. C. P. 4007(b) for the discovery of facts is up to the party desiring the testimony. Anderson, Pennsylvania Civil Practice, Vol. 5, page 217, and cases therein cited.

On the other hand, we are not inclined to grant plaintiff any attorney fees to attend the taking of depositions in Chicago, because plaintiff's headquarters are in Chicago and its principal counsel resides there.

[*Documents*]

When we come to the petition for production of documents under Pa. R. C. P. 4009, we weigh the demands in the light of relevancy and of the restrictions of Pa. R. C. P. 4011.

Pa. R. C. P. 4011 in its present form, reads as follows:

> "No discovery or inspection shall be permitted which
>
> "(a) is sought in bad faith;
>
> "(b) causes unreasonable annoyance, embarrassment, expense or oppression to the deponent or any person or party;
>
> "(c) relates to matter which is privileged or would require the disclosure of any secret process, development or research;
>
> "(d) would disclose the existence or location of reports, memoranda, statements, information or other things made or secured by any person or party in anticipation of litigation or in preparation for trial or would obtain any such thing from a party or his insurer, or the attorney or agent of either of them, other than information as to the identity or whereabouts of witnesses; or
>
> "(e) would require the making of an unreasonable investigation by the deponent or any party or witness."

[*Enforcement Campaign*]

It is our opinion that defendant is clearly entitled to a list of plaintiff's known retail outlets in this trading area. It is further entitled to learn what notices of violations have been reported to plaintiffs and what action has been taken by plaintiff pursuant to such notices of violation. This might involve the text of warning letters to determine whether there has been a bona fide campaign of enforcement.

Shopping reports and any communications between officials of the company or with other than retailers, would be memoranda or statements made or secured in antipication of litigation and therefore not demandable under Pa. R. C. P. 4011(d). Defendant invokes the authority of *Bradley v. Phila. Transportation Co.,* 87 D&C 548, 550; *Stebelski v. Phila. Transportation Co.,* 6 D&C 2nd 627, 631, which held that information received in the general conduct of one's business must be made available, although similar reports made in view of litigation are exempt. We would hold, however, that all reports on shoppings made after complaint by defendant are shoppings in preparation for litigation, because of the defense of failure to enforce. The fact that the shoppings might also give rise to litigation with the violating retailer does not make it any the less a shopping in relation to the present litigation. Furthermore, if the reports were made for any litigation, they would be immune for otherwise one litigant could procure what was inviolate to another and vice versa and the rule of exclusion would be a nullity.

We see no reason, however, why defendant should not have access to any reports or letters that have already been exhibited

to its counsel in previous hearings or that may eventually be produced, despite their present immunity under Pa. R. C. P. 4011(d).

Item "(b)" concerning shipments of Sunbeam products to this area will be refused, because of unnecessary expense and irrelevancy; and items "(d)", "(e)" and "(g)" because of irrelevancy. These items also concern Preliminary Objections Nos. 1 and 2 to defendant's New Matter in its Answer.

[*Antitrust Violations*]

Defendant, in Requests Nos. "b, d, e and g", is seeking to discover evidence that plaintiff itself is violating the Sherman Antitrust Act, 15 U. S. C. 1-8, the Clayton Antitrust Act, 15 U. S. C. 13, 13a, 13b and 21a and the McGuire Fair Trade Act, 15 U. S. C. 45.

As we understand defendant's contention, it is that plaintiff has violated above Federal Acts because it has sold its products direct to chain stores at the same price at which it sold to distributors, thus, in defendant's opinion, violating the provisions against "horizontal" agreements against competition and treating differently persons in competition with each other. This is, of course, not strictly a horizontal agreement for the party of the one part is never in the same class as the parties of the other part, although the parties of the other part are not in the same class with each other, some being distributors and other retailers. It is treating persons in the same class differently and the question might arise whether there is a valid distinction, recognizable under these Acts to justify a difference in prices or whether it is unjust discrimination.

This case differs from *U. S. v. McKesson & Robbins, Inc.* [1956 TRADE CASES ¶ 68,368], 351 U. S. 305, in which a resale price agreement with wholesalers was stricken down because the manufacturer was also a wholesaler and, therefore, the contract was condemned as one between persons in the same class.

We do not intend, however, to go into the question of whether or not plaintiff has violated any Federal laws, because we believe that any such violations, even if they exist, bear no relation to the agreement in suit and therefore cannot be here interposed as a defense. We find support in this in *obiter dictum* in the *McKesson & Robbins* case, *supra*, where it is stated (p. 309),

"The Government does not question the so-called vertical 'fair trade' agreements between McKesson and retailers of McKesson brand products. It challenges only appellee's price-fixing agreements with independent wholesalers with whom it is in competition."

If there is unlawful discrimination as to wholesale costs between chain stores and other retailers, that is for the Federal Courts to supervise. So long as the chain stores adhere to the fair trade retail prices established by plaintiff—and we have not been informed of any such violation—defendant may be prejudiced in its profits but not in its competition. Since defendant by cutting prices wants still less profits than it would be allowed at fair trade prices, it can hardly complain in this action that the chain stores enjoy a higher margin of profit than it is permitted.

[*Trade-Ins*]

If this were a situation in which trade-ins were permitted, we might have to look into the vexing problem of trade-ins. We can recognize the reason for accepting trade-ins on the purchase of a similar article in order to stimulate earlier discarding of a used device. We are disturbed by the placing of an arbitrary value on a useless article to the prejudice of a cash buyer. We have seen the abuses that have arisen from this practice. It is time enough, however, to pass upon this question when it arises.

In our case the agreement voluntarily entered into by defendant with the current price list allowed for no trade-ins upon the articles listed and therefore the trade-in policy on other articles is irrelevant unless there is evidence of lack of enforcement against other known violators of trade-in restrictions.

We use the expression "known violators" deliberately. Defendant stresses the point that distributors did not probe retailers and that plaintiff did not probe wholesalers to determine whether trade-ins were received strictly in accord with price list regulations. While the duty is laid on those who wish to maintain fair trade prices to police violations, we are not convinced that business must be conducted upon a basis of suspicion rather than on that of "credit," in the broader use of the latter term. Until, therefore, suspicions were aroused, each had the right to assume that the other was dealing fairly.

[*Loss of Business*]

This leaves the problem of whether plaintiff must demonstrate that it has lost business in this community by reason of defendant's violations of the fair trade agreement.

We consider this irrelevant for several reasons. In the first place, loss of business is a relative matter. Although plaintiff's business may have been the same or greater than before, it might have been still greater but for cheapening of its brands by discount sales. Furthermore, it is more than likely that a price war would cause a flurry of increased sales in the war area.

The real reason, however, why a showing of immediate loss to the manufacturer is unnecessary is because the public policy of the state in enacting the law protecting trade-name brands supplies the proof of loss. The title on the basic Act of Assembly of June 5, 1935, P. L. 266, 73 P. S. 7 ff., reads:

> "An act to protect trade-mark owners, distributors and the public against injuries and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name."

The effect of cheapening a brand name may take years to be felt, just as it may take years to establish its standing. The immediate effect of a price war, therefore, is of no moment. To make proof of immediate loss an issue of fact in each case would be to substitute our own economic theories for the declared public policy established by the General Assembly.

Recognizing the superior knowledge of the parties as to the problems involved we shall first give them an opportunity to draft an order in accordance with this opinion, without prejudice to the right of either to except to the rulings of the Court.

II. Preliminary Objections

Preliminary Objections Nos. 1, 2, 3(c) and (f) have been considered in what has been stated concerning a protective order. It is true that one does not ordinarily prejudge sections of a pleading any part of which asserts a valid claim or defense and we do so now only because we have had to decide the issue on the protective order and in order to save the parties the necessity of producing evidence which would be rejected at trial.

Defendant has suggested that we should allow all proof so that any error can be corrected upon appeal. Unfortunately, the trial courts must make decisions whenever called upon to do so and stand by them and then take the consequences of their correctness upon appeal.

Preliminary Objection 3(a) must be sustained. In paragraph 1 of defendant's new matter it is interposing the defense added to the Fair Trade Act of 1935 by the Act of 1956, F. [P.] L. 1756, 73 P. S. 8, which reads,

> "It shall, however, be a complete defense to such an action for the defendant to prove that the party stipulating such price, after at least seven days' written notice given by the defendant prior to the commencement of such action, failed to take reasonable and diligent steps to prevent the continuation of such advertising, offering for sale or selling, by those in competition with the defendant, who were specified in such notice."

Assuming that mere averment of nonregulation could be proved under a general statement to that effect, we are of the opinion that the language quoted, calls for specification of persons and dates if that absolute defense is being relied upon.

In line with the above assumption, we believe that the general defense of lack of enforcement can be pleaded without specification of details and that defendant's paragraphs 2 and 5 of new matter will suffice. We arrive at this conclusion the more readily, since the preliminary hearing has apprised the parties of the charges of nonenforcement.

Nor are we concerned about Preliminary Objection 3(e) raising the defense that plaintiff's trade-in policies are a subterfuge. We have thoroughly explored those policies at the preliminary hearing and what remains is mostly a matter of interpretation rather than one of proof. We are assuming that defendant is referring to the application of trade-ins to other products than shavers. We are not now concerned with plaintiff's trade-in policy as related to shavers, for shavers are not a part of this litigation. Nor are we impressed by the contention that since distributors paid $5 apiece for used shavers, they had that value and that defendant bought a valuable article from purchasers of other products and that the purchaser then paid full price. All of the advertising and display cards negate that theory.

Now, March 11, 1957, a protective order will be issued in accordance with this opinion; both parties may submit a draft of such order within fifteen (15) days after date without prejudice to their right to except to such order.

It is further ordered that Preliminary Objections Nos. 1, 2 and 3(a), (e) and (f) are sustained and paragraphs 4 and 12 of new matter in defendant's answer are stricken and it is ordered that defendant amend paragraph 1 of its new matter, specifying the names and dates of alleged violators of the Fair Trade Act as provided to plaintiff after the effective date of the Act of 1956, P. L. 1756. The other preliminary objections are dismissed.

[¶ 68,655] E. I. du Pont de Nemours & Company v. Edward Miller, individually and doing business as Miller's Washer Sales & Service.

In the Court of Common Pleas of Schuylkill County, State of Pennsylvania. November Term, 1956. No. 9. Dated March 4, 1957.

Pennsylvania Fair Trade Act

Fair Trade—Constitutionality of Pennsylvania Fair Trade Act—Nonsigner Provision.—The contention that the Pennsylvania Fair Trade Act as applied to nonsigners of fair trade contracts is unconstitutional was rejected. While such statutes had been declared violative of the Sherman Antitrust Act, the McGuire Act made fair trade laws such as the Pennsylvania Fair Trade Act constitutional as to the sale of products in interstate commerce. Also, the preponderance of opinion in the lower federal courts has sustained the constitutionality of the McGuire Act.

See Fair Trade, Vol. 1, ¶ 3040.40, 3085.40, 3258.40.

Fair Trade—Enforcement of Fair Trade Prices—Suit for Injunctive Relief—Defenses—Enforcement Policy.—A nonsigner's contention that, under the 1956 amendment to the Pennsylvania Fair Trade Act, he must have notice of a violation of the Act before any legal proceeding can be instituted against him was overruled because the fair trader alleged that it gave such notice to the nonsigner.

See Fair Trade, Vol. 1, ¶ 3440.40.

For the plaintiff: Hicks, Williamson, Freidberg & Jones, and Richard H. Klein.

For the defendant: William J. Krencewicz.

[*Fair Trade Action*]

PALMER, Presiding Judge [*In full text*]: On October 21, 1956, the plaintiff, E. I. DuPont de Nemours & Company, a corporation, filed a complaint in equity asking for an injunction under the Pennsylvania Fair Trade Act and alleging that the defendant, Edward Miller, individually and doing business as Miller's Washer Sales & Service, had sold products manufactured by the plaintiff corporation known under the trade names of "Zerex" and "Zerone" at prices less than the minimum retail sale prices stipulated in Fair Trade Contract made between the plaintiff and various dealers.

A hearing was held before this Court and an injunction was granted restraining defendant from selling the stipulated products at a price less than the established price. On November 19, 1956, the defendant filed preliminary objections to the complaint.

[*Verification of Complaint*]

The defendant's first preliminary objection is that the verification to the complaint does not comply with Rule 1024 of the Rules of Civil Procedure. The verification in this case was made by Chalmers H. Tilley, Jr., who is designated as Sales Representative of the Polychemical Department of the plaintiff corporation, for Central Pennsylvania. He avers that "the averments contained in the foregoing complaint of which he has personal knowledge are true and correct and those averments of which he has information from others he verily believes to be true."

This constitutes substantial compliance with Rule 1024 *supra.* The contention of the defendant that the verification must be made by an officer of the plaintiff corporation is without merit. It is highly improbable that an officer of the plaintiff corporation in this case could honestly make a verification, in which he stated that he had personal knowledge of the facts in a case of this kind. By necessity, an agent of the corporation familiar with all the facts must make the verification.

[*Notice*]

The second Preliminary Objection of the defendant is in the form of a demurrer and relates to the fact that the defendant is not the signer of a sales contract with the plaintiff corporation and therefore under the amendment of the Act of June 5, 1955 [1935], P. L. 266, 73 P. S. sec. 8, as amended by the Act of May 25, 1956, 8 Purdons Legal Service p. 1961, the defendant must have notice of a violation of the above Statute before any legal proceeding can be instituted against him. The defendant complains that the complaint does not aver such notice to him.

This objection is overruled as the plaintiff clearly avers that it gave such notice in paragraph 6 of the complaint. If the defendant denies having received said notice or alleges that the notice was not in proper form, it may be raised in the defendant's answer as a matter of defense. It is not properly raised as a preliminary objection.

[*Constitutionality*]

The third and final preliminary objection of the defendant attacks the constitutionality of the Pennsylvania Fair Trade Act of 1935, and its amendments, the Act of 1935, *supra.* The defendant alleges that the Statute is unconstitutional as to non-signers of sale agreement with the manufacturer. The Pennsylvania Fair Trade Act of 1935 *supra,* and its amendments, was declared constitutional in the case of *Burche v. General Electric Company* [1955 TRADE CASES ¶ 68,078], 382 Pa. 370, in so far as it applies to non-signers of sales agreements products in interstate commerce. Statutes of this nature had been declared unconstitutional in their application to non-signers of sales agreements engaged in interstate commerce in the case of *Schwegmann Brothers v. Calvert Distillery Corporation* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384. The statutes were declared in violation of the Sherman Anti-Trust Act.

In 1952, Congress amended the Federal Trade Commission Act by a statute known as the McGuire Amendment for the express purpose of setting aside the ruling in *Schwegmann Brothers & Calvert Distillery Corporation, supra.* This amendment made Fair Trade Practice Acts such as the Pennsylvania Statute of 1935, *supra,* constitutional as to sale of products in interstate commerce.

The constitutionality of the McGuire Act has not been passed upon by the Supreme Court of the United States. The preponderance of opinion in the lower Federal Courts has sustained its constitutionality. For this reason, this preliminary objection is overruled.

And now, March 4, 1957, the defendant's preliminary objections are overruled and defendant is granted twenty days from this date to file an answer on the merits.

And now, March 4, 1957, on motion of W. J. Krencewicz, Esq., attorney for defendant, an exception is allowed.

[¶ 68,656] United States v. Loew's Incorporated, et al.

In the United States District Court for the Southern District of New York. Equity 87-273. Filed March 19, 1957.

Case No. 434 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Consent Decree—Intervention.—An operator of motion picture theatres was not permitted to intervene in a Government antitrust action in which an application for additional time to dispose of certain theatre interests was pending. Since this was an action

pursuant to Section 4 of the Sherman Act, and hence enforced by the United States in the public interest, intervention by private persons must be denied for reasons of sound public policy. The retention of jurisdiction clauses of the final decrees entered in the action exclude intervention by private persons. Also, the operator's request to be heard as *amicus curiae* was denied.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8381, 8421.

For the plaintiff: Victor R. Hansen, Assistant Attorney General, Antitrust Division, Department of Justice.

For the intervenor: Socolow, Stein & Seton (Monroe E. Stein, of counsel), New York, N. Y., for Syndicate Theatres, Inc.

For the applicants: O'Brien, Driscoll & Raftery (Edward C. Raftery, of counsel), New York, N. Y., for Lucille A. Reagan and Charles M. Reagan.

For a consent decree entered in the U. S. District Court, Southern District of New York, see 1952 Trade Cases ¶ 67,228.

[*Intervention*]

PALMIERI, District Judge [*In full text*]: This is a motion by Syndicate Theatres, Inc., (Syndicate) an Indiana corporation, to intervene, pursuant to Rule 24 of the Federal Rules of Civil Procedure, in the pending application of Lucille A. Reagan, and her husband, Charles M. Reagan, for additional time to dispose of Mrs. Reagan's stock in Denham Theatres, Inc.

[*Disposition of Theatre Interests*]

Charles M. Reagan is General Sales Manager of Loew's, Inc. Mrs. Reagan has a 50% interest in a first-run theatre in Denver, Colorado, and a 25% interest in four first-run theatres in Indianapolis, Indiana, through ownership of 50% of the stock of Denham Theatres, Inc. At the time of the entry of judgment in this action, an undertaking was secured requiring the disposition of Mrs. Reagan's interest in these theatres by February 6, 1955. The purpose of this undertaking was to eliminate any preferment of these theatres in the licensing of pictures distributed by Loew's, Inc. Extensions of time have been heretofore granted and on adequate grounds. The present posture of the matter is that there is a pending application for a further extension of time beyond April 6, 1957, for the disposition of Mrs. Reagan's stock in Denham Theatres, Inc. It should be noted that the licensing of any Loew's pictures at the Regan threatres has been subjected to continuous scrutiny by the Attorney General and has been so restricted as to provide competitors with advantages which perhaps exceed those contemplated by the judgment and undertaking.

[*Intervenor*]

Syndicate, the proposed intervenor, does not operate any theatres either in Denver, Colorado, or in Indianapolis, Indiana. It asserts that it operates motion picture theatres in cities located from 20 to 80 miles outside of Indianapolis. It is also plaintiff in a private antitrust suit pending in the Southern District of Indiana, in which Loew's Inc. is one of the defendants.

Mr. and Mrs. Reagan oppose granting intervention to Syndicate, and further oppose its being permitted to appear as *amicus curiae*. The Attorney General opposes intervention by Syndicate but does not oppose its being heard as *amicus curiae*.

[*Indiana Suit*]

An examination of the pleadings in the private antitrust suit pending in the Indiana District Court indicates that a substantial basis for the proposed intervention by Syndicate here rests upon several of the allegations and charges contained in its complaint in the Indiana action. Inasmuch as that action is being actively litigated and will be tried before a jury demanded by Syndicate, I cannot escape the conclusion that Syndicate's application for intervention is motivated by its desire to give aid and comfort to its position in its private antitrust suit in Indiana. Moreover, a very considerable and unwarranted inconvenience would be foisted upon the litigants as well as the Courts if Syndicate were permitted, in effect, to accomplish simultaneous litigation of the same issues before two district courts.

[*Federal Rules*]

Rule 1 of the Federal Rules of Civil Procedure requires that the rules be construed so as "to secure the just, speedy and inexpensive determination of every action." Quite the opposite result would be reached by the granting of intervention here, since Loew's Inc. would be compelled to meet the same issues in two distant courts at the same time. I cannot conceive of any useful purpose being served by such a procedure. But it is plain that the occasions for harassment, delay and inconvenience would be innumerable.

[*Government Decree*]

Moreover, the retention of jurisdiction clauses of the final decrees entered on February 8, 1950, and substantially incorporated in the consent judgment as to Loew's, Inc. provide:

> "Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree, and no others, to apply to the court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief."

Clearly, intervention such as that now sought was expressly excluded by these clauses. Since this is an action pursuant to Section 4 of the Sherman Act, and hence enforced by the United States in the public interest, intervention by private persons must be denied for reasons of sound public policy. See *United States v. American Society of Composers, Authors and Publishers* [1950-1951 TRADE CASES ¶ 62,898], 11 F. R. D. 511 (S. D. N. Y. 1951); *United States v. Bendix Home Applicances* [1950-1951 TRADE CASES ¶ 62,546], 10 F. R. D. 73 (S. D. N. Y. 1949); *United States v. General Electric Co.* [1950-1951 TRADE CASES ¶ 62,731], 95 F. Supp. 165 (D. N. J. 1950). Intervention in the *Paramount* case has been denied on a number of occasions on the same grounds. *United States v. Paramount Pictures, Inc.* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131, 176-78 (1948); *Sutphen Estates, Inc. v. United States* [1950-1951 TRADE CASES ¶ 62,936], 342 U. S. 19 (1951); *Partmar Corp. v. United States* [1948-1949 TRADE CASES ¶ 62,497], 338 U. S. 804 (1949).

In *United States v. Loew's, Inc.* [1955 TRADE CASES ¶ 68,220], 136 F. Supp. 13 (S. D. N. Y. 1955), intervention was denied to an exhibitor allegedly in competition with Loew's, Inc. on the basis of the retention of jurisdiction clauses hereinabove quoted.

Intervention in this complex litigation by Syndicate will tend to prolong and protract the proceedings. Moreover, it will inflict an additional and heavy burden upon the Government and impair its control over these proceedings.

It is plain that if intervention were permitted, it could not be of right, but only by permission of the Court. Rule 24(b) enjoins the Court, in exercising its discretion, to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." For the reasons indicated, permission must therefore be withheld.

[*Right To Be Heard*]

I have considered the alternative of permitting the proposed intervenor to be heard as *amicus curiae*, and I feel constrained to decline to do so; first, because it has made plain that it seeks nothing short of the opportunity to conduct what it terms "a vigorous adversary proceeding" under circumstances which would effectively displace the Attorney General as vindicator of the public interest; and second, because its effectiveness as *amicus curiae* is impaired in view of its current position as an adverse party litigant in the private antitrust suit in Indiana.

Motion denied. Submit order on notice.

[¶ 68,657] Connie G. Sheffield v. The Texas Company.

In the United States District Court for the Western District of Louisiana, Shreveport Division. Civil Action No. 5458. Filed March 4, 1957.

Robinson-Patman Price Discrimination and Sherman Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—**Sufficiency of Complaint.**—A complaint in a private antitrust action was dismissed on the same grounds

that the complaint in *Alexander v. Texas Co.*, 1957 TRADE CASES ¶ 68,643, was dismissed. Except for non-essential differences in dates, the amount of alleged price discrimination, gallonage handled, location of the service station, and identity of parties with whom the defendant allegedly conspired to fix prices, the averments in the instant complaint were substantially the same as those in the *Alexander* case.

See Combinations and Conspiracies, Vol 1, ¶ 2005.355, 2005.785; Monopolies, Vol. 1, ¶ 2610.720; Price Discrimination, Vol. 1, ¶ 3505.365, 3505.390; Private Enforcement and Procedure, Vol. 2, ¶ 9009.170, 9009.275, 9009.475, 9011.200, 9011.640.

For the plaintiff: Malcolm E. Lafargue, Shreveport, La.

For the defendant: John T. Guyton, of Hargrove, Guyton, Van Hook and Hargrove, Shreveport, La.; A. B. Steed, New York, N. Y.; and Jack D. Childers, Houston, Tex.

Ruling on Motion to Dismiss

[*Complaint Dismissed*]

BEN C. DAWKINS, JR., Chief Judge [*In full text*]: Except for non-essential differences in dates, the amount of alleged price discrimination, gallonage handled, location of the service station, and identity of parties with whom defendant allegedly conspired to fix prices, the averments of this complaint are substantially the same, and it contains the same defects and inadequacies, as those found in "*Alexander v. The Texas Company*" No. 5432 on our docket [1957 TRADE CASES ¶ 68,643], upon which we rendered a decision granting an identical motion to dismiss on March 1, 1957.

For the same reasons as given in that opinion, a copy of which is attached hereto, we find that this complaint, as now presented, fails to state a claim upon which relief can be granted. Accordingly, the motion to dismiss will be granted, with leave to plaintiff to file a supplemental and amended complaint within thirty days.

[¶ 68,658] Sperry Rand Corporation v. Nassau Research and Development Associates, Inc. and John C. McGregor.

In the United States District Court for the Eastern District of New York. Civil No. 16151. Dated February 26, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Antitrust Law Violations as Defenses—Filing of Counterclaim.—Defendants were permitted to file an amended answer and counterclaim, which purported to set up claims against the plaintiff for violation of the Sherman Act, the Robinson-Patman Act, and the Clayton Antitrust Act, on the condition that they serve and file an amended answer and counterclaim which complies with the Federal Rules of Civil Procedure.

See Private Enforcement and Procedure, Vol. 2, ¶ 9046.

For the plaintiff: Campbell, Brumbaugh, Free & Graves.

For the defendants: Smith & Auslander.

[*Amended Answer and Counterclaim*]

RAYFIEL, District Judge [*In full text*]: The defendants move, pursuant to Rule 13(f) of the Federal Rules of Civil Procedure, for leave to serve and file an amended answer and counterclaim.

The proposed amended pleading purports to set up counterclaims against the plaintiff for violation of the Sherman Anti-Trust Act, Title 15 U. S. C. Section 1, *et seq;* the Robinson-Patman Act, Title 15 U. S. C. Section 13, and the Clayton Act, Title 15, U. S. C. Section 15 *et seq.*

Although the affidavit submitted by the attorney for the defendants in support of the motion could well have been more extensive, a liberal interpretation of the rules obliges me to grant the relief sought. However, a reading of the proposed counterclaim reveals that it is so indefinite, and so utterly lacking in specificity as to be defective on its face.

[*Motion Granted*]

Accordingly, the motion is granted, with the proviso, however, that the defendants

serve and file, within twenty days after the entry of the order herein, as amended answer and counterclaim which complies with the Rules. This is without prejudice, of course, to the plaintiff's right to make any appropriate motion with respect to such amended answer and counterclaim.

Settle order on notice.

[¶ 68,659] Quality Oil Company, Inc. v. E. I. du Pont de Nemours and Co., et al.

In the Kansas District Court, Shawnee County, Third Division. No. 78302. Filed January 7, 1957.

Kansas Fair Trade Act

Fair Trade—Constitutionality—Kansas Fair Trade Act.—A trial court ruled that the Kansas Fair Trade Act could not be declared unconstitutional for any of the reasons advanced by a plaintiff.

See Fair Trade, Vol. 1, ¶ 3085.

For the plaintiff: Raines, Glenn & Cornish, Topeka, Kan.

For the defendants: Lillard, Eidson, Lewis & Porter, Topeka, Kan.

[*Briefs*]

DEAN MCELHENNY, District Judge [*In full text*]: On June 13, 1956, the above case was tried upon a stipulation of fact contained in pleadings. At that time the case was argued and taken under advisement, each side being given time to serve and file briefs. Voluminous briefs were eventually filed by both sides. I have finally had an opportunity to study and consider the briefs and authorities cited.

[*Constitutionality*]

The case involves the constitutionality of the Kansas Fair Trade Act found in General Statutes of 1949, 50-301 through 50-309. Plaintiff claims the Act unconstitutional for the four (4) reasons mentioned in its brief.

I have carefully considered all the reasons suggested, argued and briefed by the plaintiff and have concluded that the Act cannot be declared unconstitutional for any of the reasons advanced by the plaintiff. Judgment is therefore being entered for the defendant this date as well as judgment for the defendant for its costs.

[*Order*]

Proper Journal Entry should be submitted for signature. The original of this letter is being filed with the Clerk of District Court so that it will become a part of the record.

[¶ 68,660] Norman M. Morris Corporation v. Hess Brothers, Inc.

In the United States Court of Appeals for the Third Circuit. No. 11,966. Argued November 15, 1956. Filed March 26, 1957.

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

McGuire Act and Pennsylvania Fair Trade Act

Fair Trade—Constitutionality—McGuire Act.—A nonsigner's contention that the McGuire Act, insofar as it exempts nonsigner provisions of state fair trade laws from the effect of the Sherman Antitrust Act, is unconstitutional was rejected. The nonsigner based its contention on *Sunbeam Corp. v. Richardson, et al.*, 1956 TRADE CASES ¶ 68,407, wherein it was held that the McGuire Act contravenes the Fifth and Fourteenth Amendments to the United States Constitution because it seeks to impose fixed prices upon nonsigners.

See Fair Trade, Vol. 1, ¶ 3040.20.

Fair Trade—Constitutionality—Pennsylvania Fair Trade Act.—A nonsigner's contention that, if the Pennsylvania Fair Trade Act is interpreted to authorize one who is not the owner of a trade-mark to stipulate a resale price binding upon a nonsigner, the Act violates the Constitutions of the United States and Pennsylvania was rejected. The Pennsylvania Supreme Court has held that the Pennsylvania Act is constitutional, and a Federal court is bound by that determination. The fact that the owner of a trade-mark stipulated the resale price in the case determined by the Pennsylvania Supreme Court was held to be without significance. Also, the United States Supreme Court has upheld the constitutionality of a state fair trade law substantially identical to the Pennsylvania Fair Trade Act.

See Fair Trade, Vol. 1, ¶ 3085.40, 3258.40.

Fair Trade—Person Who May Establish Fair Trade Prices—Seller of Commodity.—An exclusive distributor of a manufacturer's trade-marked watches for the entire United States may stipulate fair trade prices for such watches under the Pennsylvania Fair Trade Act, which does not specify the person who may stipulate the resale price beyond the word "vendor." The word "vendor" in the Pennsylvania Act is broad enough to include such a distributor. The party stipulating such prices was the exclusive distributor of the trade-marked watches over the entire United States, the distribution of such watches was the distributor's only business, and the distributor expended sums of money to enhance the value of the good will attached to the trade-mark. Therefore, any lessening of the value of this good will affected the distributor adversely. An exclusive distributor over the entire United States, by virtue of his very franchise, is impliedly authorized by the owner of the trade-mark to set the resale price. The Pennsylvania Act does not require a specific authorization from the owner of the trade-mark.

See Fair Trade, Vol. 1, ¶ 3170.

For the appellant: Irving Coleman, Northampton, Pa.

For the appellee: Thomas A. Rothwell, New York, N. Y.

Before BIGGS, Chief Judge, and McLAUGHLIN and STALEY, Circuit Judges.

Opinion of the Court

[*Fair Trade Action*]

By STALEY, Circuit Judge [*In full text*]: Defendant has appealed from the issuance of a preliminary injunction restraining it from selling trade-marked "Omega" watch products at prices below those stipulated by plaintiff such course of conduct being made actionable by the Pennsylvania Fair Trade Act.

The facts are virtually without dispute. Plaintiff, a New York corporation, is the exclusive distributor in the United States of "Omega" watches. It neither produces the watches nor owns the trade-mark. Defendant, a Pennsylvania corporation, is the owner of a department store in Allentown, Pennsylvania. Plaintiff entered into a number of resale price contracts with various retail dealers in which it stipulated the minimum prices at which "Omega" watches might be sold. It appears that the price stipulation was initiated by the plaintiff alone, and not by the producer or owner of the mark. Defendant did not sign any contract with plaintiff but was fully aware of the minimum prices. Defendant also knowingly advertised for sale and sold "Omega" watches at prices lower than the resale prices stipulated by plaintiff.

[*Defenses*]

Appellant makes three salient contentions. First, it argues that the Pennsylvania Fair Trade Act authorizes only the producer or owner of the trade-mark to stipulate fair trade prices, and not an exclusive distributor. Next, it argues that if a distributor is authorized to stipulate the resale price, then the Act contravenes both the Constitution of the Commonwealth of Pennsylvania and that of the United States. Third, it contends that the McGuire Act, which exempts nonsigner provisions from the effect of the Sherman Antitrust Act, is unconstitutional.

[*Fair Trade—History*]

Brief allusion to the historical development of Fair Trade Acts is expedient at the

threshhold of this discussion. In 1911, the United States Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 407-408, struck down an agreement to maintain resale prices as an unlawful restraint of trade violative of the Sherman Antitrust Act, 15 U. S. C. § 1 *et seq.* (1952 ed.). It was decided that vertical price fixing between manufacturer and retailer is equivalent in effect to horizontal price fixing among the retailers themselves, and therefore against public policy. It was intimated in the opinion that vertical price fixing might be valid if authorized by statute.[1]

The economic depression of the thirties, with its attendant price cutting and "loss-leader" practices at the retail level, prompted state legislatures to enact Fair Trade statutes for the avowed purpose of maintaining resale prices and rescuing small business from failure which it was thought would otherwise inevitably follow. The early statutes purported to bind only signers of resale price maintenance contracts. Underselling by those who did not sign such contracts threatened to frustrate the purpose of the Fair Trade Acts, so that today every operative state statute contains a nonsigner clause. This clause binds every vendee to sell at the minimum price or more whether or not he has signed a contract with the supplier, provided only that he have knowledge that the supplier has entered into a price stipulation contract with any vendee. This concept, alien to the law, whereby a person may be bound by a contract to which he did not give assent, indicates the desperation which impelled state legislatures in their struggle to combat a disastrous depression.

In *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.* [1932-1939 TRADE CASES ¶ 55,144], 299 U. S. 183, 198 (1936), the Supreme Court upheld the Illinois Fair Trade Act,[2] including its nonsigner provision, as affording "a legitimate remedy for an injury to the good will which results from the use of trade-marks, brands or names * * *." As an appropriate exercise of state police power in protecting the supplier's continuing property interest from price-cutting and "loss-leader" practices, the Court held that the act violated neither the due process nor the equal protection clauses of the Fourteenth Amendment.

The Sherman Act was changed by the Miller-Tydings Amendment, 15 U. S. C. § 1 (1952 ed.), which validated resale price maintenance contracts in interstate commerce, thus placing them beyond the sanctions of the Sherman Antitrust Act. It was thought that the amendment affected nonsigners as well as signers; however, the Supreme Court in *Schwegmann Bros. v. Calvert Distillers Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384 (1951), decided that the Miller-Tydings Amendment applied only to consensual contracts and not to nonsigner provisions. In 1952, the McGuire Act, 15 U. S. C. § 45(a)(3) (1952 ed.), specifically exempted nonsigner provisions from the Sherman Act.

[*Distributor's Right To Fix Prices*]

We proceed now to discuss the question of whether an exclusive distributor for the entire United States may stipulate fair-trade prices in Pennsylvania, or whether the pricing program may be initiated only by a producer or owner of the identifying mark or brand. The Pennsylvania Fair Trade Act has been characterized as an "old-type" statute in that it does not specify who may stipulate the resale price beyond the word "vendor." The pertinent provisions of the Pennsylvania Act follow:

"§ 1. Sale of goods bearing, or vending equipment of which bears trade-mark, etc.; permissible provisions

"No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, or the vending equipment from which said commodity is sold to the consumer bears the trade-mark, brand or the name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed in violation of any law of the State of Pennsylvania by reason of any of the following provisions which may be contained in such contract:

[1] "Nor can the manufacturer by rule and notice, *in the absence of contract or statutory right*, even though the restrictions be known to purchasers, fix prices for future sales." *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 405 (1911), emphasis supplied.

[2] *Old Dearborn* construed the Illinois Fair Trade Act, Ill. Rev. Stat. 1935, p. 3091, c. 140, ¶ 8 *et seq.*, Smith-Hurd Annot. Stat. c. 121½, § 188 *et seq.* It is substantially identical to the Pennsylvania Fair Trade Act.

"(a) That the buyer will not resell such commodity, except at the price stipulated by the vendor.

* * *

"§ 2. Unfair competition, defined

"Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is, or is not, a party to such contract, is unfair competition and is actionable at the suit of such vendor, buyer or purchaser of such commodity." Act of June 5, 1935, P. L. 266, §§ 1 & 2, as amended June 12, 1941, P. L. 128, No. 66, § 1, 73 Purdon's Pa. Stat. Annot. §§ 7 & 8.

The Pennsylvania Act, in providing that the "vendor" may initiate the pricing program, is similar to the statutes of twenty-four other states. See 1 CCH TRADE REGULATION REPORTS ¶ 3003. The "new-type" statutes provide, typically, that the resale price may be stipulated only by the owner of the trade-mark or by a distributor specifically authorized to establish said price by the owner of such trade-mark. Twenty-two states have adopted the "new-type" statute. Our research discloses no Pennsylvania case deciding whether the word "vendor" includes an exclusive distributor. Several other jurisdictions with statutes similar to Pennsylvania have discussed the problem. Appellant urges for our consideration a lower court opinion from New York, *Automotive Electric Service Corp. v. Times Square Stores Corp.*, 175 Misc. 865, 24 N. Y. S. 2d 733 (Supreme Ct., 1940), in which it was held that a distributor of spark plugs may not stipulate fair-trade prices. The holding of that case must be confined to its factual situation; it appeared that plaintiff was only one of more than a dozen distributors for the State of New York alone. It was the fear that each might stipulate a different price which prompted this decision.[3] There are indications that the court would have reached a different result if the plaintiff were an exclusive distributor over a large area.[4] In *Bourjois Sales Corp. v. Dorfman* [1932-1939 TRADE CASES ¶ 55,155], 273 N. Y. 167, 7 N. E. 2d 30, 110 A. L. R. 1411 (1937), plaintiff was exclusive distributor for the State of New York and defendant was a nonsigner who sold below prices stipulated by plaintiff. The lower court had dismissed the complaint, although the Supreme Court of the United States at its October Term had decided *Old Dearborn* which, as we have said, held that a *distributor* may stipulate resale prices binding upon nonsigners with knowledge without constitutional violation. The New York Court of Appeals, feeling bound by *Old Dearborn*, reversed the lower court judgment. It would seem that in New York an exclusive distributor may stipulate resale prices, at least where he was authorized to do so by the owner of the trade-mark.[5] *Continental Distilling Sales Co. v. Famous Wines & Liquors, Inc.* [1948-1949 TRADE CASES ¶ 62,267], 274 App. Div. 713, 80 N. Y. S. 2d 62 (Supreme Ct., App. Div. 1948).

The position of New Jersey, which also has a similar statute, is made clear by the court syllabus in *Frank Fischer Merchandising Corp. v. Ritz Drug Co.*, 129 N. J. Eq. 105, 19 A. 2d 454, 455 (Ch. 1941):

"1. Price maintenance contracts made under the Fair Trade Act * * * by a distributor of products sold under the trade-mark of a manufacturer or producer are valid although the distributor acts without the authority or consent of the owner of the trade-mark. *Schenley Products Co. v. Franklin Stores Co.*, 124 N. J. Eq. 100, 199 A. 402, followed."

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[3] The court stated the rationale of the case at 24 N. Y. S. 2d 740: To permit the distributor to establish the retail price "would produce intolerable confusion and very largely defeat the purpose of the statute, for if a person other than such owner can do it then a hundred others may do it and each may fix different prices. Under such a holding the owner of the trade-mark might find his prices fixed for him by the very cut-raters against whom the statute aims to protect such owner."

[4] The court found it necessary to distinguish the opinion of *Bourjois Sales Corp. v. Dorfman*, [1932-1939 TRADE CASES ¶ 55,155], 273 N. Y. 167, 7 N. E. 2d 30, 110 A. L. R. 1411 (1937), in which the New York Court of Appeals reversed the dismissal of a fair trade complaint. At 24 N. Y. S. 2d 739, the court said the case being considered differed from *Bourjois* in that there "the plaintiff had the sole and exclusive right to use in the State of New York the trademarks, * * * and also that the plaintiff was the owner of the business and the good will in the State of New York associated with the sale and distribution of said articles. Record on Appeal, fols. 29, 30."

[5] It will be observed that this result reads into an "old-type" act the "new-type" provision that a distributor may establish resale prices if he is specifically authorized by the owner of the mark. A lower court in Wisconsin reached the same conclusion. *Hiram Walker, Inc. v. Goldman* (Wisc. Cir., Milwaukee County, 1938) 1 CCH TRADE REGULATION REPORTS ¶ 3172.53.

In New Jersey, then, any distributor may stipulate resale price regardless of whether he was authorized to do so by the owner of the trade-mark.[6]

One of the ostensible purposes of a Fair Trade Act is to protect the good will inherent in a trade-marked brand from what is considered uneconomic practices, deemed in one way or another to lessen the value of the commodity in the eyes of the public. This being so, its provisions inure to the benefit of those persons affected by the diminution in the value of the good will. In most situations, this will be the producer or owner of the trade-mark. However, it is quite apparent that an exclusive distributor for a large geographic area would be affected quite seriously by the value of the good will inherent in the trade-mark.[7] In the case under consideration here, for example, plantiff is the exclusive distributor of "Omega" watches over the entire United States. This is plaintiff's only business, and the annual sales run to several million dollars. It spends approximately $750,000 a year in advertising, designed to enhance the value of the good will attached to the "Omega" name. Certainly, any lessening of the value of this good will affects plaintiff adversely.

We do not consider it of any importance that the owner of the trade-mark here did not initiate the resale price maintenance contracts, or that the record does not disclose that the owner specifically authorized plaintiff to do so, for the Pennsylvania statute, unlike the "new-type" act, does not require specific authorization. We are of the opinion that an exclusive distributor over the entire United States,[8] by virtue of his very franchise, is impliedly authorized by the owner of the mark to set the resale price (see 1 Callmann, *Unfair Competition and Trade-Marks,* 2d ed. 1950, § 24.1(b), pages 468-469), and that the term "vendor" in the Pennsylvania Fair Trade Act is broad enough to embrace the plaintiff.

[*Constitutionality*]

The second principal contention urged by appellant is that if the Pennsylvania Fair Trade Act is interpreted to authorize one who is not the producer or owner of the mark to stipulate a resale price binding upon a nonsigner, then the Act violates the Constitutions both of Pennsylvania and the United States.

The Pennsylvania Supreme Court in *Burche Co. v. General Electric Co.* [1955 TRADE CASES ¶ 68,078], 382 Pa. 370, 115 A. 2d 361 (1955), held the Pennsylvania Fair Trade Act constitutional, and insofar as Pennsylvania's highest court interprets its own constitution, we are bound by that determination. It is contended, however, that in both the *Burche* case and the *Old Dearborn* case the owner of the mark set the resale price. That is accurate as to the *Burche* case; it is not accurate as to the *Old Dearborn* case, for in the latter it was the *distributor* who set the price. 299 U. S. at pages 186-187.[9] The distinction nonetheless is without significance for *Old Dearborn* decided that a *distributor* had a proprietary interest in the trade-mark and could stipulate the resale prices against nonsigners without violating the due process or equal protection clauses of the Fourteenth Amendment, and it was the existence of

[6] This broad interpretation of the "vendor" who may stipulate fair trade prices is shared by a lower court in California. *Parrott & Co. v. Somerset House, Inc.* (Calif. Super. for Los Angeles, 1937), 1 CCH TRADE REGULATION REPORTS ¶ 3170.05. The court there said: *"The statute is sufficiently broad to include any contract made by any owner with any vendee."*

[7] The Supreme Court in *Old Dearborn* alluded to the fact that a distributor has a proprietary interest in the good will created by the trade-mark: "* * * Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities." 299 U. S. at p. 194. By way of comparison, see also *Scandinavia Belting Co. v. Asbestos & Rubber Works,* 257 Fed. 937 (C. A. 2), cert. denied, 250 U. S. 644 (1919), where the court decided that an exclusive United States distributor for a foreign manufacturer had enough interest to register the trade-mark as its own.

[8] There is no basis here for the fear expressed in some decisions that various distributors may stipulate different prices and thereby render a fair trade act a travesty of its purpose. Here the plaintiff is the exclusive and sole distributor.

[9] *Old Dearborn* decided two cases considered together. The reports in the Illinois Supreme Court discuss the facts more fully and indicate clearly that it was the distributor who fixed the resale price and not the producer or owner of the trade-mark. See *Joseph Triner Corp. v. McNeill,* 363 Ill. 559, 2 N. E. 2d 929, 930-931 (1936). At pages 937 the court said: "* * * Vertical price maintenance merely enables a producer, or his distributor, to set a price at which the trade-marked commodity shall be sold to the consumer." See also *Seagram-Distillers Corp. v. Old Dearborn Distributing Co.,* 363 Ill. 610, 2 N. E. 2d 940, 941 (1936), as an indication again that it was the distributor, and not the producer, who stipulated the resale price.

such a proprietary interest which was the basis of the *Burche* decision.

Appellant intimates that *Schwegmann* invites us to restudy the economic foundation of Fair Trade Acts.[10] It is true that the *Schwegmann* case used strong language in criticizing the nonsignor provisions in interstate commerce,[11] but until *Old Dearborn* is overruled it remains the law and we are bound by it. See *Sunbeam Corp. v. Wentling* [1950-1951 TRADE CASES ¶ 62,739], 185 F. 2d 903 (C. A. 3, 1950).

The constitutionality of the McGuire Act is also challenged by appellant. The attack is based on reasoning expressed in the case of *Sunbeam Corp. v. Richardson* [1956 TRADE CASES ¶ 68,407], 144 F. Supp. 583, 592 (W. D. Ky. 1956). There the court held:

> "* * * [N]either the McGuire Act nor the Fair Trade Statute of Kentucky is a lawful exercise of the police power. The portion of the McGuire Act which seeks to impose fixed prices upon nonsigners of contracts contravenes these constitutional provisions [the Fifth and Fourteenth Amendments] and is invalid."

The court felt free to hold this, because it was of the opinion that *Old Dearborn* was concerned only with the signers of fair trade contracts, and therefore not controlling as to nonsigners. With this we do not agree. Although *Old Dearborn* concerned a defendant who did in fact sign a resale contract, the defendant questioned the contract's validity, and the Supreme Court assumed, for purposes of decision, that he was a nonsigner. It said, at 299 U. S. 187:

> "* * * The contract was assailed by appellant below [defendant] as ineffective, and for present purposes we accept that view. It is plain enough, however, that appellant had knowledge of the original contractual restrictions and that they constituted conditions upon which sales thereafter were to be made."

This quotation, attended by the over-all rationale of the opinion based upon a continuing property right in the good will proprietor, not dependent upon contract, indicates to us that the case decided the question of constitutionality as to both signers and informed dealers alike.[12] See *Sunbeam Corp. v. Wentling* [1950-1951 TRADE CASES ¶ 62,739], 185 F. 2d 903, 905 (C. A. 3, 1950), vacated and remanded on other grounds, 341 U. S. 944 (1951) [1950-1951 TRADE CASES ¶ 62,840], 192 F. 2d 7 [1950-1951 TRADE CASES ¶ 62,935], (C. A. 3, 1951).

[*Intrastate Transactions*]

We do not now consider the problem which confronted us in *Sunbeam Corp. v.*

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[10] The Report of the Attorney General's National Committee to Study the Antitrust Laws (March 31, 1955), page 154, concluded that the Miller-Tydings and McGuire Act amendments should be repealed:

"* * * [T]he throttling of price competition in the process of distribution that attends 'Fair Trade' pricing is, in our opinion, a deplorable yet inevitable concomitant of federal exemptive laws. Moreover, whatever may be the underlying legislative intent, any operative 'Fair Trade' system facilitates horizontal price-fixing efforts on the manufacturing and each succeeding distributive level. And the prominent existence of a federal price-fixing exemption not only symbolizes a radical departure from National antitrust policy without commensurate gains, but extends an invitation for further encroachment on the free-market philosopy that the antitrust laws subserve.

"We therefore recommend Congressional repeal both of the Miller-Tydings amendment to the Sherman Act and the McGuire amendment to the Federal Trade Commission Act, thereby subjecting resale-price maintenance, as other price-fixing practices, to those Federal antitrust controls which safeguard the public by keeping the channels of distribution free." See also Note, 16 U. of Pitt. L. Rev. 50 (1954).

[11] "* * * If a distributor and one or more retailers want to agree, combine, or conspire to fix a minimum price, they can do so if state law permits. Their contract, combination, or conspiracy—hitherto illegal—is made lawful. They can fix minimum prices pursuant to their contract or agreement with impunity. When they seek, however, to impose price fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different. That is not price fixing by contract or agreement; that is price fixing by compulsion. That is not following the path of consensual agreement; that is resort to coercion.

"* * * Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. See *Parker v. Brown*, 317 U. S. 341, 350. Elimination of price competition at the retail level may, of course, lawfully result if a distributor successfully negotiates individual 'vertical' agreements with all his retailers. But when retailers are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids 'horizontal' price fixing. A real sanction can be given the prohibition of the proviso only if the price maintenance power granted a distributor is limited to *voluntary* engagements. * * *" *Schwegmann Bros. v. Calvert Distillers Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384, 388-389 (1951) (italics in original).

[12] On the general question of the constitutionality of the Fair Trade Acts and the McGuire Act, see *Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co.*, [1953 TRADE CASES ¶ 67,516], 205 F. 2d 788 (C. A. 5), cert. denied, 346 U. S. 856 (1953).

Wentling [1950-1951 TRADE CASES ¶ 62,739], 185 F. 2d 903, that is, the applicability of the Pennsylvania statute to interstate transactions, for the injunction in question is limited to "intrastate transactions."

[*Affirmed*]

For the foregoing reasons, the issuance of the preliminary injunction will be affirmed.

[¶ 68,661] United Grocers' Company v. Sau-Sea Foods, Inc., and Ernest Schoenbrum and Abraham Kaplan, doing business as Shore Distributors.

In the United States District Court for the Southern District of New York. Civ. 114-365. Filed March 22, 1957.

Robinson-Patman Price Discrimination and Sherman Antitrust Acts

Price Discrimination—Suit for Civil Damages—Necessary Averments To State Cause of Action—Two Purchasers.—Where it could be inferred from a distributor's complaint that a processor and its selling agent would sell their products to a distributor only on the condition that the distributor adhere to their suggested resale prices, the distributor might argue that the defendants were discriminating in price because they sold their products to others without imposing that condition. However, no cause of action for unlawful price discrimination was stated since the plaintiff distributor did not allege that any other purchaser of the defendants was treated differently.

See Price Discrimination, Vol. 1, ¶ 3505.585.

Combinations and Conspiracies—Suit for Civil Damages—Necessary Averments To State Cause of Action—Refusal to Deal.—A distributor, by alleging a conspiracy between a processor and its selling agent to create an unreasonable restraint of trade and to fix the resale prices at which their products would be sold by the distributor, did not sufficiently charge that the defendants had gone beyond the mere refusal to sell to those who would not observe the suggested retail prices and had, by contracts or combinations, unduly hindered or obstructed the free flow of commerce. The phrase "in furtherance of their conspiracy to create an unreasonable restraint of trade" was merely a conclusion in the language of the Sherman Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments To State Cause of Action—Interstate Commerce.—A distributor's complaint, alleging that a processor and its selling agent violated the antitrust laws when they refused to sell to the distributor unless it adhered to the resale prices suggested by them, was held insufficient on the ground that interstate commerce was not adequately alleged. The complaint merely alleged that the products sold by the defendants were shipped and distributed in interstate commerce. The fact that the defendants distributed some of the product, which they allegedly refused to sell to the distributor, in interstate commerce would not be sufficient to bring under Federal jurisdiction their relations with the distributor, if the product was not distributed to the distributor or to the distributor's customers in interstate commerce.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.600.

For the plaintiff: Manes, Sturim, Donovan & Laufer, New York, N. Y.

For the defendants: Louis G. Greenfield, New York, N. Y.

For a prior opinion of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,639.

Opinion

[*Motion To Dismiss*]

DIMOCK, District Judge [*In full text*]: According to an allegation of the complaint, this action arises under sections 13 and 15 of title 15 of the United States Code. Section 13 is that part of the Clayton Act which makes unlawful price discriminations the effect of which may be substantially

to lessen competition, tend to create a monopoly or injure competition. Section 15 is the section which gives a private right of action for threefold damages. Defendants move that the complaint be dismissed under Rule 12(b)(6) F. R. C. P. and Rule 12(h)(2) on the grounds that it fails to state a claim under which relief can be granted and it appears that the Court lacks jurisdiction of the subject matter.

Plaintiff opposes the motion on the ground that a motion by defendant for summary judgment has already been denied. It was denied, however, on the ground that issues of fact were presented. It may well be that issues of fact were joined by the parties in affidavits submitted on the motion for summary judgment without there being any statement in the complaint of a claim on which relief could be granted and without the Court's having jurisdiction of the subject matter. It does not appear from the Court's opinion that it accepted the complaint as defining plaintiff's charge. Indeed, in stating plaintiff's charge, the Court included material not alleged in the complaint and which must have been obtained from plaintiff's affidavits and a deposition of one of plaintiff's officers which were before the Court. The sufficiency of the allegations of the complaint have thus not been passed upon and the way is open for the prosecution of this motion to dismiss the complaint.

[*Defendants*]

The complaint alleges that defendant corporation, with its principal place of business in Yonkers, New York, at all of the times therein mentioned, manufactured, packed, processed and distributed certain frozen food products, among which were frozen shrimp; that the two individual defendants, at all such times, were partners, with their principal place of business with defendant corporation, and were engaged in the sale and distribution of frozen foods.

[*Plaintiff*]

Plaintiff, with its principal place of business in Brooklyn, New York, is alleged to be engaged in the business of distributing frozen food products to over 5,000 small independent retail food merchants who are in active competition with other larger units owned and operated by chain store corporations. The complaint says that plaintiff, at all the times therein mentioned was and is in competition with other distributors of frozen food products and "is required to" purchase on equal terms with other buyers of the same class free from discriminatory trade practices; that it is essential to plaintiff's business that it be enabled to supply its said customers prices low enough to permit competition with large chain store retail operators.

[*Alleged Cause of Action*]

Plaintiff alleges that, from April 10, 1956, to July 10, 1956, it purchased from individual defendants, as the sales agents of corporate defendant, packages of frozen shrimp; that on or about May 21, 1956, "in accordance with plaintiff's policy as aforementioned", it reduced its price to its customers from $4.60 per dozen packages to $4.15 per dozen, which price was above cost plus a reasonable mark-up.

Then come paragraphs 11, 12 and 14 which contain every word in the complaint addressed to the statement of any legal wrong committed by defendants. They follow:

> "11. That defendants, acting in concert with other persons engaged in the business of distributing frozen food products, on or after the 21st day of May, 1956, objected to the price at which plaintiff sold the said commodities and requested and demanded of plaintiff that it increase its price to the suggested resale price of $4.60 per dozen, to which demands and requests plaintiff refused to accede."
>
> "12. That defendants, acting in concert and in furtherance of their conspiracy to create an unreasonable restraint of trade and to fix the resale price at which the said commodities would be sold by plaintiff, in violation of the aforesaid Section 13 of Title 15 of the United States Code Annotated, refused and still refuses to sell to plaintiff any of the aforedescribed products, and that plaintiff is and continues to be injured and damaged in its business by reason thereof."
>
> "14. That the aforesaid products manufactured, processed, distributed and sold by defendants are products shipped and distributed in interstate commerce."

I cannot but think that the draftsman of these paragraphs was proceeding under the rule of *Dioguardi v. Durning*, 2 Cir., 139 F. 2d 774, and was unfamiliar with the host

of cases * which require that the complaint in an antitrust case state a cause of action instead of merely stating a claim.

[*Price Discrimination*]

The pleader does not tell us who the other persons were with whom defendants acted in concert in objecting to plaintiff's reduced price and demanding that the suggested price be restored.

He next alleges that "defendants, acting in concert and in furtherance of their conspiracy to create an unreasonable restraint of trade and to fix the resale price at which the said commodities would be sold by plaintiff" refused to sell to plaintiff. This is the first time that it is charged that defendants acted in conspiracy.

No connection between defendants' conspiracy to restrain trade and fix prices, on the one hand, and the competitive position of plaintiff and plaintiff's customers on the other, is alleged or suggested. It is not alleged that defendants knew anything about plaintiff's competitive position.

We have the bare allegation that defendant corporation and defendants its selling agents, acting in concert with other persons in the business, objected to plaintiff's price cut and demanded the restoration of a suggested price and that defendants, presumably after the refusal to restore the price, refused to sell to plaintiff in furtherance of a conspiracy between them to create an unreasonable restraint of trade and to fix the resale price. Construing the complaint with great liberality one might say that it alleged that defendant seller and defendants sales agents conspired to restrain trade and fix the resale price of the frozen shrimp that they sold and that, on plaintiff's refusal to adhere to the resale price that they suggested, they refused to sell to plaintiff. From this one might infer that defendants would sell to plaintiff on condition that plaintiff adhere to the resale price. So, if it were alleged that defendants sold to others without imposing that condition, it might be argued that defendants were "discriminating" in price between different purchasers contrary to section 13 relied on by plaintiff. There is, however, no suggestion in the complaint that any other purchaser is treated differently.

[*Conspiracy*]

While there is thus no cause of action stated under section 13 on which plaintiff purports to rely, plaintiff's allegations, by employing the words "conspiracy to create an unreasonable restraint of trade," hint at some wrong under section 1, the Sherman Act, which makes such conspiracy illegal.

As Mr. Justice Day said in *Federal Trade Comm. v. Beech-Nut Co.*, 257 U. S. 441, 452, "it is settled that in prosecutions under the Sherman Act a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale." That is not the whole story, however. Mr. Justice Day went on, "He may not, consistently with the act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade." That latter statement raises the question before me: has plaintiff by alleging, in those bare words, a conspiracy between corporate defendant and its selling agents to "create an unreasonable restraint of trade and to fix the resale price at which the said commodities would be sold by plaintiff" sufficiently charged that defendants have gone beyond the mere refusal to sell to those who will not observe the suggested retail prices and have by contracts or combinations, express or implied, unduly hindered or obstructed the free and natural flow of commerce.

There is nothing in the pleading to suggest this except the words "in furtherance of their conspiracy to create an unreasonable restraint of trade." That is the most naked of conclusions and a conclusion in the language of the statute is insufficient as a pleading. *Baim & Blank, Inc. v. Admiral Corporation*, D. C. S. D. N. Y. [1955 TRADE CASES ¶ 68,046], 132 F. Supp. 150, and cases cited.

* *E. g. Bader v. Zurich General Accident & Liability Ins. Co.*, D. C. S. D. N. Y. [1952 TRADE CASES ¶ 67,277], 12 F. R. D. 437; *Dublin Distributors v. Edward & John Burke, Limited*, D. C. S. D. N. Y. [1952 TRADE CASES ¶ 67,398], 109 F. Supp. 125; *New Dyckman Theatre Corp. v. Radio-Keith-Orph. Corp.*, D. C. S. D. N. Y. [1954 TRADE CASES ¶ 67,853], 16 F. R. D. 203; *Baim & Blank, Inc. v. Warren-Connelly Company*, D. C. S. D. N. Y. [1956 TRADE CASES ¶ 68,285], 19 F. R. D. 108. Even under the *Dioguardi* rule plaintiff would have been sailing very close to the wind. See *United States v. Lamont*, 2 Cir., 236 F. 2d 312, 317.

CASES ¶ 68,088], 132 F. Supp. 412, and cases cited.

[*Interstate Commerce*]

In another respect the complaint is deficient in stating a claim under the Federal antitrust acts. Its only reference to interstate commerce is paragraph 14 reading as follows:

> "That the aforesaid products manufactured, processed, distributed and sold by defendants are products shipped and distributed in interstate commerce."

The fact that defendants distributed *some* of the frozen shrimp in interstate commerce would not be sufficient to bring under Federal jurisdiction their relations with plaintiff if none of the shrimp were distributed to plaintiff or to plaintiff's customers in interstate commerce. Can such a strong presumption in favor of the pleader be brought to bear as to permit the construction that *all* shrimp distributed by defendants are distributed in interstate commerce? It is conceivable that defendant corporation's processing plants are located in some state within which none are distributed. While the conclusory statement might thus be consistent with a state of affairs where all defendants' relations with plaintiff were interstate, conclusory allegations are not enough for a complaint under the antitrust laws.

[*Motion Granted*]

It is regrettable that under our procedure a plaintiff can extemporize such an effusion as this complaint and by filing it in a public office compel the defendant to retain counsel and the court to spend the time of the public in attempting to supply by inference allegations which plaintiff, if it had facts to support them, could have actually set out in small fraction of the time.

The motion to dismiss the complaint is granted.

In view of this disposition, plaintiff's motion to compel defendants to submit to examination is denied.

[¶ 68,662] United States v. Central States Theatre Corporation, Center Drive-In Theatre Co., and Midwest Drive-In Theatre Co.

In the United States District Court for the District of Nebraska. Civil No. 0117. Filed September 7, 1956.

Case No. 1276 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Motion To Strike Portions of Answer.—A Government motion to strike portions of a defendant's answer was granted where such portions of the answer were found to be argumentative and exculpatory, scandalous and impertinent, redundant and scandalous, or immaterial. Generally, the stricken portions of the answer attempted to plead evidentiary items and advanced argumentative positions. Also, they distracted attention from the issues tendered in the complaint, to which alone the answer should respond. It is sound judicial administration to restrain each case within its own logical bounds and to discourage impertinent excursions into alien fields.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8229.200.

For the plaintiff: Earl A. Jinkinson, Attorney, Department of Justice, Chicago, Ill., and William C. Spire, United States Attorney, Omaha, Neb.

For the defendants: Yale C. Holland (Kennedy, Holland, DeLacy & Svoboda) for Central States Theatre Corp.; Edward G. Garvey for Center Drive-In Theatre Co.; and Eugene N. Blazer and Gale Richards for Midwest Drive-In Theatre Co.; all of Omaha, Neb.

Memorandum

[*Motions*]

DELEHANT, Chief Judge [*In full text*]: Mention may approximately be made of certain issues pending in this action which are *not* yet submitted or being determined. They arise out of separate motions served and filed by plaintiff, (a) To Add an Additional Defendant and To Amend the Complaint (filing 20), and (b) For a Preliminary Hearing on Certain Defenses Raised by De-

fendant Central States Theatre Corporation (filing 21), Both motions concern directly only defendant Central States Theatre Corporation, among the several named defendants. The court understands that counsel for the interested parties are in agreement upon a program for the allowance of the first motion, and that although they do not agree respecting the appropriate disposition of the several defenses within the reach of the second motion, they do concur in an understanding that a preliminary hearing should be held on those defenses. But some material required for that hearing has thus far been impossible of production. Accordingly, the disposition of both motions will undoubtedly await the contemplated preliminary hearing, and is not now in order.

What is already submitted and ready for ruling is a Motion To Strike Certain Matter From the Answer of Defendant Midwest Drive-In Theatre Co., served and filed by plaintiff (filing 18). Oral argument of counsel and their typewritten briefs upon that motion have been presented and fully considered.

[*Complaint*]

This is a civil action brought by the United States under Section 4 of the Sherman Act, 15 U. S. C. Section 1 *et seq.*, against the three designated defendants, of which the first allegedly operates two, and each of the others one of the so-called drive-in theatres in the vicinity comprising Omaha, Nebraska and Council Bluffs and Carter Lake, Iowa, which in its complaint plaintiff defines as included within the term, "Omaha area." The complaint charges defendants with engagement in a combination and conspiracy consisting of a continuing agreement, understanding and concert of action whereby they agree (a) to fix, establish and maintain uniform and non-competitive prices to be charged for (1) admission to their theatres, and (2) for food and beverages sold thereat, and (3) maximum dollar amounts for newspaper advertising to be expended by or on behalf of their theatres, and also (b) to threaten to refrain from dealing with distributors who or which provide pictures to drive-in theatres for exhibition at admission prices below those agreed upon by defendants. And plaintiff prays that the alleged combination and conspiracy be adjudged violative of Section 1 of the Sherman Act, for injunctive relief against the continued, revival or renewal of such alleged combination or conspiracy, and for appropriate general relief.

[*Answer*]

Defendant, Midwest Drive-in Theatre Co., answered separately (filing 15). In its answer, it admitted certain allegations of the complaint, denied others including generally those averring its participation in the alleged combination and conspiracy, and, in considerable detail made certain allegations in affirmative language manifestly designed to support its denials, or to explain supposed acts on its part on which it may expect plaintiff to rely. It is towards some of those affirmative allegations, challenged separately, that the motion to strike is directed. The individual sections of the motion will now be considered very briefly. It is claimed not in order to expand this announcement by quoting all of the questioned material in the answer sentence by sentence. Sufficient identification of most of it may be made by brief references, in association with which counsel will understand the court to have in view the entire portions of the answer at which the several items of the motion are respectively pointed.

[*Motion to Strike*]

ITEM 1. Here is requested the striking of all of paragraph 10 of the answer except its first sentence on the ground of immateriality and impertinence. Paragraph 10 of the answer responds to paragraph V(12)(a) of the complaint which alleges as one of the substantial terms of the charged agreement, understanding and concert of action of defendants, an undertaking "to fix, establish and maintain uniform and non-competitive prices to defendants' theatres." The first sentence of paragraph 10 of the answer categorically denies that charge. Then, in the remaining and challenged part of the paragraph, the answering defendant proceeds to assert that the producers and distributors of the pictures by it licensed and to be licensed on a percentage basis have at all material times demanded and exacted from it a statement of the prices it will charge its customers for admissions, "presumably for the purpose of securing a maximum license fee or rental," and that this demand and exaction have occurred with the complete consent and approval of plaintiff through its Department of Justice, which Department also consents to, and approves

of, a program whereby, if the answering defendant should violate its undertaking as to admission prices, the producer or distributor may consider such violation in negotiations or dealings touching later pictures.

The matter thus affirmatively stated adds nothing to the denial already made in direct language, and is argumentative and exculpatory in its nature. It is clearly vulnerable to the motion made against it; and the motion in that respect is being granted and sustained.

ITEM 2. This portion of the motion asks for the striking as scandalous and impertinent of all but the first sentence of paragraph 11 of the answer. The answer's paragraph 11 has to do with paragraph V(12) of the complaint, wherein plaintiff charges as another feature of the agreement, understanding and concert of action, an agreement by defendants "to fix, establish and maintain dollar amounts for newspaper advertising to be expended by or on behalf of" their theatres. The first sentence of the answer's paragraph 11 squarely denies the allegation. For the rest, the paragraph, at considerable length, asserts that over an unspecified period of years, the newspaper field in the Omaha area was progressively contracted from an earlier position in which there were three competing publications to the present situation in which one paper, which is mentioned by name both in the complaint and in the answer and is owned and operated by a designated corporation monopolizes the field, and that, since achieving its monopoly that organ has held the answering defendant and the other defendants at its mercy in the matter of advertising rates and has made repeated and some recent increases in such rates, and that it now constitutes a monopoly in violation of Section 2 of the Sherman Act.

It is not now said by the Court that absolutely no evidence of the character foreshadowed by the language just referred to may in any circumstances be received upon the trial. But if any of such evidence be receivable at all it will have to be such as may repel the existence of agreement charged against defendants by plaintiff. The remaining newspaper and its owner are not parties to this proceeding and are not to be subjected to trial in it upon the basis of any diversionary or "back fire" pleading. The matter moved against is, in its context, scandalous and impertinent; and the motion for its exclusion is being granted and sustained.

ITEM 3. This item of the motion seeks the striking as redundant, immaterial, impertinent and scandalous of the following language from paragraph 14 of the answer:

> ". . . except as admission prices for exhibition demanded by the producers and distributors of the motion pictures exhibited and to be exhibited in defendant's theatre have been determined by the distributor and under compulsion and with the assent of the plaintiff and the defendant was left with no further choice except to comply . . . For further answer alleges that films are licensed by the distributors on a competitive or negotiated basis, that this defendant has competed with others in an effort to secure the said motion pictures from time to time as the same were available in competition with all other exhibitors including all drive-in theatres, all indoor theatres in the so-called Omaha area. For further answer alleges that each and every motion picture released by the various distributors for exhibition in the Omaha area or territory during all times herein mentioned have been exhibited and there has actually been a dearth or a shortage of motion pictures available for exhibition."

The language thus quoted appears in the answer between explicit denials of paragraph VI(14)(a) and VI(14)(c) of the complaint averring respectively as effects of the alleged combination and conspiracy, (a) the denial to members of the public of the opportunity to see pictures at drive-in theatres in the Omaha area at prices determined in a free competitive market, and (c) the substantial reduction in volume of theatre advertising purchased by the defendants from newspapers circulating in interstate commerce. The language is principally, and it would appear entirely, oriented to the former of those charged effects and its denial.

Here again, so far, if at all, as the material objected to may be entitled to any consideration upon the trial it may be presented under the denial which it patently tries to support argumentatively. It states no defense apart from the denial itself. It is, accordingly redundant; and in its attempt to fasten responsibility on strangers to the suit, is scandalous, and on those accounts is being stricken by way of the allowance of that part of the motion.

ITEM 4. Finally, the motion asks that all of paragraph 15 of the answer be stricken as immaterial. It is immaterial; and, to that extent also, the motion is being granted and sustained. Paragraph 15 of the answer is an averment of the minimum present number of theatres in the Omaha area, both of the drive-in type and of all types, and of the comparative modesty of the proportion of the total theatre partronage in the area enjoyed, (a) by the answering defendant, and (b) by all the defendants. That is not a defense to the charges made against the answering defendant.

[*General Observations*]

GENERALLY. It may be observed broadly that the portions of the answer moved against, and now stricken upon the motion, are subject to the criticisms that they are (a) an attempt to plead evidentiary items, and such items largely of dubious allowability, and (b) the gratuitous advancement of argumentative positions. They also, and too obviously, undertake to distract attention from the issues tendered in the complaint, to which alone the answers should respond; and to do this by pointing out the supposed sins of others against whom plaintiff has not seen fit to proceed in this action. It is pretty sound judicial administration, at least to attempt to restrain each case within its own logical bounds and to discourage impertinent excursions into alien fields.

[*Motion Granted*]

An order allowing the motion in its entirety and striking from the answer all of the several portions of it identified in the motion is being filed herewith.

[¶ 68,663] Miller Motors, Incorporated v. Ford Motor Company.

In the United States District Court for the Middle District of North Carolina, Winston-Salem Division. Civil Docket No. 563. Filed March 20, 1957.

Clayton and Sherman Antitrust Acts

Combinations and Conspiracies — Tie-in Sales — Manufacturer-Dealer Advertising Arrangement—Legality.—A manufacturer of automobiles did not engage in a conspiracy which unreasonably burdened interstate commerce in two makes of its automobiles or in the advertising of such automobiles by entering into an arrangement with dealer advertising organizations throughout the country, whereby it collected from each dealer assessments made by the dealer advertising organization to which such dealer belonged and turned such assessments over to such organization to be spent for advertising in the name of an individual dealer or of all dealers selling such automobiles. The manufacturer did not own or control the dealer advertising organizations, which were composed of dealers of two makes of the manufacturer's automobiles who were interested in promoting the sale of such automobiles against other automobiles produced by the manufacturer as well as against automobiles made by other manufacturers. Neither the manufacturer nor the dealer organizations sold advertising, and each dealer organization had the right to select its own advertising agency or agencies. Furthermore, the manufacturer did not require such dealers to use the advertising of the dealer organizations exclusively; and the manufacturer made nothing directly from dealer organization advertising—the indirect benefit received from such advertising was matched by the benefit the dealers received from the manufacturer's own advertising of the automobiles sold by the dealers. The dealer advertising program was a reasonable arrangement, designed to promote the interests of the dealers by furnishing them with effective advertising at a minimum of cost.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.848.

Monopolies—Conspiracy to Monopolize—Tie-in Sales—Manufacturer-Dealer Advertising Arrangement—Legality.—A manufacturer of automobiles did not engaged in a conspiracy to monopolize commerce in two makes of its automobiles or in the advertising of such automobiles by entering into an arrangement with dealer advertising organizations

throughout the country, whereby it collected from each dealer assessments made by the dealer advertising organization to which such dealer belonged and turned such assessments over to such organization to be spent for advertising in the name of an individual dealer or of all dealers selling such automobiles. The manufacturer did not own or control the dealer advertising organizations, which were composed of dealers of two makes of the manufacturer's automobiles who were interested in promoting the sale of such automobiles against other automobiles produced by the manufacturer as well as against automobiles made by other manufacturers. Neither the manufacturer nor the dealer organizations sold advertising, and each dealer organization had the right to select its own advertising agency or agencies. Furthermore, the manufacturer did not require such dealers to use the advertising of the dealer organizations exclusively; and the manufacturer made nothing directly from dealer organization advertising—the indirect benefit received from such advertising was matched by the benefit the dealers received from the manufacturer's own advertising of the automobiles sold by the dealers. There was no claim that the effect of the arrangement was to create a monopoly in the manufacture and sale of automobiles in general, and every manufacturer has a natural monopoly in his own product, especially when sold under his trade name, but such a monopoly is not prohibited by the antitrust laws.

See Monopolies, Vol. 1, ¶ 2610.850.

Exclusive Dealing—Tie-in Sales—Manufacturer-Dealer Advertising Arrangement—Legality.—A manufacturer of automobiles did not tie-in the sale of advertising with the sale of two makes of its automobile by entering into an arrangement with dealer advertising organizations throughout the country, whereby it collected from each dealer assessments made by the dealer advertising organization to which such dealer belonged and turned such assessments over to such organization to be spent for advertising in the name of an individual dealer or of all dealers selling such automobiles. The manufacturer did not own or control the dealer advertising organizations, which were composed of dealers of two makes of the manufacturer's automobiles who were interested in promoting the sale of such automobiles against other automobiles produced by the manufacturer as well as against automobiles made by other manufacturers. Neither the manufacturer nor the dealer organizations sold advertising, and each dealer organization had the right to select its own advertising agency or agencies. Furthermore, the manufacturer did not require such dealers to use the advertising of the dealer organizations exclusively.

The manufacturer did not attempt to tie-in the sale of one of its products to the sale of another of its products because the manufacturer was not engaged in the business of selling advertising. The manufacturer made nothing directly from dealer organization advertising—the indirect benefit received from such advertising was matched by the benefit the dealers received from the manufacturer's own advertising of the automobiles sold by the dealers. Even a true tie-in sale is not prohibited unless the effect of it may be to substantially lessen competition or tend to create a monopoly. The effect of such advertising was to promote competition and not to lessen competition in the sale of automobiles. Also, there was no restraint of competition in, or tendency toward monopolization of, advertising.

See Exclusive Dealing, Vol. 1, ¶ 4009.580.

Exclusive Dealing—Tie-in Sales—Sales of Automobiles and Sale of Parts—Manufacturer's Stock Policy—Legality.—A manufacturer of automobiles did not require one of its dealers to purchase parts and accessories as a condition of its acceptance of individual orders for the purchase of automobiles, although the manufacturer did insist that the dealer purchase and carry a volume of parts and accessories satisfactory to it as a condition of continuing the dealer's franchise. The manufacturer had the undoubted right to require the dealer not to sell as genuine parts any parts that were not genuine. Such a requirement is designed to maintain the good will of the public toward the manufacturer's automobiles. Furthermore, under the circumstances in the instant case, the manufacturer had the right to require the dealer to carry a representative line of genuine accessories as a condition of continuing its franchise. The manufacturer had the right to select its customers and to refuse to sell its products to anyone, for reasons sufficient to itself; therefore, the manufacturer had the right to terminate the dealer's franchise

when its performance with respect to the sale of parts and accessories was not satisfactory to the manufacturer. Also, the manufacturer did not enjoy a monopolistic position in the automobile industry, and the manufacturer did not restrain a substantial volume of commerce in parts and accessories.

See Exclusive Dealing, Vol. 1, ¶ 4005.210, 4009.580.

Monopolies—Monopolization—Attempt to Monopolize—Market Domination and Distribution Control—Legality.—The "market domination or distribution control" claimed to have been exercised by a manufacturer of automobiles, or the "economic captivity" claimed to have been imposed on an automobile dealer, did not amount to a monopolization of, or an attempt to monopolize, any part of trade or commerce in violation of Section 2 of the Sherman Act. The dealer unsuccessfully contended that the existence of the power which the manufacturer possessed to control its dealers, and the manufacturer's exercise of this power, amounted to "economic slavery" and "market domination or distribution control," violated Section 2 of the Sherman Act, and entitled him to sue the manufacturer for any losses it may have sustained by reason of such domination. Congress, in passing the Automobile Dealer Franchise Act, does not share the dealer's view because, under this Act, automobile dealers are entitled to recover damages sustained by reason of an automobile manufacturer's failure to act in good faith in complying with a dealer franchise or in terminating such a franchise. There is no suggestion in the Senate and House reports that a dealer has such a remedy as the dealer sought to establish in the instant suit. Furthermore, there is no reported case which allows recovery to a dealer against a manufacturer under the "domination" theory advanced by the dealer.

See Monopolies, Vol. 1, ¶ 2530, 2610.800; Private Enforcement and Procedure, Vol. 2, ¶ 9070.01.

Combinations and Conspiracies—Monopolies—Termination of Dealer Franchise—Refusal to Deal.—An automobile manufacturer's termination of a dealer's franchise was justified where such dealership was terminated because the dealer's performance was not satisfactory to the manufacturer, in that, among other things, the dealer did not sell enough automobiles, did not sell enough parts, and did not cooperate with the manufacturer's policies and programs. The manufacturer had the right to select its customers and to refuse to sell its automobiles to anyone, for reasons sufficient to itself. The dealer had claimed, among other things, that the manufacturer's arrangement with dealer advertising organizations was unlawful, that the manufacturer shipped defective automobiles, that the manufacturer discriminated against it by either giving it too many automobiles or not enough automobiles, that the manufacturer forced it to accept tie-in sales and to buy exclusively from the manufacturer, and that the manufacturer conspired with dealer advertising organizations to cancel its franchise.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785; Monopolies, Vol. 1, ¶ 2610.720.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Evidence—Public Injury.—Private antitrust suits are maintainable only when the defendant's conduct has caused some injury to the public generally, as distinct from purely personal or private damage. In holding that an automobile dealer did not show public injury in its suit against an automobile manufacturer, the court noted that "Suits by dealers against automobile manufacturers have been generally unsuccessful because the dealers have been unable to show any injurious effects on the public automobile market."

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.475.

For the plaintiff: Elledge and Johnson, Winston-Salem, N. C.

For the defendant: Womble, Carlyle, Sandridge and Rice, Winston-Salem, N. C.

[*Treble Damage Action*]

ROSZEL C. THOMSEN, District Judge, sitting by designation [*In full text*]: This is an action for treble damages under the antitrust laws brought against Ford Motor Company by a former Lincoln-Mercury dealer at Winston-Salem, N. C. No claim is made based upon any breach of contract or other cause of action except the alleged violation of the antitrust laws.

The complaint is elaborate and was amended twice before trial; so amended,

it sets up six causes of action, alleges that all acts complained of in the several causes of action were done in furtherance of the conspiracy alleged in the first cause of action, and that the acts alleged in each cause of action violated Secs. 1 and 2 of the Sherman Act and Secs. 3[1] and 4 of the Clayton Act, 15 U. S. C. A. 1, 2, 14, 15.

[*Causes of Action*]

The first cause of action alleges that Ford entered into an arrangement with the several Lincoln-Mercury Dealers Advertising Funds (LMDAs) throughout the country, under which Ford collected from each dealer the assessments made by the LMDA to which such dealer belonged, and turned the money over to that LMDA, to be spent by it for advertising in the name of the individual dealer or of Lincoln-Mercury dealers generally. The question is whether that arrangement was either (a) a conspiracy which unreasonably burdened the interstate commerce in Lincoln-Mercury automobiles or the advertising thereof, in violation of Sec. 1 of the Sherman Act, or (b) an attempt to monopolize the commerce in such automobiles or the advertising thereof, in violation of Sec. 2 of the Sherman Act, or (c) a tie-in of the sale of advertising with the sale of automobiles, in violation of Sec. 3 of the Clayton Act.

The second cause of action alleges that Ford shipped to plaintiff many defective automobiles, required plaintiff to fix them, and refused to pay plaintiff's regular and customary charges for this type of work; that plaintiff did the work under duress, and because of the low rates allowed by Ford, frequently lost money on such repairs. On defendant's motion for summary judgment, I ruled that the second cause of action did not state a separate claim under the antitrust laws, but that plaintiff might offer evidence of the facts alleged therein, as means claimed to have been used to enforce the conspiracy alleged in the first cause of action and to effectuate the domination alleged in the fifth.

The third cause of action alleges that Ford discriminated against plaintiff by not giving plaintiff its proportionate number of cars at the beginning of new model years, but after automobiles became plentiful insisting that plaintiff accept and sell more automobiles than its territory would absorb; that this alleged discrimination was practiced against plaintiff because plaintiff would not submit to all of Ford's demands. At the end of plaintiff's case, its counsel conceded that it was not entitled to recover under the third cause of action as a separate claim, but argued that the evidence offered in support thereof should be considered in connection with plaintiff's claim that Ford dominated plaintiff's business.

The fourth cause of action deals with parts and accessories; it alleges that "defendant required the plaintiff wilfully, unlawfully and under duress to accept tie-in sales, and * * * to buy exclusively from the defendant, * * * in order to obtain automobiles from the defendant each model year." The issue is whether Ford's insistence that its dealers purchase and carry parts and accessories manufactured by or for it was so great and of such nature that it violated Sec. 3 of the Clayton Act.

The fifth cause of action alleges that "defendant wilfully, unlawfully and maliciously dominated and monopolized the * * * business of the plaintiff by holding a leaver (sic) over the head of the plaintiff due to the fact that the defendant had the exclusive sale and manufacture of Lincoln-Mercury automobiles." Violation of Sec. 2 of the Sherman Act is claimed.

The sixth cause of action alleges that Ford, in conspiracy with LMDA, cancelled plaintiff's sales agreements, because of plaintiff's unwillingness to do the various things Ford insisted upon, as set out in the first five causes of action. At the end of plaintiff's case, its counsel conceded that it was not entitled to recover under the sixth cause of action as a separate claim, but argued that the evidence offered in support thereof should be considered in connection with plaintiff's claims of conspiracy, domination and monopolization.

In connection with each cause of action which is being pressed, the question arises whether plaintiff proved any damages resulting from alleged violations which occurred within the applicable period of limitations.

LIMITATIONS

The original complaint in this case was filed on July 29, 1955. The new Federal

[1] The second cause of action does not charge a violation of Sec. 3 of the Clayton Act.

statute of limitations, 15 U. S. C. A. Sec. 15b, for claims under Secs. 15 and 15a, did not become effective until January 7, 1956, and provided that it should not revive any cause of action theretofore barred under existing law. It had been repeatedly held that 28 U. S. C. A. 2462 (R. S. 1047) was not applicable to actions under 15 U. S. C. A. 15, but that the court should apply the statutes of limitations of the state in which the action was commenced. *Chattanooga Foundry & Pipe Works v. Atlanta,* 203 U. S. 390; *Glenn Coal Co. v. Dickinson Fuel Co.,* (4 Cir.) [1932-1939 TRADE CASES ¶ 55,062] 72 F. 2d 885.

Defendant contends that this action is barred by Sec. 1-54(2) of the General Statutes of North Carolina, which imposes a one year limitation on any action "upon a statute, for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation." Failing this, defendant falls back upon Sec. 1-52(2), which imposes a three year limitation on any action "upon a liability created by statute, other than a penalty or forfeiture, unless some other time is mentioned in the statute creating it."

It is not clear which of these two sections governs actions under the antitrust laws. It is clear, however, that in such a case as this, the sources of damage are separable for purposes of limitations. *Emich Motors Corp. v. General Motors Corp.,* (7 Cir.) [1956 TRADE CASES ¶ 68,249] 229 F. 2d 714, and cases cited. It is also clear that plaintiff has not alleged or proved any such duress as would toll the statute, assuming it could be tolled by duress. To constitute duress, the threatened action must be unlawful. 54 *C. J. S.* p. 201. A threat to do what one has a legal right to do cannot constitute duress. *Kirby v. Reynolds,* 212 N. C. 271, 282, and cases cited. The alleged duress consisted of threats by Ford to terminate plaintiff's dealership, which Ford had the clear right to do. *Ford Motor Co. v. Kirkmyer Motor Co.,* (4 Cir.) 65 F. 2d 1001. So, at a pretrial hearing, although withholding decision on the question of which section applies, I did rule: (a) that evidence with respect to damages should be limited to damages resulting from alleged violations of the antitrust laws during the period of three years before suit, and should also show what part of the damages so claimed were caused by alleged violations during the last year; and (b) that evidence of defendant's acts and conduct beyond the period of three years might be offered to prove a conspiracy, a course of dealing or other conduct relevant and material to any of the issues in the case.

FACTS

After oral argument, I dictated into the record rulings on many proposed findings of fact submitted by the respective parties; the following narrative statement, however, gives all the facts necessary to an understanding of the issues.

The Industry

The evidence in this case, like that given before the Congressional Committees in 1956, supports the following statement, which is quoted from the Report of the Senate Judiciary Committee, 84th Cong., 2d Sess., Rep. No. 2073.

> "The evidence indicated that great pressure had been exerted, at least by the dominant automobile manufacturers, upon dealers to accept automobiles, parts, accessories, and supplies which they did not need, did not want, or did not feel their market was able to absorb. * * * dealer witnesses asserted that while they were ostensibly independent businessmen, the factory dominated and controlled almost every phase of their operations at all times. The conflict in interest between factory and dealer is a conflict between parties of totally unequal economic power. Automobile production is one of the most highly concentrated industries in the United States * * *. Today there exist only 5 passenger-car manufacturers, 3 of which produce in excess of 95 per cent of all passenger cars sold in the United States. There are approximately 40,000 franchised automobile dealers distributing to the public cars produced by these manufacturers. Dealers have an average investment of about $100,000. This vast disparity in economic power and bargaining strength has enabled the factory to determine arbitrarily the rules by which the two parties conduct their business affairs. These rules are incorporated in the sales agreement or franchise which the manufacturer has prepared for the dealer's signature. Dealers are with few exceptions completely dependent on the manufacturer for their supply of cars. When the dealer has invested to the extent required to secure a franchise, he becomes in a real sense the economic captive of his manufacturer. The substantial

investment of his own personal funds by the dealer in the business, the inability to convert easily the facilities to other uses, the dependence upon a single manufacturer for supply of automobiles, and the difficulty of obtaining a franchise from another manufacturer all contribute toward making the dealer an easy prey for domination by the factory. * * * The faults of the factory-dealer system are directly attributable to the superior market position of the manufacturer. This economic strength manifests itself in two principal ways: (1) Control and supervision of the dealer's business. (2) Power to terminate or refuse to renew the dealer's franchise. The threat of termination which the manufacturer holds over the dealer once the dealer commits himself to the requirements for entry into the industry permits the manufacturer to control the dealer and his operation. The dealer accepts this relationship in the expectation that it will be profitable. He later can reconsider his decision only with the knowledge that his business is specialized in nature and his capital not readily transferable to alternative uses. * * *"

The Defendant and Its Sales Agreements

Ford is the second largest producer of passenger automobiles, with assets of some 2½ billion dollars. It produced 22.78% of all new automobiles sold in the United States in 1952, 25.15% in 1953, and 30.84% in 1954. In 1953 it sold 1,443,153 cars, of which about 327,000 were Lincolns and Mercurys; in 1954 the corresponding figures were 1,706,617 and 306,000, respectively. It has 8,500 retail distributors, of whom 1,843 sold Lincolns and Mercurys.

Before 1946, Lincolns and Mercurys were sold by Ford car dealers. In October, 1946, Ford organized the Lincoln-Mercury Division, which is subdivided into regions, districts, and zones, with its own field organization. Winston-Salem is in the Atlanta District, which, in 1950, had been separated from the Jacksonville District, of which it had theretofore been a part.

The field organization serves two principal purposes: (1) obtaining information for the factory, or home office, at Detroit, and (2) helping promote the sale of Lincolns and Mercurys to franchise dealers, and by such dealers to the public. Members of the field organization call on each dealer, suggest how he may improve his operations, and take orders for automobiles, parts and accessories. The methods of car production and distribution are essentially those set out in *U. S. v. General Motors Corp.* [1940-1943 TRADE CASES ¶ 56,120, 56,139], 121 F. 2d 376, at 386 to 388, and need not be detailed here.

Plaintiff, like other dealers, entered into separate but similar sales agreements covering Lincolns and Mercurys. Under these agreements, the dealer is obligated to maintain a place of business located in a place and equipped in a manner acceptable to Ford; to maintain tools, machinery and equipment recommended by Ford; to employ sufficient competent salesmen to solicit adequately all potential purchasers of the division's products in the community; to employ sufficient competent service mechanics to render prompt, efficient service to owners of Lincolns and Mercurys, and to render such service; to install and maintain an accounting system in accordance with a manual approved by Ford; to furnish Ford, at regular intervals, accurate financial statements, reflecting the financial condition of the dealer's business; to make available all records, contracts and accounts for examination by Ford at all reasonable times; to maintain a stock of automobiles, parts and accessories; to have available one or more new automobiles for demonstration purposes; to advertise the use of genuine parts in the repair of Ford's products only where such genuine parts are actually used; to advertise in no manner or method detrimental to Ford, or to which Ford may object as being detrimental to its name or good will. For its part, Ford agrees that if it terminates the sales agreement, it will re-purchase the dealer's stock, subject to payment of transportation costs by the dealer and certain other conditions. The agreements may be terminated at will by either party, but in case of termination by Ford, sixty days notice must be given. The agreements specify that the dealer is not an agent. Ford expressly reserves the right to refuse to deliver automobiles to the dealer for reasons satisfactory to it, and the agreement expressly provides that Ford shall not be liable for failure to ship or for delay in shipments, however caused.

The agreements provide for a cooperative advertising fund, to which each dealer contributes a certain amount and Ford a smaller amount for each new Lincoln or Mercury purchased by the dealer. The fund

so established is controlled by Ford, but each dealer's contributions are spent in his territory. Plaintiff, like other dealers, was required to sign the co-op agreements.

Dealers employ various methods of paying for automobiles, of which the method used by plaintiff is the most common. Plaintiff had an open letter of credit with a finance company. Upon receipt from plaintiff of each order for a certain number of cars, Ford would draw a draft on the finance company, which would pay for each automobile at the time of its delivery to the convoy carrier at the factory. Ford engages the convoy carrier and pays the transportation charges; the dealer pays to Ford a charge for distribution and delivery, which includes an amount equal to railway freight from Wayne County, Michigan, to the dealer's place of business.

Under its "Warranty and Policy Procedure Manual," Ford warrants to the dealer parts of the automobiles for a period of ninety days from the date of original delivery to the ultimate purchaser, or until the vehicle has been driven 4,000 miles, whichever shall first occur. This warranty applies only to such parts as shall, under normal service, appear to Ford to have been defective in workmanship or material. The dealer makes the same warranty to the purchaser and delivers to him an "Owner's Service Policy," which obligates the dealer to deliver, without charge, replacement parts to which the purchaser is entitled under the terms of the warranty. The Manual sets forth a detailed procedure, under the terms of which Ford repays the dealer for parts used in warranty work and a specified percentage of the dealer's retail labor rate. This payment is intended to cover the dealer's costs, without any allowance for overhead or profit, and, because of specific time allowances for various jobs fixed by the manual, sometimes results in a small profit to the dealer, but more often resulted in a loss to plaintiff. The procedure has been modified from time to time. Unless the required procedure is followed, the dealer may encounter considerable difficulty or delay in securing reimbursement for warranty work done and parts used. Plaintiff consistently failed and refused to fill out the forms properly, and Miller abused Ford's representatives who attempted to show him how to do so.

An "Extended Adjustment Policy" was adopted, effective April 1, 1953, to assist the dealers in promoting customer good will and to protect the reputation of Ford's products.

When the factory turned out an unusually large number of cars with minor defects, as sometimes happened when substantial changes were made in the models, the factory had insufficient "hospital" space for the cars, and sent them on to the dealers in the expectation that the dealer would correct the defects in the "new car get ready" process. This practice cost conscientious dealers money. An inordinate proportion of the expenses of plaintiff's shop was spent on such work; but plaintiff spent considerably less money per car on such work than the average dealer in the district, region or country. The disproportion was principally caused by the lack of public repair work done by plaintiff at ordinary retail prices, which, in turn, was largely due to the fact that plaintiff did not make sufficient effort to sell shop service to the public.

Plaintiff's Dealership and Its Termination, Including Alleged Domination and Discrimination by Ford

Plaintiff was incorporated in 1946 as Davis-Miller Motor Company. Miller had been a Ford dealer before the war and was familiar with many of Ford's practices of which he now complains, including the policy requiring a dealer to purchase the number of cars Ford feels the territory should absorb, on pain of losing his franchise. Nevertheless, Miller solicited a Lincoln-Mercury dealership in 1946.

Plaintiff's net worth (original investment plus retained profits) varied considerably during the course of its operations, reaching a high of $133,000 in January, 1953; it was regarded as a large dealer though not a metropolitan dealer.

During the sellers' market following the war, plaintiff's business, like that of most automobile dealers, was very profitable; for the years 1946-1951, its profits totalled $113,733.75, after comfortable salaries to the two principal officers.[2] Thereafter, the busi-

[2] Davis was the first president of the plaintiff; he was not a practical automobile man; his principal business was insurance; and Miller bought him out in 1949.

ness was not profitable; Miller was not capable of meeting the keen and ruthless competition which developed in 1953. His sales managers, parts managers, and service managers were not aggressive. Ford's representatives had frequently urged Miller to hire more forceful persons, and Miller had made a few changes, but not enough to secure an effective organization.

In 1952-53 the market shifted from a sellers' market to a buyers' market; but the automobile companies, particularly General Motors and Ford, seemed determined to sell ever more cars. Substantially increased quotas were presented to plaintiff and other dealers. Ford insisted that its dealers come close to meeting the new quotas if they were to hold their dealerships. In most cases the volume of cars could not be sold in the traditional manner; and the practice of holding blitz sales developed throughout the industry. Officers and employees of the manufacturers encouraged blitz sales, until they recanted during and after the Congressional hearings in 1956. At best, blitz sales meant that a dealer would sell an increased number of cars at a much smaller profit, sometimes at no profit. At worst, blitz advertising was dishonest; prices were padded in order to show apparent reductions in price. Dealers who did not engage in such practices found that their customers complained because they were not given large discounts and trade-in allowances. Ford did not suggest dishonest advertising; but continued to insist upon an increasing volume of purchases. Dealers in Lincolns and Mercurys, as well as in other makes of cars, in Charlotte, Greensboro, and other cities in North Carolina, engaged in blitz selling, to the detriment of plaintiff's business. Ford's field representatives urged Miller to undertake blitz sales, since it was apparent plaintiff could not meet its quota in any other way.

Despite Ford's insistence that its dealers order such a large number of cars that they could not be sold except at substantial discounts, especially toward the end of model years, Ford did not allow any reductions in its own prices to the dealers, except in cases where they exceeded special quotas set by the factory.

Ford's field representatives persuaded Miller to enlarge his facilities on a number of occasions, and insisted that he engage in various advertising and promotional programs. Miller frequently objected to these programs; he was uncooperative, critical of the policies of Ford and its representatives, and at times abusive, belligerent and threatening.

During the period December 1, 1951, to November 30, 1954, plaintiff lost $97,991.82. By far the greater part of this loss occurred after September 30, 1953, when Miller suggested to the Regional and District Sales Managers that they try to find a purchaser for his business. Miller ordered very few cars after September, 1953, and since his expenses were continuing, he had a large loss.

The complaint alleges numerous instances of discrimination against plaintiff by Ford and its representatives. But the evidence shows no real discrimination. There were the usual number, perhaps more than the usual number, of irritating mistakes and delays with respect to body types ordered by plaintiff, and similar matters, to which big business seems more prone than small. Some of the delays were due to strikes, changes in orders by Miller, and other causes beyond Ford's control. And in view of Miller's lack of cooperation, the field representatives would have been more than human if, when they had three show cars to divide between two dealers, they had not given the break to the more cooperative dealer. But the evidence does not support plaintiff's allegation that Ford discriminated against plaintiff by withholding from it new cars at the beginning of a new model year and loading it down with cars at the end of a model year, or in any other substantial manner. Plaintiff now admits that Ford did not conspire with LMDA to do any of the things alleged in the third cause of action.

In September, 1953, Miller wrote a long letter to the Atlanta District Manager complaining of alleged discrimination against him and other grievances. He sent a copy of this letter to Henry Ford, II. Following a very unsatisfactory conference on September 30, 1953, with the district and regional managers, he insisted that they produce a cash purchaser for his business or stop threatening cancellation if he did not sell more cars. From then on there was constant friction between Miller and most of Ford's representatives with whom he came in contact. In October, 1953, the

Regional Manager recommended to the home office that plaintiff's franchise be terminated. On May 19, 1954, the General Sales Manager placed this recommendation before the Merchandising Committee, which authorized termination.

The notice of intention to terminate was dated June 1, 1954, and was received by plaintiff June 8, 1954. The letter actually terminating the dealership and sales agreements was dated August 4, 1954, and was received by plaintiff on August 19, 1954.

Plaintiff's dealership was terminated because its performance was not satisfactory to Ford, in that, among other things, plaintiff did not sell enough cars, did not sell enough parts, and did not cooperate with Ford's policies and programs, but was openly and avowedly antagonistic to them. Plaintiff's sales of new Lincolns and Mercurys were well below district, regional, and national averages, and below those of dealers in comparable North Carolina cities. Its operating expenses per new car, unabsorbed expenses per new car and direct selling expenses per new car were far higher than such averages; accordingly, plaintiff's net profit per new car and return on investment were far lower. Ford's termination of its sales contracts with plaintiff was well justified.

Only two out of the 100-odd Lincoln-Mercury dealers in the Southern region have been terminated in the last seven years; five others have resigned upon request. In other words, requested terminations have run about 1% per year.

LMDA

In 1934, while N. W. Ayer & Son was advertising counsel for Ford Motor Company, another agency, McCann-Erickson, solicited Ford dealers for their advertising, and the first Ford Dealers Advertising Fund (FDA) was organized. Thereafter, thirty-three FDAs were organized throughout the country; some used the same advertising counsel as Ford, some did not. During World War II there was no dealer advertising; Maxon, Inc., and later J. Walter Thompson handled Ford's institutional advertising. After the war, Maxon began reactivating FDAs throughout the United States and was appointed counsel by twenty-four of them, Thompson by nine. In 1946 Thompson acquired all of Maxon's FDA accounts.

When it was announced that the L-M Division would be set up in October, 1946, L-M dealers elected two representatives from each of the six L-M Sales Regions to form the first L-M Dealers National Advertising Council. These delegates met in Detroit in December, 1946, and were unanimous in their desire to form dealer advertising funds separate and distinct from FDAs. Shortly thereafter, LMDAs were organized throughout the United States. Thompson was then handling the Ford Division and the FDA accounts, and it solicited the newly-formed LMDAs; but after the L-M Division appointed Kenyon & Eckhardt (K&E) its advertising counsel, K&E solicited each LMDA separately and signed advertising agency agreements with all of them.

Ford cooperated with the interested dealers in the organization of FDAs and LMDAs. The Jacksonville LMDA was set up in April, 1947, at a meeting of L-M dealers. Some of the L-M dealers at the meeting were also Ford dealers, who had served on the FDA committee. The general plan of the FDA was satisfactory to the L-M dealers, but they wanted to administer their own advertising funds, since they considered themselves in competition with Ford dealers, as well as with dealers in Buicks, Pontiacs, and other makes. They decided unanimously to form an LMDA and elected six directors from their own number, on nominations from the floor.

The directors employed a Jacksonville attorney, who also represented the local FDA, to incorporate the Jacksonville LMDA (J-LMDA); it was incorporated under the laws of Florida as a non-profit corporation. Its charter and its by-laws were similar to those of the FDA. The by-laws provided for a self-perpetuating board of directors; but they were amended in 1954 to provide for the election of directors. The practice in this respect varies among LMDAs.

Before J-LMDA was organized, a charge for L-M dealer advertising had been collected by Ford on the sale of Lincolns and Mercurys and turned over to the district FDA to be administered along with similar charges collected on Ford cars. After J-LMDA was organized, an accounting was had and the unexpended money in the hands of the FDA which had been collected on Lincolns and Mercurys was turned over to J-LMDA.

J-LMDA employed K&E on March 8, 1948. Each LMDA had the right to select its own advertising counsel, but J-LMDA, like the others, selected K&E because it was then representing the L-M Division and had engaged a number of Thompson's employees, who were familiar with the account.

K&E is a well known advertising agency, whose stock is owned by its officers and employees. No officer or director of Ford is an officer or director of K&E.

When an L-M dealer signed his original sales agreements, the Ford representative usually presented him with an LMDA agreement for signature. This agreement recited that LMDA was organized for the mutual benefit of the dealers in the territory, and for the purpose of promoting the sale of new Lincoln and Mercury cars. It authorized the LMDA directors, or the executive committee, to employ an advertising agency, and to advertise Lincolns and Mercurys in various ways. The dealer agreed to contribute to LMDA a specified amount for each new Lincoln or Mercury purchased by the dealer from Ford, payment to be made in such manner as the directors or the executive committee should provide. In practice this provision was treated as an authorization, and the directors fixed the actual amount to be collected from time to time within the limits of the authorization. The amounts collected varied widely among the LMDAs throughout the country, and varied from time to time within J-LMDA. The LMDA agreement provided that it should continue until terminated, termination to be effective sixty days after receipt by the fund of a written notice from a majority of the members of their desire to terminate the agreement. On the other hand, the by-laws provided that an individual dealer might resign by giving sixty days written notice. After the organization of the Atlanta district by Ford, J-LMDA served both districts; its name was changed, but for convenience it will still be referred to as J-LMDA.

After its president executed the LMDA agreement, plaintiff made contributions to J-LMDA in varying amounts, until the termination of its dealership in September, 1954. At the request of J-LMDA, these contributions were included on the invoices for the automobiles delivered to plaintiff, and Ford transmitted the funds so collected each month to the treasurer of J-LMDA. Supporting data accompanied the check. A firm of certified public accountants employed by J-LMDA rendered periodic financial statements to the executive committee, and plaintiff makes no claim of dishonesty in the handling of these funds either by Ford or by J-LMDA.

Advertising was usually purchased by J-LMDA on a quarterly basis. Ford would forecast to K & E the production of Lincolns and Mercurys for the ensuing year; this forecast would be revised from time to time during the year in the light of actual production. Thus, the money available to J-LMDA for advertising would be estimated. K & E would then propose an advertising program for the ensuing quarter within the funds estimated to be available, and present the program to the J-LMDA advertising committee. In the case of newspaper advertising, K & E generally prepared 25 or 30 ads for consideration, from which a lesser number would be selected by the committee, after they had been submitted to Ford's advertising department for approval.

Other media employed by J-LMDA in its earlier years included radio spots and chain-break announcements, billboards, movie trailers, direct mail advertising, and banners announcing new models, for display by dealers. The advertising selected often referred to used cars, as well as to new Lincolns and Mercurys. Most LMDA advertising was bought either from K & E or at the suggestion of the defendant, but some was purchased from other sources. Television advertising was a later development.

The district and regional sales managers of the L-M Division had a standing invitation to attend J-LMDA meetings, and the district manager usually attended. They did not dictate the decisions made at those meetings, but were present mainly as a source of information regarding factory plans, new developments, production schedules, etc.

The J-LMDA committee kept minutes, and mailed to all L-M dealers in the district a report of each meeting and of the advertising plans for the ensuing quarter. When K & E placed newspaper or radio ads, the newspaper in the dealer's town was instructed to show the copy to the dealer in advance of publication; if the dealer did not like the ad, he had the privilege of substituting another. In the case of radio spots, the dealer could hear the various spot an-

nouncements on the platter sent by K & E to the radio station, and make his selection in advance of the broadcast. The advertising program adopted by J-LMDA was usually kept flexible, so that it could be changed to help a dealer with peculiar problems. In locations where newspaper or radio coverage was inadequate, billboard advertising to the same dollar amount as the proposed newspaper or radio advertising might be substituted. If a dealer preferred that his newspaper ads appear in the classified section, rather than in the display section, as was customary, his ads were changed accordingly. When "make your own deal" advertising and other blitz advertising commenced in 1953, with the change from a sellers' market to a buyers' market, the committee on a number of occasions permitted a dealer to substitute such advertising for more conventional advertising selected by the committee. K & E wrote "blitz" advertising for dealers who preferred it.

The J-LMDA committee did not always follow K & E's recommendations. While a basic theme usually ran through all advertising of Lincolns and Mercurys, each LMDA had the right not to follow that theme. The committee frequently made changes in the copy submitted by K & E.

That agency received its compensation in the customary manner; the advertising medium charged the advertisers the regular rate but allowed the agency a 15% commission. LMDAs paid the agency for art work.

J-LMDA first tried to keep accounts for each dealer, showing the amount generated by his purchases and the cost of his advertising. A year or two's experience showed that these amounts generally ran within 5% of each other; thereafter K & E kept records from which any particular dealer's account could be reconstructed to determine if such dealer was receiving his rightful share of advertising, but individual accounting was abandoned. Very few dealers ever asked for an accounting; when they did it was furnished them.

For a period of about two years J-LMDA set aside 40% of each dealer's contribution for the dealer to spend locally through any media he chose. Some of the dealers were lax about spending their money and the plan was abandoned, because the committee understood that tax considerations required it to spend each year substantially all money collected during that year. In January, 1949, J-LMDA increased its assessments $15 per Mercury and $20 per Lincoln for a period of six months, and donated the additional funds to Ford in recognition of the cost of producing and promoting the radically new 1949 line of cars. For a period of six months, in 1953 and 1954, the LMDA committees received $20 per car from the Co-op Fund; in effect, the LMDAs administered the Co-op Fund during that period, pursuant to an agreement signed by plaintiff and other dealers.

The Ed Sullivan TV show went on the air in March, 1949, over some 12 or 15 stations. Several L-M dealers in Atlanta wanted the show in 1949. J-LMDA paid for the show in Atlanta in lieu of newspaper advertising in that city, and the Atlanta dealers guaranteed to make good any excess of the cost of TV over the cost of newspaper advertising there. No other dealers paid any part of the cost of the show in Atlanta. From Atlanta the show gradually spread throughout the district. It went on the air in Greensboro and Charlotte on July 5, 1952. Winston-Salem is within the primary coverage of the Greensboro TV station. Before adding a station, the chairman of the J-LMDA committee would consult the dealers within the primary coverage of the station under consideration; the wishes of a majority of those dealers controlled. Dealers with TV coverage received less advertising through newspapers and other media.

The Ed Sullivan show was carried in all sections of the country, and other LMDAs contributed to its cost. It proved very popular, and as more and more stations were added, the cost exceeded normal LMDA advertising contributions. Beginning about 1951 or 1952, Ford underwrote the deficit between the cost of the show and the LMDA contributions. An L-M TV Fund was established in 1952 or 1953. This fund was administered by six L-M dealers, elected to represent each of the L-M sales regions. As the show became more popular and more expensive, Ford automobile dealers and others wanted to co-sponsor the show, but the LMDAs, with the support of Ford, succeeded in keeping it exclusively for L-M dealer advertising.

The advantages to dealers of LMDA advertising over individual dealer advertising include the following: (1) The cost of art work is shared by dealers in all the LMDAs.

(2) The research work and experienced personnel of a national agency produce better advertising copy than an individual dealer could obtain without spending large sums of money. (3) Many small dealers do not have the time or know-how to plan good advertising or to place it intelligently; usually they do not employ any advertising counsel. (4) A coordinated effort repeating a single advertising theme, which is an accepted fundamental of good advertising, can be obtained.

The advantages to dealers of LMDA advertising over co-op advertising administered by the factory include the following: (1) The LMDA committees are familiar with seasonal changes and local problems, such as closed textile mills. (2) The LMDA committees counsel directly with the dealers, and, being dealers themselves, have a better understanding of dealer problems. (3) Factory advertising tends to emphasize styling and comfort, while LMDA advertising tells the public that the automobile is for sale at a particular dealer's place of business. (4) LMDA advertising is more dynamic; it can strike harder and need not be as dignified as factory advertising. In practice, it was not submitted to legal counsel, as Ford's advertising was. (5) LMDA advertising included used car advertising, in which the interest of the dealer was more immediate than that of the factory.

The evidence does not disclose any substantial objection by L-M dealers to LMDA as such, at least until 1954, with the possible exception of Miller, who seems to have been opposed to any advertising of automobiles during the halcyon days following the war. Sometime during late 1953 or early 1954, Miller told one or more of Ford's field representatives that he did not like the Ed Sullivan show and thought it was a waste of money; that it gave the impression that if somebody came to plaintiff's place of business he could get an automobile for nothing and plaintiff would not make any profit.

In March, 1954, R. D. Nelligan, an L-M dealer in Greenville, S. C., asked W. A. Toms, manager of the Southern Region of the L-M Division, whether it was necessary for him to participate in LMDA in order to keep his franchise to sell automobiles; Toms told him to take the question up with his LMDA committee.

Later that evening, at a dealer meeting in Atlanta, Nelligan requested a ruling of the LMDA committee whether or not an individual member might resign from LMDA, because his information indicated there might be some official sanction which would make it mandatory that a dealer belong. K. M. Matthews, President of J-LMDA, replied that he could not say for sure, but in his opinion if a dealer did not contribute, he would be taking the risk of the factory cancelling his sales agreements. G. H. Schricker, manager of the Atlanta District of the L-M Division, was present, and was asked a few moments later what the repercussions would be if a dealer attempted to withdraw from LMDA. He gave an evasive answer. Toms, the Regional Manager, read the minutes of the meeting, and did nothing to correct the impression these questions and answers naturally conveyed.

In effect, participation in LMDA was compulsory. Like other dealers, Miller believed that plaintiff's sales agreements would be cancelled if he refused to pay his LMDA assessments.

If a majority of the dealers in any district became dissatisfied with LMDA advertising, because Ford dominated the agency, or for any other reason, they could have dissolved their LMDA. Indeed, it is hard to see how an LMDA could have been continued, even with Ford's support, against the determined opposition of a substantial minority of the dealers in any area. On the other hand, the pressure of the other dealers would and did require Ford to insist that an occasional recalcitrant dealer should be told that continued memberships in LMDA was a condition of continued dealership.

Only one Lincoln-Mercury dealer in the United States, Absey Motors, Inc., Grand Forks, N. D., did not belong to an LMDA between January 1, 1950, and November 4, 1954. Three other dealers were not members of an LMDA during some period between 1945 and 1956. Nelligan is the only dealer who ever requested to withdraw from the J-LMDA.

From 1947 through the end of 1954, total contributions by Lincoln-Mercury dealers throughout the United States to the various LMDA funds totalled approximately $38,790,000. In 1953, they were $8,807,000; in 1954, $7,582,000.

The total LMDA assessments paid by plaintiff after July 29, 1952, amounted to

$8,330. These contributions did not deprive plaintiff of the financial means of carrying on his own independent advertising to the extent of $10,750.06 in 1952, $15,403.28 in 1953, and $8,368.47 in 1954. Plaintiff did not feel a need for the services of an advertising agency in preparing or placing this advertising. Over the past four years plaintiff has received not less than $716.37 of advertising in its name in excess of its contributions to the LMDA, and its co-op account had been overspent by more than $4,000. This advertising cost plaintiff no more than if plaintiff had purchased the advertising.

Parts and Accessories [3]

The first sales agreements between plaintiff and Ford, signed in 1946, obligated plaintiff not to sell any replacement parts for Lincolns and Mercurys except genuine Lincoln and Mercury parts, unless Ford was unable to supply the parts or unless a purchaser expressly requested plaintiff to use some other part. This was amended in 1949, to obligate plaintiff not to sell as a genuine Lincoln and Mercury part any part which was not in fact a genuine Lincoln or Mercury part. The agreements also obligated plaintiff to maintain a stock of genuine parts and approved accessories of an assortment reasonably comparable to current demand, equivalent to at least one-sixth of its sales of parts and accessories during the previous twelve months.

There was no contract or agreement, express or implied, requiring plaintiff to buy from Ford all or any given percentage of plaintiff's parts and accessories requirements; and, in practice, Ford did not require plaintiff to buy exclusively from it.

During the years 1946 through 1949, numerous accessories were shipped in the trunks of cars delivered to plaintiff, although no written order had been signed for these accessories. The officers of plaintiff, including Miller, and other dealers generally, were entirely satisfied with this practice and made no objection to it, since they made a large profit out of it. Beginning with the 1950 model year, this practice was discontinued and orders for accessories were obtained from plaintiff's parts department.

Certain parts and accessories, such as cylinder blocks and body parts for Lincolns and Mercurys were available only from Ford. Other accessories, such as tires and paint, and parts for other makes of cars, were not sold by Ford. Still other parts and accessories could be bought from either Ford or other suppliers. Examples of this third class were fuel pumps, spark plugs, ignition parts, windshield wipers, transmission gears, anti-freeze, water pumps, seat covers, undercoating, etc.

Plaintiff purchased about half of the third class from Ford and half from other suppliers; of all parts and accessories combined, plaintiff purchased a little more than half from Ford. Most of the parts and accessories purchased from other suppliers were used in the repair and reconditioning of used cars, accepted by plaintiff as trade-ins. However, except for fenders and body parts, plaintiff could buy practically everything it needed for Lincoln and Mercury automobiles from automobile supply houses in Winston-Salem; so could an individual motorist. There was not difficulty getting parts almost anywhere, both in and out of the city. Plaintiff listed over fifty suppliers in or near Winston-Salem from whom it purchased parts and accessories.

Ford's field representatives frequently objected to plaintiff keeping in its stockroom parts and accessories purchased from other suppliers, but never threatened to withhold cars or to terminate plaintiff's dealership for that reason. The field representatives made repeated efforts to sell plaintiff a larger quantity of parts. Miller was told that his purchases were substantially below the amount Ford considered satisfactory, and was urged both to increase the volume of his retail sales and to wholesale more parts to garages and other retailers.

Plaintiff would have preferred to purchase a larger portion of certain accessories from outside sources, but Ford's representatives insisted that its dealers were its only customers and that plaintiff had to carry a representative line of Lincoln-Mercury accessories if it was to continue as a franchise dealer. Near the close of model years, the field representatives would insist upon plaintiff buying its proportionate share of the remaining parts and accessories assigned to the region, district and zone,

[3] No definition of the word "accessories", as distinguished from the word "parts" is practicable. The use of the terms has varied from place to place and from time to time.

some of which were likely to be very slow sellers. Sometimes there was a reason for this other than the desire of Ford to make its dealers bear the financial load of carrying the parts, sometimes not. Carrying of warehouse stock is recognized by Ford as one of the major functions a dealer performs in the distribution of automobiles. On a number of occasions the General Sales Manager of the Lincoln-Mercury Division referred to the purchase of seat covers and other parts and accessories dealers didn't want as "franchise insurance."

However, I find as a fact that Ford did not require plaintiff to purchase under duress parts or accessories or anything else as a condition of Ford's accepting any of plaintiff's monthly orders for the purchase of automobiles. Plaintiff never complained in writing to Ford about any requirement that it purchase parts and accessories, although Miller wrote numerous letters complaining about other matters.

Miller admits that plaintiff never bought any parts or accessories over the counter that it did not want after the fall of 1952. There is no evidence that plaintiff bought any particular parts or accessories that it did not want after July 29, 1952. After termination of its dealership, plaintiff sold for $15,421 its inventory of parts and accessories, most of which had been purchased since 1952 and which had a book value of $23,122.60; but there is no basis for any claim that this loss was caused by plaintiff's being required to purchase any accessories it did not want during the applicable period of limitations.

While I do not find that Ford required plaintiff to purchase parts and accessories as a condition of Ford's acceptance of individual orders for the purchase of automobiles, I do find that Ford insisted that plaintiff purchase and carry a volume of parts and accessories satisfactory to Ford as a condition of continuing as a franchise dealer. There is no basis for plaintiff's allegation that the pressure on plaintiff to take more parts and accessories had anything to do with the relationship of either plaintiff or defendant with LMDA.

DISCUSSION

I. LMDA—(First Cause of Action).

[*General Motors Case*]

Plaintiff's claim under the First Cause of Action is based primarily upon *U. S. v. General Motors Corp.*, (7 Cir.) [1940-1943 TRADE CASES ¶ 56,120, 56,139] 121 F. 2d 376, *cert. den.* 314 U. S. 618, reh. den. 314 U. S. 710. In that case the indictment charged and the evidence showed that General Motors Corp., General Motors Sales Corp., and General Motors Acceptance Corp. conspired to restrain unreasonably interstate trade and commerce in GM cars; that their purpose was to control the financing essential to the wholesale purchase and retail sale of GM cars; and that in furtherance of this purpose the conspirators devoted themselves to concerted action by which GMAC financing was imposed on dealers who were engaged in the purchase and sale of such cars.

There are many similarities between that case and the case at bar, but also many vital distinctions.

First, the similarities. Ford is one of three corporations holding dominant positions in the automotive industry. GMC was and is the largest. The facts set out above under the headings "The Industry" and "The Defendant and its Sales Agreements" are similar to those found in the *GMC* case.

In the *General Motors* case the court said, at p. 398:

> "The record leaves no doubt that the dealer body as a whole was made acutely aware and had knowledge of the set policy of the appellants with respect to use of GMAC financing facilities. The fear of cancellation or refusal to renew contracts was great, so much so that the dealer was reluctant to refuse the terms and policies dictated by the appellants."

In the instant case fear of cancellation was equally great; and the other dealers would no doubt have required Ford to terminate any dealer who refused to contribute to his LMDA, but sought to obtain a free ride on the TV and other LMDA advertising in his area.

But the distinctions between the *General Motors* case and the instant case are even more important.

GMAC was owned by GMC; the conspirators had identical interests, to make money for the GMC family. But the interests of Ford and the LMDAs are not identical. Ford does not own or control the LMDAs; they are composed of L-M dealers, who are interested in promoting the sale of Lincolns and Mercurys against Ford

cars as well as against cars made by other manufacturers. Nor does Ford own any interest in the advertising agency used by the LMDAs.

GMAC was selling financing and was in active competition with other finance companies. Neither Ford nor LMDA is selling advertising. Both of them are buying advertising—sometimes in the same and sometimes in different media, usually through the same but sometimes through different advertising agencies. Each LMDA had the right to select its own agency or agencies; it usually selected the agency used by Ford, but this selection was made for sound business reasons advantageous to dealer members. Other agencies and all media had a right to compete for the advertising purchased by the LMDAs; many different media were used; and the LMDAs purchased some advertising from outside agencies.

The requirement of GMAC financing was an unreasonable arrangement, so far as the dealers were concerned; it was designed solely to promote the selfish interests of GMAC. LMDA advertising is a reasonable arrangement, designed to promote the interests of L-M dealers by furnishing them with effective advertising at a minimum of cost through cooperative effort.

GMC required dealers to promise to use GMAC financing exclusively. Ford did not require L-M dealers to use LMDA advertising exclusively or to promise to use it exclusively; in fact, it was not used exclusively by plaintiff, which spent many thousands of dollars for other types of advertising in local papers and other media. Plaintiff's officers signed the original LMDA agreement voluntarily without any threats from Ford. Although Miller now says that he was dissatisfied with some of the advertising in the early years and again in late 1953, neither he nor any other dealer ever sought to withdraw from LMDA until 1954.

GMAC financing was found to have prevented many members of the public from buying GMC cars. It has not been shown that the cost of LMDA advertising had any such effect. The purpose and effect of the advertising was to increase the sale of L-M cars.

Restraining of commerce in GMC cars through sale of financing was not necessarily inconsistent with the interests of GMC, for GMC made a profit directly from GMAC financing. The suggestion in the *GMC* case "Sometimes it is good business to sacrifice car sales in order to increase the sale of a complementary product or service" has no application here. Ford made nothing directly from LMDA advertising; the indirect benefit it got from LMDA advertising was matched by the benefit the dealers got from Ford's own advertising of Lincolns and Mercurys and by Ford's contributions to the cost of the Ed Sullivan show. Moreover, LMDA advertising promoted Lincolns and Mercurys against Fords, as well as against cars of other manufacturers; Ford car dealers had their own advertising funds, which promoted Fords as against Lincolns and Mercurys.

The Seventh Circuit held, p. 400 b, that the restrictions imposed upon the financing of the wholesale and retail sale of General Motors cars, bore no reasonable relation to manufacturer's goodwill. The court recognized, however, pp. 400 a, 403 b, that it is proper for a manufacturer to promote its goodwill and to protect itself against inefficient as well as unscrupulous dealers, citing *Pick Mfg. Co. v. General Motors Corp.*, (7 Cir.) 80 F. 2d 641, aff'd [1932-1939 TRADE CASES ¶ 55,138] 299 U. S. 3; cf. *International Business Machines Corp. v. U. S.* [1932-1939 TRADE CASES ¶ 55,112], 298 U. S. 131.

The Seventh Circuit also noted, p. 404 a:

> "The finance restriction operates on the retail purchaser as well as on the dealer, and the competing discount companies are unable to finance General Motors cars. The parts restriction in the *Pick* case operated on the General Motors dealer only, and the competition of other parts manufacturers was not completely destroyed."

The case at bar is similar to the *Pick* case in those respects, and not to the *General Motors* case.

[*Monopoly*]

Plaintiff does not claim that the effect of the LMDA arrangement was to create a monopoly in the manufacture and sale of automobiles, either nationally or locally, but "to create a monopoly in the interstate trade and commerce in Lincoln and Mercury automobiles and accessories and advertising used for the sale of said automobiles." However, as the Supreme Court noted in *U. S. v. E. I. Du Pont de Nemours & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 393, every manufacturer has a natural

monopoly in his own product, especially when sold under his trade-name, and such a monopoly is not prohibited by the antitrust laws. See also *Arthur v. Kraft-Phenix Cheese Corp.,* (D. C. Md.) 26 F. Supp. 824; *Schwing Motor Co. v. Hudson Sales Corp.,* (D. C. Md.) [1956 TRADE CASES ¶ 68,292] 138 F. Supp. 899, aff'd [1956 TRADE CASES ¶ 68,564] (4 Cir.) 239 F. 2d 176. The issues arising out of the sale of parts and accessories will be discussed in the next section of this opinion.

[*Tie-in Sales*]

Ford manufactures and sells automobiles, not advertising; it is not seeking to enter the field of selling advertising. The LMDAs were organized for the purchase of advertising, not its sale. The TV and radio networks and stations, newspapers and other advertising media do the selling. All of the tying cases, which will be discussed below, involve efforts by a defendant to tie one of his own products to the sale of another of his products—never to the sale of somebody else's product; "the essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next." *Times-Picayune Publishing Co. v. United States* [1953 TRADE CASES ¶ 67,494], 345 U. S. 594, at 611. No such exploitation is involved in LMDA advertising. It is true that Ford obtained an indirect benefit from LMDA advertising; but that benefit is offset by the benefit obtained by dealers from Ford's advertising of L-M cars and by Ford's contribution to the TV advertising done by LMDA. Nelligan, the Greenville, S. C., dealer who has a similar suit against Ford, conceded that LMDA had "accomplished a necessary job" and had increased the sale of Lincoln and Mercury automobiles.

Even a true tie-in sale is not prohibited under Sec. 3 of the Clayton Act unless, in the language of the statute, the effect "may be to substantially lessen competition or tend to create a monopoly * * *". The effect of aggressive advertising of L-M cars is to promote competition between those cars and other makes, not to lessen such competition.

Nor has there been any restraint of competition in or tendency toward monopolization of advertising. Each LMDA is free to choose its own agency and the media for its advertising. In practice, several agencies and many different media have been used, including newspapers and radio stations in the dealers' home towns. Some advertising agencies or advertising media may lose some dealer advertising as a result of coordinated LMDA advertising; that is true of any advertising by any association, because it is possible, indeed probable, that some members would do more individual advertising if they did not participate in coordinated advertising. But advertising by associations does not violate the Sherman Act unless it restricts competition or tends to create a monopoly to an extent far beyond anything suggested in the present case. In addition to its LMDA and co-op advertising, plaintiff spent locally each year substantial sums for advertising which plaintiff itself selected.

[*Public Injury*]

Finally, private suits under 15 U. S. C. A. 15 are maintainable only when the defendant's conduct has caused some injury to the public generally, as distinct from purely personal or private damage. *Wilder Mfg. Co. v. Corn Products Refining Co.,* 236 U. S. 165; *Glenn Coal Co. v. Dickinson Fuel Co.,* (4 Cir.) [1932-1939 TRADE CASES ¶ 55,062] 72 F. 2d 885, at 889; *Schwing Motor Co. v. Hudson Sales Corp., et al.,* (D. Md.) [1956 TRADE CASES ¶ 68,292] 138 F. Supp. 899, at 903, aff'd [1956 TRADE CASES ¶ 68,564] (4 Cir.) 239 F. 2d 176; *Arthur v. Kraft-Phenix Cheese Co.,* (D. Md.) 26 F. Supp. 824, 826; *Feddersen Motors, Inc. v. Ward,* (10 Cir.) [1950-1951 TRADE CASES ¶ 62,579] 180 F. 2d 519; *Hudson Sales Corp. v. Waldrip,* (5 Cir.) [1954 TRADE CASES ¶ 67,694] 211 F. 2d 268, *cert. den.* 348 U. S. 821; *Shotkin v. General Electric Co.,* (10 Cir.) [1948-1949 TRADE CASES ¶ 62,341] 171 F. 2d 236. No such injury to the public has been shown in this case.

[*No Antitrust Violation*]

Defendant has not violated the antitrust laws with respect to any matter alleged in the First Cause of Action. It did not conspire with LMDA to restrain unreasonably interstate trade and commerce in L-M cars or accessories, or the advertising thereof, in violation of Sec. 1 of the Sherman Act. It did not conspire with or through LMDA or otherwise to monopolize interstate trade and commerce in L-M cars and accessories nor to monopolize interstate trade and commerce in the advertising of said cars and

accessories, in violation of Sec. 2 of the Sherman Act. LMDA payments made by plaintiff were not tied in with the sale of defendant's products to plaintiff, in violation of Sec. 3 of the Clayton Act.

II. Parts and Accessories—
(Fourth Cause of Action)

[*Tie-in Sales*]

Sec. 3 of the Clayton Act, 15 U. S. C. A. 14, prohibits a lease or sale of goods "on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Plaintiff admits that there was no express condition, agreement or understanding that plaintiff would not use or deal in the goods of a competitor or competitors of Ford. Plaintiff further admits that it did so deal, to a substantial extent. Plaintiff also agrees that the sales agreements were not "requirements" contracts. Its counsel argues:

> "Thus the question of a violation of Section 3 of the Clayton Act must be viewed from the standpoint of each individual sale, and whether or not the sale of each individual automobile was made on the condition that the dealer also purchase advertising, parts and accessories bearing no reasonable relation to the protection of the manufacturer's good will. If such a condition existed, then it becomes immaterial whether or not the sale or condition was accompanied by threats or pressure. In such a case it is the condition itself that invokes the violation, and not the means by which the condition may have been enforced."

But Ford did not require plaintiff to purchase parts and accessories as a condition of Ford's acceptance of individual orders for the purchase of automobiles. Ford did insist that plaintiff purchase and carry a volume of parts and accessories satisfactory to Ford as a condition of continuing as a franchise dealer; and terminated plaintiff's franchise agreement because plaintiff did not sell enough automobiles and enough parts and accessories to satisfy Ford, along with other reasons.

The problem in the instant case is complicated by the fact that plaintiff occupied a dual role with respect to parts and accessories. In some instances it was the ultimate consumer, i.e., when it used parts to repair Lincolns, Mercurys or other makes of automobiles which it owned. In other instances it was a dealer, sometimes a wholesaler and sometimes a retailer, selling some parts and accessories purchased by it under its franchise agreement with Ford, and other parts and accessories purchased by it from other sources for resale to its customers.

[*Good Will*]

Ford had the undoubted right to require plaintiff not to sell as genuine parts any parts that were not genuine, and might have required plaintiff to use only parts and accessories supplied by Ford in repairing Lincoln and Mercury automobiles. *Pick Mfg. Co. v. General Motors Corp., supra.* Such a provision is designed to maintain the good will of the public toward the manufacturer's automobiles. Plaintiff does not question *Pick,* so far as the sale or use of genuine L-M parts is concerned, and Ford does not contend that the *Pick* doctrine extends to all accessories. Ford does argue that the same reasoning should extend to such accessories as rear view mirrors, seat covers, heaters and radios, which are frequently purchased as part of the car or installed by the dealer at the time of the sale.

Ford also contends that it had the right to require plaintiff to carry a representative line of L-M Division accessories, if it was to continue as a franchise dealer, since it was the only franchise dealer of that division in Forsyth County, in which Winston-Salem is located. There is considerable force in this argument, and I conclude that it justifies the pressures which Ford applied to plaintiff in this case. It is not necessary to decide how far the argument might support a manufacturer in a different case.

[*Right To Select Customers*]

It has been repeatedly held that a single manufacturer has a right to select its customers and to refuse to sell its goods to anyone, for reasons sufficient to itself. *United States v. Colgate & Co.,* 250 U. S. 300; *Federal Trade Commission v. Raymond Bros.-Clark Co.,* 263 U. S. 565; *Times-Picayune Publishing Co. v. United States* [1953 TRADE CASES ¶ 67,494], 345 U. S. 594; *Great Atlantic*

& Pacific Tea Co. v. Cream of Wheat Co., (2 Cir.) 227 F. 46. A refusal to deal becomes illegal only when it produces an unreasonable restraint of trade or a monopoly forbidden by the antitrust laws. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.* [1950-1951 TRADE CASES ¶ 62,737], 340 U. S. 211; *Lorain Journal Co. v. United States* [1950-1951 TRADE CASES ¶ 62,957], 342 U. S. 143; *Schwing Motor Co. v. Hudson Sales Corp.,* (D. Md.) [1956 TRADE CASES ¶ 68,292] 138 F. Supp. 899, aff'd (4 Cir.) [1956 TRADE CASES ¶ 68,564] 239 F. 2d 176. A manufacturer has the right to develop his enterprise intelligently by promoting productive business relationships and channels of distribution, while abandoning those which are relatively barren.

In *Hudson Sales Corp. v. Waldrip,* (5 Cir.) [1954 TRADE CASES ¶ 67,694] 211 F. 2d 268, *cert. den.* 348 U. S. 821, the court held that the exercise by Hudson of its right not to renew a dealer's franchise could not form the basis of a suit under Sec. 15, even if the evidence had shown that Hudson had done so only because the dealer had refused to give up in the future his other agencies and center his efforts on, and give his undivided attention to, Hudson and Hudson products. To the same effect is *Nelson Radio & Supply Co. v. Motorola,* (5 Cir.) [1952 TRADE CASES ¶ 67,386] 200 F. 2d 911, *cert. den.* 345 U. S. 925, where the court noted that in all of the cases decided by the Supreme Court involving Sec. 3 of the Clayton Act there was an agreement and not a mere refusal to deal. *Standard Oil Co. v. U. S.* [1948-1949 TRADE CASES ¶ 62,432], 337 U. S. 293, discusses the earlier cases, and they need not be reviewed here. There was also an express agreement in the later Supreme Court cases. *Richfield Oil Corp. v. U. S.* [1952 TRADE CASES ¶ 67,262], 343 U. S. 922, reh. den. 343 U. S. 958; *Times-Picayune Publishing Co. v. United States, supra.*

The *Nelson* case was cited with approval in *Allied Equipment Co., Inc. v. Weber Engineered Products, Inc.,* (4 Cir.) [1956 TRADE CASES ¶ 68,502] 237 F. 2d 879. In that case Allied contended that Weber, by attempting to use the threat of cancellation to force Allied to enter into an illegal exclusive dealing contract, violated Sec. 3 of the Clayton Act. Judge Prettyman, writing for the Fourth Circuit, said, at p. 883:

> "Allied faces a dilemma on the point. If there was no contract denying it the right to handle products competitive to Weber, there was no violation of the antitrust laws. If there was such a contract, as we have already pointed out the breach was by Allied and so no damages accrued to it."

Emich Motors Corp. v. General Motors Corp., (7 Cir.) [1950-1951 TRADE CASES ¶ 62,577] 181 F. 2d 70, [1950-1951 TRADE CASES ¶ 62,778] 340 U. S. 558, and [1956 TRADE CASES ¶ 68,249] 229 F. 2d 714, may be in conflict with *Allied v. Weber* if the statement quoted above is taken to refer to all antitrust laws. But if the statement quoted is taken to refer only to the Clayton Act, which was the only act relied on by the plaintiff in that case, and not to the Sherman Act, there is no conflict between *Allied v. Weber* and *Emich v. GMC.* Emich owned his own finance company and insisted upon using it in preference to GMAC; his motor company did not enter into any agreement with GMAC. Both the motor company and the finance company were plaintiffs in the case, and GMC and GMAC were defendants. A prima facie case of conspiracy and coercion was made out by offering in evidence defendant's criminal conviction under the Sherman Act, *U. S. v. GMC, supra.* All Emich had to do was to show that his companies were damaged by the conspiracy. Sec. 3 of the Clayton Act was not involved in the case.

[*Public Injury*]

Sec. 3 of the Clayton Act was designed to protect the competitors of a seller from being foreclosed from the market. *Hudson v. Waldrip, supra; Nelson v. Motorola, supra; Brosious v. Pepsi-Cola Co.,* (3 Cir.) [1946-1947 TRADE CASES ¶ 57,459] 155 F. 2d 99; *Shotkin v. General Electric Co.,* (10 Cir.) [1948-1949 TRADE CASES ¶ 62,341] 171 F. 2d 236; *Feddersen Motors, Inc. v. Ward,* (10 Cir.) [1950-1951 TRADE CASES ¶ 62,579] 180 F. 2d 519; *Riedley v. Hudson Motor Car Co.,* (W. D. Ky.) [1948-1949 TRADE CASES ¶ 62,369] 82 F. Supp. 8; *Dublin Distributors, Inc. v. Edward & John Burke, Ltd.,* (S. D. N. Y.) [1952 TRADE CASES ¶ 67,398] 109 F. Supp. 125, 61 Yale Law Journal, 1010, 1048 (1952). Suits by dealers against automobile manufacturers have been generally unsuccessful because the dealers have been unable to show any injurious effects on the public automobile market. *Schwing v. Hudson, supra; Feddersen v. Ward, supra; Riedley v. Hudson, supra.* See also *Glenn Coal Co. v. Dickinson Fuel Co.,* (4 Cir.) [1932-1939

Trade Cases ¶ 55,062] 72 F. 2d 885, 889. None is shown here. There can be no recovery by a private litigant under the antitrust laws in the absence of a public injury. See cases cited on this point near the end of Section I of this discussion.

[*Tests*]

In *Times-Picayune v. U. S.* the majority opinion held that "the essence of illegality in tying agreements is the wielding of monopolistic leverage; * * * Solely for testing the strength of that lever, the whole and not part of a relevant market must be assigned controlling weight." [1953 Trade Cases ¶ 67,494] 345 U. S. 594, 611.

> "When the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained, a tying arrangement violates the narrower standards expressed in Section 3 of the Clayton Act, because from either factor the requisite potential lessening of competition is inferred." 345 U. S. 608, 609.

Ford does not enjoy a monopolistic position in the automobile industry. The total volume of its business in parts and accessories does amount to a substantial volume of commerce; but by far the greater part of that volume is represented by "genuine" parts and accessories, which it is conceded by everyone Ford has a right to require its dealers to handle and use. *Pick v. GMC, supra.* Ford's total commerce in seat covers, undercoating and similar accessories is not negligible, viewed on a national basis. But there was no evidence of any substantial restraint of commerce even in those items. Plaintiff bought seat covers, undercoating, etc., from many other sources as well as from Ford. It purchased from other sources nearly half of all the parts and accessories which it sold or used, more than half of all except "genuine" Lincoln-Mercury parts. Rival suppliers had no difficulty in securing consumer access. More than fifty suppliers in or near Winston-Salem sold parts and accessories to plaintiff. Ford's competitors were not foreclosed from the market. And there is no evidence that *any* parts or accessories were sold to plaintiff against the will of its officers within the three year period before this suit was filed.

[*No Antitrust Violation*]

Plaintiff admits that there was no express condition, agreement or understanding that it would not use or deal in parts and accessories supplied by others, except when it was undertaking to use or supply "genuine" Lincoln-Mercury parts or accessories. I find that there was no such implied condition, agreement or understanding, and that the sales agreements did not have that practical effect.

Plaintiff has not shown any violation by Ford of Sec. 3 of the Clayton Act in connection with the sale of parts and accessories, at least within a period of three years before the action was filed. Moreover, plaintiff has not shown that it sustained any damages in connection with parts and accessories as a result of anything done by Ford or its representatives within the three year period.

III. Domination and Monopoly—(Fifth Cause of Action)

[*"Domination" Theory*]

The power which Ford possessed to control its dealers is shown by the facts set out under the heading "The Industry" in the statement of facts above. They are the same facts found by the Congressional Committees in 1956. Plaintiff contends that the existence of this power, and its exercise by Ford to the extent shown by the findings of fact, amounted to "economic slavery" and "market domination or distribution control," violated Sec. 2 of the Sherman Act, and entitled plaintiff to sue the manufacturer under that act for any losses it may have sustained by reason of such domination.

[*Dealer Franchise Act*]

Congress evidently did not share this view; it found it necessary to adopt an entirely new statute "to supplement the antitrust laws of the United States, in order to balance the power now heavily weighted in favor of automobile manufacturers, by enabling franchise automobile dealers to bring suit in the district courts of the United States to recover damages sustained by reason of the failure of automobile manufacturers to act in good faith in complying with the terms of franchises or in terminating or not renewing franchises with their dealers." See title of P. L. 1026, 84th Cong., 2d Sess., August 8, 1956, Chap. 1038, 70 Stat. 1125, 15 U. S. C. A. 1221, *et seq.*, U. S. C. Cong. & Adm. News, p. 6589.

Nowhere in the Senate and House reports is it suggested that a dealer has such

a remedy as plaintiff seeks to establish under the fifth cause of action. On the contrary, the Senate Committee stated, Report No. 2073, p. 3:

"Dealers seeking redress for grievances under these franchises found themselves effectively foreclosed in attempting to bring suit upon the franchises. The terms of this one-sided document compelled the courts to conclude that, however, inequitable the consequences, the dealer executing such a franchise had, for all practical purposes, surrendered his right to litigate his grievance. This has been the prevailing view of courts, both Federal and State, in passing upon suits filed by dealers under the franchises. Representative of the thinking of the courts is the decision in *Ford Motor Company v. Kirkmyer Motor Co.*, (65 F. 2d 1001, (CCA 4, 1933)), where the court stated: 'While there is a natural impulse to be impatient with a form of contract which places the comparatively helpless dealer at the mercy of the manufacturer, we cannot make contracts for parties or protect them from the provisions of contracts which have been made for themselves. Dealers doubtless accept these one-sided contracts because they think that the right to deal in the product of the manufacturer, even on his terms, is valuable to them; but after they have made such contracts, relying upon the good faith of the manufacturer for the protection which the contracts do not give, they cannot, when they get into trouble, expect the courts to place in the contract the protection which they themselves have failed to insert.'"

[*General Motors Case*]

Plaintiff's principal reliance is upon certain statements in the opinion of the Seventh Circuit in *U. S. v. General Motors Corp.* [1940-1943 TRADE CASES ¶ 56,120, 56,139], 121 F. 2d 376. After recognizing that it is proper for General Motors (or Ford) to promote manufacturer's good-will and to protect the manufacturer against inefficient and unscrupulous dealers, the court said that "there is a limit to how far a manufacturer may go to control the whole process of distribution." 121 F. 2d at 400. It should be noted that the finance restriction in that case operated on the retail purchaser as well as on the dealer. There is no similar restriction in this case. Discussing the question of domination, the Seventh Circuit said:

"For that matter GMC has always dominated the market for General Motors cars to a considerable extent, but it was only when control of the marketing process was perfected by the appellants and was directed at the creation of an artificial non-competitive market for GMAC, that it extended beyond legitimate business demands and became a menace to the interests of the public." 121 F. 2d at 403.

The statement contained in the last quotation has been approved by the Fourth Circuit. *Schwing Motor Co. v. Hudson Sales Corp., et al.* [1956 TRADE CASES ¶ 68,292], 138 F. Supp. 899, 906, aff'd [1956 TRADE CASES ¶ 68,564] 239 F. 2d 176.

[*No Antitrust Violation*]

Plaintiff's counsel admit that no reported case allows recovery to a dealer against a manufacturer under the domination theory they advance. I conclude that such "market domination or distribution control" as Ford may have exercised, or such "economic captivity" as it may have imposed on the plaintiff, did not amount to a monopolization of, or an attempt to monopolize, any part of the trade or commerce among the several States, in violation of Sec. 2 of the Sherman Act.

CONCLUSION

Plaintiff is not entitled to recover under any cause of action in this case. This conclusion makes it unnecessary to pass on the question of the applicable statute of limitations, to go more fully into the matter of damages, or to consider the question of plaintiff's attorneys' fees. Plaintiff is entitled to receive the $1,417.10 due it for repairs to automobiles, which defendant paid into court. I direct the Clerk to pay that amount over to the plaintiff forthwith.

Enter judgment for the defendant, with costs.

[¶ 68,664] United States v. Schenley Industries, Inc.

In the United States District Court for the District of Delaware. Civil Action No. 1686. Dated April 3, 1957.

Case No. 1214 in the Antitrust Division of the Department of Justice.

Clayton Antitrust Act

Acquisitions of Stock or Assets—Consent Decree—Practices Enjoined—Acquisition of Competitors—Producer-Distributor of Whiskey.—A producer-distributor of whiskey was prohibited by a consent decree, for a period of ten years, from acquiring, directly or indirectly, through subsidiaries or otherwise, the business of any corporation engaged in distilling and distributing whiskey in bottles in the United States by the acquisition of stock or other share capital or by the purchase of assets. However, if the producer-distributor desired to make any acquisition prior to the expiration of ten-year period, it could notify the Government of the proposed acquisition. If the Government does not object to the acquisition, the acquisition would be deemed not to be a violation of the consent judgment. If the Government objects to the acquisition, the producer-distributor could apply to the court for permission to make the acquisition, and such permission could be granted upon a showing that the acquisition would not substantially lessen competition or tend to create a monopoly in the distilling or distribution of whiskey.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4206, 4207, 4208.05; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8421.

For the plaintiff: Victor R. Hansen, Assistant Attorney General, and W. D. Kilgore, Jr., Ephraim Jacobs, William H. McManus, John M. O'Donnell, and Charles F. B. McAleer, attorneys.

For the defendant: Dewey, Ballantine, Bushby, Palmer & Wood by Leonard Joseph.

Final Judgment

CALEB WRIGHT, District Judge [*In full text*]: Plaintiff United States of America having filed its complaint herein; defendant Schenley Industries, Inc. (hereinafter "Schenley") having appeared and filed its answer to such complaint denying the substantive allegations thereof and denying any violation of law; and the parties herein, by their respective attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without admission by any party in respect to any such issue of fact or law,

Now, therefore, without any testimony having been taken herein, and without trial or adjudication of any issue of fact or law herein and on consent of the parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I

[*Clayton Act*]

This Court has jurisdiction of the subject matter herein and of all parties hereto pursuant to Section 15 of the Act of Congress of October 15, 1914, as amended, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and For Other Purposes," commonly known as the Clayton Act; and the complaint states a claim upon which relief may be granted under Section 7 of said Act.

II

[*Applicability of Judgment*]

The provisions of this Final Judgment shall be binding upon said defendant, its officers, agents, servants, employees and subsidiaries, and upon those persons in active concert or participation with said defendant who receive actual notice of this Final Judgment by personal service or otherwise.

III

[*Acquisitions Prohibited*]

Schenley is enjoined and restrained until March 1, 1967 from acquiring, directly or indirectly, through subsidiaries or otherwise, either by acquisition of stock or other share capital, or by the purchase of assets, the business of any corporation engaged in distilling and distributing whiskey in bottles in the United States. Provided, however, that if at any time Schenley desires to make

any acquisitions prior to March 1, 1967 which would be otherwise prohibited by the foregoing, it may submit disclosure of the facts with respect to such proposed acquisition and the reason therefor to the plaintiff. If the plaintiff shall not object to the proposed acquisition within 30 days after receipt of such notice, such acquisition shall be deemed not to be a violation of this Final Judgment. In the event the plaintiff shall object, defendant may apply to this Court for permission to make such acquisition, which may be granted upon a showing by the defendant to the satisfaction of this Court that the acquisition would not substantially lessen competition or tend to create a monopoly in the distilling or distribution of whiskey.

Nothing contained herein shall be deemed to prohibit the purchase by the defendant of bulk whiskey or other supplies or equipment in the normal course of business.

IV

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall be permitted, upon written request of the Attorney General, or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant at its principal office, (1) to inspect during office hours all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the defendant relating to any of the subject matters contained in this Final Judgment; and (2) subject to the reasonable convenience of the defendant and without restraint or interference from it, to interview any officer or employee of the defendant, who may have counsel present, regarding any such matters; (3) and to require the defendant to submit such reports in writing with respect to matters contained in this Final Judgment, as may from time to time be necessary to the enforcement of this Final Judgment. No information obtained by the means provided in this Section IV shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

V

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

[¶ 68,665] United States v. Loew's Incorporated, et al.

In the United States District Court for the Southern District of New York. Equity No. 87-273. Filed March 27, 1957.

Case No. 434 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Divorcement—Court Appointment of Directors.—Where a motion picture company was required by a consent decree to separate its exhibition business from its production and distribution business, the court decided to appoint a special consultant and two directors of a new theatre company which was organized to take over the exhibition portion of the company's business. The consent decree provided that one-half of the membership of the board of the new theatre company was to be approved by the court and subject to its direction until the stock of the new theatre company is distributed to the stockholders of the motion picture company.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.10, 8421.

For the plaintiff: United States Attorney.

For the defendant: Leopold Friedman, New York, N. Y.

For the text of the consent judgment entered in the U. S. District Court, Southern District of New York, see 1952 Trade Cases ¶ 67,228.

[*Decree—Divorcement*]

EDMUND L. PALMIERI, District Judge [*In full text*]: This matter deals with the conditions which must be observed with respect to compliance with certain provisions of the Consent Judgment entered on February 6, 1952, relating to the divorcement of the exhibition business of Loew's Incorporated from its production and distribution business.

[*Extension of Time*]

On January 29, 1957, Loew's Incorporated and New Theatre Company, the theatre subsidiaries of Loew's Incorporated, jointly petitioned for an extension of time in which to comply with the Consent Judgment, and for modification of certain provisions thereof. This petition was necessitated by virtue of the time limitations contained in the Consent Judgment. That judgment provided that a division or refinancing to accomplish a division of its "present funded debt" (as of February 6, 1952) shall in any event be made no later than five years from the date of such Consent Judgment; and further, that Loew's Incorporated shall distribute the stock of New Theatre Company pro rata among its stockholders within thirty days after the division or refinancing of its present funded debt. These provisions of the judgment thus fixed February 6, 1957, the expiration of the five-year period, as the time limit for partial compliance and thirty days thereafter as the time limit for complete compliance.

Since the matter was one of considerable complexity and no proper disposition could be made without the careful study of many matters going back over a period of years, I thought it wise to obviate any further time limit until such time as I could formulate the bases for a decision. Accordingly, and on February 4, 1957, I entered a standby order providing in substance that the dates for compliance specified in the Consent Decree of 1952 for the division or refinancing and the stock distribution hereinabove referred to, be postponed *sine die* and until further order of this Court.

Since the entry of that order, further study of the problems involved has convinced me that the complexities of the matters with which I am required to deal are such that I cannot expect to arrive at expeditious solutions without the benefit of consultation with persons having financial and accounting expertise in matters of comparable scope. I am dismayed that so much time has already passed without definitive solutions and short of the accomplishment of total compliance with the Consent Decree. But I do not wish to imply that more could have been accomplished during the time that has passed since the entry of the Consent Decree. Any conclusions in this regard must necessarily await a thorough study of the problems which remain to be solved.

[*Approval of Directorships*]

The Consent Judgment as to Loew's Incorporated, as amended, provided that one-half of the membership of the boards of the theatre-owning subsidiaries were to be "approved by the Court and subject to its direction" until the capital stock of the New Theatre Company is distributed to the stockholders of Loew's Incorporated (Section V E, page 58 of the Consent Judgment and Order entered on June 24, 1954).

Approval of designated persons to serve as directors has invariably been given with the express reservation that it was to continue "unless otherwise ordered by this Court." Because I wish to avoid undue delay, expense and inconvenience and to reduce to a minimum the holding of court hearings and proceedings which might easily ensnare us in vexatious and time-consuming detail, I have decided to appoint a special consultant and two directors of the New Theatre Company, in accordance with the terms and conditions of the accompanying orders.

I wish to make plain that no disqualification must be deemed to attach to either of the two directors displaced by this decision. They may remain eligible to serve either by succession to company directors or by any enlargement of the board which preserves the balance between Court appointed and other directors.

[¶ 68,666] Maple Drive-In Theatre Corp. v. Radio-Keith-Orpheum Corp., et al.

In the United States District Court for the Southern District of New York. Civ. 96-101. Filed March 26, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Pretrial Hearing—Issues.—At a pretrial hearing, the court required the plaintiff (1) to submit in writing a detailed statement of the facts which it expects to prove upon trial relating to its charge of conspiracy and identify such documentary proof as it will offer on such issue and (2) to submit in writing a detailed statement of the facts which it expects to prove upon trial, and identify such documentary proof as it will offer, with respect to its claim that the defendants further delayed pictures beyond their availability.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.725.

For the plaintiff: Robert H. Ruskin, Flushing, N. Y.

For the defendants: Dwight, Royall, Harris, Koegel & Caskey; R. W. Perkins; Phillips, Nizer, Benjamin & Krim; Adolph Schimel; Schwartz & Frohlich; Louis Phillips; Benjamin Melniker; Donovan, Leisure, Newton & Irvine; O'Brien, Driscoll & Raftery; and Herbert B. Lazarus, all of New York, N. Y.

For prior opinions of the U. S. District Court, Southern District of New York, see 1956 Trade Cases ¶ 68,456, 68,422 and 1955 Trade Cases ¶ 67,972.

Memorandum

[*Pretrial Order*]

MURPHY, District Judge [*In full text*]: While sitting in Part I of the Jury Calendar Part of this court at the request of counsel an attempt was made on three separate hearings to pre-try this private antitrust cause.

At the last hearing on March 8, 1957, it was agreed that the court would resolve, on receipt of memoranda, what purported to be two remaining issues, to wit, (1) whether plaintiff should state each specific overt act on which it relies to show conspiracy and attach a list identifying clearly each document on which it will rely to prove its claim, and (2) whether with respect to plaintiff's claim that defendants further delayed pictures beyond their availability, plaintiff should advise defendants of the name of each such picture stating the date it claims it should have had it and the date it was afforded.

Memoranda, reply memoranda and numerous letters have now been submitted devoted not to such issues but a host of others, some previously ruled upon, others not heretofore raised and still others that properly belong before another court, all of which leaves with the court a suspicion which we have purposely refrained from recording.

As to the two issues it was agreed should be resolved it is ordered:

(1) Plaintiff shall within ten days of the date hereof state in writing a detailed statement of the *facts* it expects to prove upon the trial relating to its charge of conspiracy and identify by appropriate reference such documentary proof as it will offer on such issue.

(2) With respect to plaintiff's claim that defendants further delayed pictures beyond their availability plaintiff should within ten days of the date hereof state in writing a detailed statement of the *facts* it expects to prove upon the trial relating to such claim and identify by appropriate reference such documentary proof as it will offer on such issue.

This is an order. No settlement is necessary.

[¶ 68,667] J. Rose & Company, Inc. v. Unity Stove Company, Inc.

In the New York Supreme Court, New York County, Special Term. Dated December 23, 1955.

New York Antitrust Laws

Combinations and Conspiracies Under State Laws—Practices—Refusal to Deal—Sufficiency of Counterclaim.—A counterclaim of a wholesaler-retailer of gas ranges charging that a manufacturer of gas ranges and three other wholesalers-retailers of gas

ranges engaged in a conspiracy in which the manufacturer refused to sell its gas ranges to the wholesaler-retailer was held insufficient on the grounds that the wholesaler-retailer failed to allege that the manufacturer had a monopoly or that its product was not otherwise obtainable, or that the manufacturer's product was imperatively necessary for the continued maintenance of the competitive position of the wholesaler-retailer. Also, the wholesaler-retailer failed to allege that the manufacturer's action had a necessary and final effect unlawfully to stifle competition and produce injury.

See Combinations and Conspiracies, Vol. 1, ¶ 2337.34, 2425.34.

For the plaintiff: Rosenblum & Hein.

For the defendant: Wolfe R. Charney.

[*Nature of Action*]

IRVING H. SAYPOL, Justice [*In full text*]: The plaintiff moves, pursuant to rule 113 of the Rules of Civil Practice, and section 476 of the Civil Practice Act, to strike out the answer and for judgment, and pursuant to rule 109 to strike out the counterclaim for insufficiency. The action is brought to recover a balance due upon the purchase price of gas ranges sold and delivered to the defendant. The claim is admitted. Although the counterclaim is stated in equity and seeks damages in an amount greater than the plaintiff's claim, it is nevertheless invalid. This counterclaim is an action within the purview of subdivision 3 of rule 113. (*Salt Springs Nat. Bank of Syracuse v. Hitchcock,* 144 Misc. 547, revd. on other grounds 238 App. Div. 150.) Here, the defendant has submitted no proof to support it.

[*Antitrust Counterclaim*]

The counterclaim is based on alleged conspiratorial violations of section 340 of the General Business Law and section 580 of the Penal Law and seeks equitable relief and damages. The defendant, a wholesaler and retailer of gas ranges alleges that the plaintiff, another manufacturer of gas ranges, and three wholesalers and retailers, competitors of the defendant, conspired that the plaintiff should refuse to sell ranges to the defendant and that the plaintiff failed and refused to do so pursuant to the conspiracy. Statement of facts of the tortious acts included in the conspiracy are essential to a validly stated cause of action (*Park & Sons Co. v. National Wholesale Druggists' Assn.,* 175 N. Y. 1; *Miller v. Spitzer,* 224 App. Div. 39; *McGrane v. McGrane,* 195 Misc. 868). The defendant alleges the amount of business previously done with the plaintiff, without showing its relation to the whole of the defendant's business. It alleges further in general conclusory fashion that the plaintiff, in concert with others, conspired, by withholding its product from the defendant, to restrain and prevent competition by it and its freedom in marketing, purchasing, and selling gas ranges but without further factual allegations that the plaintiff's product was unique or indispensable to such activities or from which it could be inferred that the withdrawal of the plaintiff's product, whether voluntary or by concerted action, would have that effect. Further, the allegations do not lend support to any inference that the claimed concerted action brought to bear such economic power resulting in that magnitude of stifled competition necessary to constitute a violation of the statutes. Certainly there is no intimation in the counterclaim that the defendant was forced out of business. The claim of loss of profits realizable from the sale of ranges withheld is innocuous, for as has been said nothing contained in the pleading warrants the inference that the plaintiff's product was indispensable to the realization of such profits and that no other product was available, so that the defendant was thus ousted from a fair competitive position. In short, while the defendant was excluded by the plaintiff's exercise of competitive practice, it does not follow from the allegations that the defendant was also injured or ruined. There must be allegation that in addition to the mere exclusion there is proof which would sustain a claim that the action had a necessary and final effect unlawfully to stifle competition and produce injury. Here at most is the defendant's conclusory allegation of nothing more than plaintiff's acts in freely refusing to sell its products to the defendant (*Alexander's Dept. Stores v. Ohrbach's Inc.* [1940-1943 TRADE CASES ¶ 56,285], 266 App. Div. 535, appeal dismissed 291 N. Y. 707). The failure to allege either that the plaintiff had a monopoly or that its product was not otherwise obtainable or that the plaintiff's

product was imperatively necessary for the continued maintenance of the defendant's competitive position is fatal (*Locker v. American Tobacco Co.,* 121 App. Div. 443; *cf. Alexander's Dept. Stores v. Ohrbach's Inc., supra*). Furthermore, no proof of such facts is submitted in opposition to the motion pursuant to rule 113. The motion is granted. Settle order.

[¶ 68,668] J. C. Martin Corp.; Jack Kaslow and Seymour Orenstein, individually and as officers of J. C. Martin Corp.; Jack Kaslow, trading as K. W. Sales Company; and Seymour Orenstein, trading as L & S Sales Company v. Federal Trade Commission.

In the United States Court of Appeals for the Seventh Circuit. October Term 1956—January Session 1957. No. 11859. Dated April 3, 1957.

On petition to review and set aside an order of the Federal Trade Commission.

Federal Trade Commission Act

Unfair Practices—Lottery Devices—Element of Prize—Legality of Sales Method.—A Federal Trade Commission order prohibiting a company from selling merchandise by means of a lottery scheme was set aside since the company's sales method did not constitute a lottery in violation of the Federal Trade Commission Act. A prospective purchaser had the option of purchasing directly from a descriptive list of merchandise or of pulling a tab to ascertain his purchase and the price to be paid. There was no price differential in regard to a particular article depending on whether a "straight" sale or a "pull tab sale" took place. Whether or not an individual elected to purchase the article identified by a tab he had pulled, he did not pay anything for the privilege of pulling the tab. In order to constitute a lottery, the elements of consideration, chance, and prize must be present. The pull tab device standing alone was not a lottery scheme since the company's sales methods did not incorporate the element of prize which is the motivating factor or the inducement that accounts, in large part, for the success of virtually all forms of gambling—the opportunity to get something for nothing. Where, as here, each participant in the scheme, would, in any event, receive the equivalent of the amount contributed by him, and where he was not under any hazard of pecuniary loss, nor offered the chance of receiving something of more value than the amount contributed by him, a lottery did not exist. The fact that an article may be of value or use to one recipient and not to another does not establish the element of prize.

See Unfair Practices, Vol. 2, ¶ 5173.50.

For the petitioners: Edward L. Smith, Washington, D. C.

For the respondent: Robert B. Dawkins and John W. Carter, Jr., Washington, D. C.

Vacating and setting aside a Federal Trade Commission cease and desist order in Dkt. 6145.

Before LINDLEY, SWAIM and SCHNACKENBERG, Circuit Judges.

[*Review of FTC Order*]

SWAIM, Circuit Judge [*In full text*]: This matter comes here on a petition to review and set aside an order to cease and desist issued by the Federal Trade Commission at the conclusion of an administrative proceeding in which petitioners were charged with having engaged in unfair and deceptive acts and practices in commerce by the sale and distribution of merchandise to the public by means of a game of chance, lottery or gift enterprise in violation of Section 5 of the Federal Trade Commission Act, 52 Stat. 111, 15 U. S. C. A. § 45.

[*Petitioners' Business*]

Petitioners are engaged in the sale and distribution of numerous and varied articles of merchandise including, among others, jewelry, silverware, kitchen utensils and toiletries. Practically all of petitioners' sales are made through members of the public acting as distributors or sales agents for petitioners' merchandise. Petitioners obtain these agents or distributors by sending catalogues to persons whose names and addresses are obtained from mailing lists. The catalogues or sales circulars contain pictures and descriptions of various articles

of merchandise offered as premiums or compensation to the distributor for his services in selling forty assorted articles of merchandise. The catalogue contains a list of forty articles of merchandise offered for sale with descriptive details for each item, including the name and price. There is a blank space opposite the name of each item for inserting the name of the purchaser. To the right of the articles listed for sale on the sales sheet there are forty perforated tabs. Each tab conceals the name and price of an article of merchandise corresponding to the name and price of an article in the list of merchandise offered for sale. Immediately above the blocks of pull tabs the following notice appears:

> "This is a sales sheet. It is not a punchboard or a gambling device. Do not construe or accept for use as a gambling device.
>
> * * *
>
> "Here's how it works. You may purchase from the list shown on the left where the merchandise is described or you may pull any one of the slips below on the back of which is printed the article and price. If not satisfied with the item you picked you are not obliged to buy it."

As provided by the notice, a prospective purchaser has the option of purchasing directly from the descriptive list of merchandise or of pulling a tab to ascertain his purchase and the price to be paid. There is no price differential in regard to a particular article depending on whether a "straight sale" or a "pull tab sale" takes place. A purchaser may buy as many of any particular article as he wishes either outright or by means of the tabs. Whether or not an individual elects to purchase the article identified by a tab he has pulled, he does not pay anything for the privilege of pulling the tab. After a sale has been consummated, the name of the purchaser is written in the blank space opposite the name of the article purchased.

When the person operating the catalogue has sold all of the articles and remitted the purchase price of the articles to the petitioners, petitioners ship to this person the merchandise so sold together with a premium as compensation for his services in operating the catalogue or sales circular. The distributor then delivers this merchandise to the respective purchasers whose names appear on the list which was filled out at the time the purchases were made.

If the complete assortment is disposed of the distributor would collect $29.99 to remit to the petitioners. The distributor may elect to retain a specified percentage of this amount in lieu of the premium. In the event the distributor does not succeed in selling the complete assortment, he is not entitled to a premium but receives a cash commission on the articles sold. In the event that the distributor's sales exceed the amount represented by the complete assortment, he receives in addition to the regular premium a cash commission on the excess. Approximately 70 per cent of petitioners' sales made by means of the sales circular, which includes sales made through the use of the pull tabs and sales made outright, have been for the amount represented by a complete assortment of the forty items ($29.99), 20 per cent for amounts exceeding that figure and 10 per cent for amounts below that figure. Petitioners purchase the forty assorted articles as a complete, packaged unit and the success of their method of selling merchandise depends in large part upon the sale of not more nor less than a complete assortment. Otherwise inventories of the individual articles must be maintained and special packaging arrangements must be made when an order is to be filled.

[*FTC's Findings and Order*]

The Commission found that petitioners' sales methods involve and contemplate the use of lottery devices in the sale and distribution of their merchandise to the public and constitute unfair acts and practices in commerce within the meaning of Section 5 of the Federal Trade Commission Act. Petitioners were ordered to cease and desist from:

> "1. Supplying to or placing in the hands of others pull cards or any other devices which are designed or intended to be used in the sale and distribution of [their] merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.
>
> "2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme."

[*Lottery Defined*]

A lottery is a scheme for the distribution of prizes by lot or chance; it is a device whereby the amount of return an individual receives for the amount contributed by him

is made to depend upon chance. *Federal Trade Commission v. Keppel & Bro.* [1932-1939 TRADE CASES ¶ 55,042], 291 U. S. 304; *Keller v. Federal Trade Commission,* 7 Cir. [1940-1943 TRADE CASES ¶ 56,322], 132 F. 2d 59; *Hofeller v. Federal Trade Commission,* 7 Cir. [1932-1939 TRADE CASES ¶ 55,105], 82 F. 2d 647, certiorari denied 299 U. S. 557. The three essential elements of a lottery are: (1) the distribution of prizes (2) according to chance (3) for a consideration. *Wolf v. Federal Trade Commission,* 7 Cir. [1940-1943 TRADE CASES ¶ 56,326], 135 F. 2d 564. *Cf. United States v. Rich,* E. D. Ill., 90 F. Supp. 624.

[*Notice Disregarded*]

Petitioners contend, *inter alia,* that the Commission's findings are unsupported by substantial evidence. Petitioners urge that the notice to prospective purchasers that they are not obliged to buy the article identified by a tab eliminates the element of chance and consideration because the purchaser is entitled to reject his purchase after he ascertains what it is and the price to be paid. A similar contention was advanced and rejected by this court in *Wolf v. Federal Trade Commission* [1940-1943 TRADE CASES ¶ 56,326], 135 F. 2d 564, which involved an almost identical sales scheme. Petitioners insist, however, that there was a finding in the *Wolf* case that the notice was a subterfuge intended to avoid the consequences incident to the operation of a lottery scheme, whereas there is no such finding here. The difficulty with any argument based upon this notice is that it presupposes the very thing we are trying to decide. If the device constitutes a lottery, the law itself declares that a purchaser would not be bound to buy the article indicated by the tab. As was said in the *Wolf* case, 135 F. 2d at 566:

> "This is no more than a recognition of the common law rule that a gambling transaction is unenforcible, and 'only the loser has recourse to the courts.'"

If, on the other hand, the device does not constitute a lottery, then the legal significance of the notice would lie in the province of the law of contracts. Therefore, in regard to the issues presented by this case the notice may properly be disregarded.

[*Element of Chance*]

Petitioners next insist that since an individual has the option to purchase a desired article outright, rather than utilize the tab device, the element of chance is absent. This was also true in the *Wolf* case although the sales circular there did not contain a notice indicating to the purchaser that he had such an option as is the case here. In any event, we fail to see what comfort petitioners can gain from the fact that a prospective purchaser has this option. If an individual exercises his option to take a chance by pulling a tab can it be said that he has not taken a chance? The objection to the pull tab scheme cannot be removed by offering the individual an unobjectionable alternative.

[*Element of Prize*]

A more serious question is whether the pull tab device standing alone is a lottery scheme. We think it is not. Petitioners' sales method does not incorporate the element of prize which is the motivating factor or the inducement that accounts, in large part, for the success of virtually all forms of gambling—the opportunity to get something for nothing.

In order to constitute a lottery the elements of consideration, chance and prize must be present. The mere presence of chance does not constitute a lottery, nor will chance when coupled with consideration suffice. It is not chance in general with which we are concerned, but the chance of winning a prize, whether that chance be as to any return or merely as to the amount or value of the return. *Federal Trade Commission v. Keppel & Bro.* [1932-1939 TRADE CASES ¶ 55,042], 291 U. S. 304; *Keller v. Federal Trade Commission,* 7 Cir. [1940-1943 TRADE CASES ¶ 56,322], 132 F. 2d 59; *Hofeller v. Federal Trade Commission,* 7 Cir. [1932-1939 TRADE CASES ¶ 55,105], 82 F. 2d 647, certiorari denied 299 U. S. 557. The only chance involved in the petitioners' scheme is as to the article to be purchased; there is no chance of prize in the sense of the amount or value of the thing to be received being dependent upon lot or chance. Of course, the mere fact that each purchaser receives a thing of value for his contribution does not negate the existence of a lottery. *Keller v. Federal Trade Commission,* 7 Cir. [1940-1943 TRADE CASES ¶ 56,322], 132 F. 2d 59. But where, as here, each participant in the scheme will in any event receive the equivalent of the amount contributed by him, and he is not under

any hazard of pecuniary loss, nor offered the chance of receiving something of more value than the amount contributed by him, a lottery does not exist.

The Commission was of the opinion that prize is present in petitioners' scheme

> "because the some forty articles which may be obtained through the pull card vary widely in nature and might well prove to be either valuable or worthless, depending upon the situation of the particular individual receiving them. An article regarded as a "prize" by one recipient might be wholly without use or value to another. For example, the cigarette lighter offered on one of [petitioners'] circulars would be of value to a smoker, while valueless to a nonsmoker. Again, a man receiving the ten packages of razor blades included in the list probably would get his money's worth if he used a safety razor rather than an electric shaver and if the blades would fit his razor; otherwise the blades would be wholly without value to him."

[*Wolf Case*]

We believe that it would be stretching the term lottery to the breaking point to sustain this finding of prize in petitioners' sales method. Admittedly, the Commission finds support for the validity of this finding in the *Wolf* case where a similar definition of "prize" is stated. The Commission in the *Wolf* case had found that some of the merchandise offered by the petitioner had greater value and ordinarily sold at higher prices than the prices listed, thereby inducing purchasers to pull tabs in the hope that they would receive those articles of greater value than the price designated to be paid for them. The petitioner there also complained of the Commission's effort to find the element of prize in his method of sales and distribution. The court, after noting the finding concerning the relative values of the merchandise, said:

> "*We think we might go even further and find an element of prize* in whether or not the purchaser drew a chance to buy an article that would be of any value to himself. To illustrate, a person needing razor blades might well consider himself a prize winner if he drew a chance to buy a package of them instead of a bottle of perfume which might be a total loss to him." (Italics added.) 135 F. 2d at 567.

We think the court went too far in defining "prize"—a definition which was not necessary to the court's decision. It was alleged in the complaint in the instant case that:

> "Some of [petitioners'] articles of merchandise have purported and represented retail values greater than the prices designated for them, but are distributed to the consumer for the price designated on the tab which he pulls. The prices of others of the articles are higher in proportion than the articles first mentioned. The apparent greater values of some of said articles induces members of the purchasing public to purchase the tabs or chances in the hope that they will receive articles of merchandise of greater value than the designated prices to be paid for same."

But the hearing examiner found that there was no evidence supporting these allegations. Since there is no finding here concerning the relative values of petitioners' merchandise, the *Wolf* case is not controlling.

[*Other Contentions*]

We are constrained to reject the finding of the Commission that petitioners' sales methods constitute a lottery scheme and, since our disposition of this issue is dispositive of the petition for review, we do not reach petitioners' other contentions.

[*Order Vacated*]

The petition for review is allowed and the Federal Trade Commission's order to cease and desist, entered in this matter on June 29, 1956, is vacated and set aside.

[¶ 68,669] Federal Trade Commission v. W. W. Tuttle, Resident Manager, Ernst & Ernst.

In the United States Court of Appeals for the Second Circuit. October Term, 1956. No. 232. Docket No. 24325. Argued January 16, 1957. Decided April 2, 1957.

Appeal from an order of the United States District Court, Southern District of New York (Cashin, J.) denying the application of the Federal Trade Commission for enforcement of an administrative subpoena *duces tecum,* issued pursuant to Section 9 of the Federal Trade Commission Act, directed to the respondent, W. W. Tuttle, a partner and resident manager of Ernst & Ernst, a firm of accountants and auditors. Reversed.

Clayton and Federal Trade Commission Acts

Federal Trade Commission Enforcement and Procedure—Anti-Merger Proceedings—Production of Documents—Subpoena Power in Clayton Act Proceeding and as to Persons Not Being Investigated or Proceeded Against.—In a Clayton Act anti-merger proceeding against a manufacturer of sporting goods, the Federal Trade Commission had the power, under Section 9 of the Federal Trade Commission Act, to issue a subpoena *duces tecum* demanding an accounting firm to produce records which had been submitted to the firm by members of a sporting goods manufacturers' association for the purpose of preparing the association's annual census report. The Commission, in Clayton Act proceedings, may use the subpoena power vested in it by Section 9 of the FTC Act. While such power is not expressly granted to the Commission in Clayton Act proceedings, Congress evidently concluded that it was unnecessary to incorporate the full subpoena power in both the Clayton and the FTC Acts and was content to set it forth in Section 9 of the FTC Act. Furthermore, the Commission's power under Section 9 of the FTC Act is not limited to documents and records of the corporation being investigated or proceeded against by the Commission, in view of the provisions of Section 9 in general, the purpose and policy of the FTC Act, the legislative history of the Act, the Congressional intent, and the effect that such a limited construction of Section 9 of the Act would have upon the Commission's functions. "In the second half of the first sentence of Section 9 the words 'the production of all such documentary evidence relating to any matter under investigation' should be construed to mean 'the production of all documentary evidence relating to any matter under investigation,' thus eliminating the word 'such.'" Also, the records submitted to the accounting firm were not privileged or confidential communications.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8741, 8801.870.

Federal Trade Commission Enforcement and Procedure—Anti-Merger Proceeding—Production of Documents—Subpoena Power—Legality of Subpoena Served on Person Not Being Investigated or Proceeded Against—Reasonableness of Subpoena—Trade Secrets.—In a Clayton Act anti-merger proceeding against a manufacturer of sporting goods, the Federal Trade Commission was held to have the power, under Section 9 of the Federal Trade Commission Act, to issue a subpoena *duces tecum* demanding an accounting firm to produce records which had been submitted to the firm by members of a sporting goods manufacturers' association for the purpose of preparing the association's annual census report. Section 9 of the FTC Act is not unconstitutional in authorizing the service of a subpoena demanding the records of corporations not being investigated or proceeded against by the Commission. The records submitted to the accounting firm were not privileged or confidential communications, and the records sought were relevant to the issues in the Commission's anti-merger proceeding against the manufacturer. The subpoena did not violate the Administrative Procedure Act, and it was not unreasonable nor oppressive. Also, the use of the subpoena would not be unconstitutional even if it indirectly had an adverse effect on a certain part of the accounting firm's business. There is no reasonable basis for the contention that the Federal Trade Commission or the United States is taking the accounting firm's property without due process of law.

Assuming that the records of the individual members of the association constituted trade secrets, Section 6(f) of the FTC Act does not prohibit the Commission from demanding the production of trade secrets. The section merely prohibits the publication of such secrets.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8701.92, 8741.10, 8741.55, 8741.70.

For the appellant: Earl W. Kintner, General Counsel, FTC; Robert B. Dawkins, Assistant General Counsel, FTC; and John T. Loughlin, Attorney (Daniel M. Friedman, Attorney, Department of Justice, of counsel), Washington, D. C.

For the appellee: Davis, Polk, Wardwell, Sunderland & Kiendl (S. Hazard Gillespie, Jr., and Robert B. Fiske, Jr., of counsel), New York, N. Y.

Reversing a decision of the U. S. District Court, Southern District of New York, 1956 Trade Cases ¶ 68,399, denying an application to enforce a Federal Trade Commission subpoena *duces tecum* in Dkt. 6478.

Before: MEDINA and HINCKS, Circuit Judges, and LEIBELL, District Judge.

[*Issue*]

LEIBELL, District Judge [*In full text*]: The question to be decided on this appeal concerns the power of the Federal Trade Commission under Section 9 of the Federal Trade Commission Act, to subpoena documents and records of third parties "In the Matter of A. G. Spalding & Bros. Inc.," a corporation against which the Commission had filed a complaint, charging it with a violation of Section 7 of the Clayton Act (T. 15 U. S. C. § 18).[1] The District Court denied an application by the Commission for an order enforcing a subpoena *duces tecum* to compel Ernst & Ernst, the accountants for the Athletic Goods Manufacturers Association, to produce records of members of the Association in the possession of the accountants, and their own records relating thereto.

[*FTC Complaint*]

On December 8, 1955, the Commission issued a complaint against A. G. Spalding & Bros. Inc. charging it with a violation of Section 7 of the Clayton Act in that the Spalding corporation, one of the four largest manufacturers and distributors of athletic goods in the United States, had acquired on or about December 6, 1955, all of the outstanding capital stock of the Rawlings Manufacturing Company, which was also one of the four largest in that field. The complaint further charged, in some detail, that by the acquisition of the Rawlings stock, Spalding had eliminated a large competitor, and that the acquisition of the stock would have the effect of substantially lessening competition or tending to create a monopoly in the manufacture and distribution of athletic goods.

[*Work of Accounting Firm*]

In the course of the hearing, which an examiner of the Federal Trade Commission conducted in relation to the charges contained in the complaint, a subpoena *duces tecum* was served upon W. W. Tuttle of the accounting firm of Ernst & Ernst. The accounting firm, under an arrangement made with the Athletic Goods Manufacturers Association, prepared annually so-called "Census Reports" for the Association, based on information the accounting firm received from the Association's members in the form of statistical data and memoranda. Under its arrangement with the Association's members, Ernst & Ernst were to keep in strictest confidence the data thus received and the data was to be destroyed as soon as it had served the accountants' purpose in the preparation of the annual census report. The accountants had been preparing these reports for the Association since 1949. The reports set forth the sales in units and dollars of various categories and types of athletic equipment.

[*Subpoena—Compliance*]

By a subpoena dated February 24, 1956, signed by the Federal Trade Commission Hearing Examiner and addressed to W. W. Tuttle, a partner and resident manager of Ernst & Ernst, at Boston, Mr. Tuttle was required to appear and testify at a hearing before the Examiner to be held in the United States Courthouse in New York City on April 30, 1956, in the "Matter of A. G. Spalding & Bros. Inc."; and to bring with him the following books, papers and documents:

> "1. Such books, records and documents as will disclose all correspondence, telegrams, memoranda, statistics, work papers, bulletins, census and reports prepared, transmitted or received by Ernst and Ernst, its officers, agents, employees, boards, council, committee or member thereof for the past four years, in the possession or control of Ernst and Ernst and relate to census reports prepared for the Athletic Goods Manufacturing Association."

Ernst & Ernst only partially complied with the subpoena *duces tecum*. They produced the "census reports" and also, with the permission of the two corporations, so much of the data as the accounting firm had received from A. G. Spalding Bros. and Rawlings Manufacturing Company, for the years 1954 and 1955. Information as to individual companies for the years prior to 1954 had been destroyed before the

[1] "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

institution of the Commission's proceedings against Spalding. But Ernst & Ernst did not produce any of the data and information they had received from the other individual companies who were members of the Association for the years 1954 and 1955, or their own records.

[*Petition for Compliance*]

The Federal Trade Commission on May 17, 1956, filed a petition in the United States District Court, Southern District of New York, for an order compelling Mr. Tuttle, resident manager of Ernst & Ernst, to fully comply with the requirements of the subpoena *duces tecum.* The jurisdiction of the District Court to hear and consider the petition is derived from the third unnumbered paragraph of Section 9 of the Federal Trade Commission Act.[2]

[*Defenses*]

Mr. Tuttle filed an answer to the petition and set up three special defenses:

(1) That under Section 9 of the Federal Trade Commission Act the petitioner, the Commission, does not have the power or authority to obtain by subpoena *duces tecum* documentary evidence of any corporation not being investigated or proceeded against, and that therefore the Commission cannot obtain by subpoena from Ernst & Ernst the reports of individual companies other than Spalding and Rawlings; and that the Court does not have the power to order the Respondent Tuttle, or Ernst & Ernst, to produce the reports of those other companies.

(2) That Section 9 of the Federal Trade Commission Act if it grants the Commission that power of subpoena violates the

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[2] Section 9 of the Federal Trade Commission Act provides (*T. 15 U. S. C. § 49;* Chap. 311, § 9, 38 Stat. 722):

"§ 49. Documentary Evidence; Depositions; Witnesses

For the purposes of sections 41-46 and 47-58 of this title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of sections 41-46 and 47-58 of this title or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under sections 41-46 and 47-58 of this title at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Sept. 26, 1914, c. 311, § 9, 38 Stat. 722."

Fifth Amendment of the United States Constitution, in that the Commission would be taking part of the business of Ernst & Ernst which it conducts as accountants for this Association and other similar groups, and would deprive Ernst & Ernst of a valuable business, without due process of law.

(3) That in view of the hardship it would impose on Ernst & Ernst if they are required to disclose this confidential information, which they assert is merely hearsay and not competent proof in the Spalding matter, enforcement of the subpoena would violate Section 6(c) of the Federal Administrative Procedure Act, as being unreasonable and oppressive and therefore not "in accordance with law."

[*District Court Ruling*]

The District Judge concluded "that the plain words of Section 9 of the Federal Trade Commission Act do not authorize the issuance of this subpoena." He held that the Commission's power of subpoena under Section 9 was limited to the production of any documentary evidence of any corporation being investigated or proceeded against; that the respondent (Mr. Tuttle as Resident Manager of Ernst & Ernst) is neither being investigated nor proceeded against (nor are the so-called other companies); and that "the subpoena is unauthorized and the application (of the Commission to enforce the subpoena) is denied."

[*Contentions on Appeal*]

The Commission on this appeal contends (1) that the District Court erred in its construction of the subpoena clause in Section 9 of the Federal Trade Commission Act; (2) and that although the Court did not reach other objections to the subpoena raised by respondent, they are without merit and the subpoena should be enforced.

The respondent-appellee in addition to the contentions asserted in the special defenses set forth in their answer, argue that the Commission has no authority to issue a subpoena *duces tecum* in a proceeding brought by it to enforce the Clayton Act.

Before taking up the main issue presented by this appeal, the construction of Section 9 of the Federal Trade Commission Act, the collateral issues will be considered.

[*Lawful Use of Subpoena Power*]

Section 9 of the Federal Trade Commission Act is not unconstitutional if its provisions permit the service of the subpoena *duces tecum* in this case. The petitioner is seeking the production by the respondent of 150 reports which were furnished by members of the Athletic Goods Manufacturers Association to Ernst & Ernst to enable it to prepare the annual "census report" for the industry. The 150 reports are not "privileged" or confidential communications. The data sought is relevant to the issues that will arise under the allegations of the complaint which the Commission has filed against Spalding, as a reading of the complaint will show. The "reports" have a bearing on the competitive relationship of the members of the Association and will serve to establish the extent of the market control that may have resulted from Spalding's purchase of the Rawlings stock. For those reasons also the subpoena does not violate the Federal Administrative Procedure Act (§ 5c) in relation to subpoenas.[3] The subpoena is not unreasonable in its scope, nor in any way oppressive, and it is in accordance with law, if the Commission had the power under Section 9 of the Federal Trade Commission Act, to issue the subpoena.

The use of the subpoena would not be unconstitutional even if it indirectly had an adverse effect on a certain part of Ernst & Ernst's accounting business. The public interest to be served is superior. If the Association and similar groups wish to have the "census reports" prepared annually, accountants from convenient offices of Ernst & Ernst (they have 60 offices in the United States) could examine the necessary data at the offices of the Association's members. There appears to be no reasonable basis for respondent's contention that either the petitioner or the United States, of which it is an Agency, is taking respondent's property without due process of law.

[*FTC Power to Issue Subpoena*]

Defendant's contention that the Federal Trade Commission does not have the power to issue subpoenas in a proceeding under the Clayton Act, overlooks the fact that both the Clayton Act and Federal Trade Commission Act were under consideration

[3] T. 5 U. S. C. § 1005; Chap. 324, 60 Stat. 237, June 11, 1946.

by the Congress at the same time;[4] that the Congressional debates show that investigations under the Clayton Act were to be conducted by the Commission;[5] that the Commission is mentioned in Sections 2, 7 and 11 of the Clayton Act; and that under Section 11 of the Clayton Act (§ 21 of T. 15 U. S. C.) the Federal Trade Commission is authorized to enforce compliance with Section 7 of the Clayton Act (§ 18 of T. 15 U. S. C.). Likewise the Commission was granted the power under Section 1 of the Robinson-Patman Act (§ 13 of T. 15 U. S. C.) to investigate and institute proceedings to enforce the provisions of the Robinson-Patman Act. The Supreme Court has held that the Commission possesses "broad power of investigation and subpoena" which it may use prior to the filing of a complaint for price discrimination, a violation of the Robinson-Patman Act. *Automatic Canteen Co. v. F. T. C.* [1953 TRADE CASES ¶ 67,503], 346 U. S. 61, 79. The subpoena power necessary for that purpose is found in Section 9 of the Federal Trade Commission Act. The Robinson-Patman Act contained no subpoena powers.

An adequate subpoena power is essential to any investigation of offenses under the Clayton Act[6] and to the enforcement of Section 7 of that Act. The Congress evidently concluded that it was unnecessary to incorporate the full subpoena power in both Acts and was content to set it forth in Section 9 of the Federal Trade Commission Act.[7] The Congress followed a similar course in later anti-monopoly and unfair trade-practices Acts,[8] relating to certain specific industries or markets, and it did not in those Acts set forth the subpoena powers required for the investigations to be conducted by the Commission.

[*Scope of Subpoena Power*]

The main issue on this appeal is the scope of the subpoena power given the Federal Trade Commission in Section 9 of the Federal Trade Commission Act. The argument of respondent on that point is that the subpoena power is limited to documents and records of the corporation being investigated or proceeded against, which in this case would be the Spalding corporation and possibly the Rawlings corporation. Respondents stress the use of the word "such" in the first sentence of Section 9, which states:

> "Sec. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation."

The word "'such' is a rather slippery word" as Judge Dobie remarked in *United*

[4] The Federal Trade Commission Act was enacted by the 63rd Congress (2nd Sess) on September 26, 1914, and the Clayton Act was enacted October 15, 1914.

[5] 51 Cong. Rec. 12918; 14475; 13214; 14090; 14222; 16162; 16319; 16332.

[6] Chap. 323, 38 Stat. 730 (Oct. 15, 1914)

The Federal Trade Commission Act supplements the Clayton and Sherman Acts; and Section 5 of the Federal Trade Commission Act "minimally registers violations of the Clayton and Sherman Acts." *Times-Picayune Pub. Co. v. United States* [1953 TRADE CASES ¶ 67,494], 345 U. S. 594, 609. The Federal Trade Commission has the power to suppress as unfair competition, practices of a combination that run counter to the public policy declared in the Sherman and Clayton Acts. *Fashion Guild v. Trade Comm'n* [1940-1943 TRADE CASES ¶ 56,101], 312 U. S. 457, 463 (footnote 4).

[7] See opinion of Thomsen, C. J. (Md.) in *Federal Trade Commission v. Menzies* [1956 TRADE CASES ¶ 68,478], 145 F. Supp. 164, 168 in support of this power, and opinion of Judge Dimock (S. D. N. Y.) in *Federal Trade Commission v. Rubin* [1956 TRADE CASES ¶ 68,505], 145 F. Supp. 171, *contra*, presently on appeal to this Court (Docket #24449).

On appeal to the Fourth Circuit Court of Appeals, that Court, in an opinion by Parker, C. J. [1957 TRADE CASES ¶ 68,648], affirmed on March 7th Judge Thomsen's decision in the *Menzies* case, and held that in a proceeding against three corporations, which were charged with the violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, the Federal Trade Commission could exercise its right to subpoena records under Section 9 of the Federal Trade Commission Act.

A recent (Feb. 15, 1957) opinion of Judge Hoffman (No. Dist. of Ill.) [1957 TRADE CASES ¶ 68,647], holds that the "subpoena power conferred upon the Commission is available to it in the discharge of its duties under this Clayton Act," citing *F. T. C. v. Reed Candy Co.*, another Northern District Illinois case, decided June 12, 1956 [1956 TRADE CASES ¶ 68,551].

[8] The Acts under which the Federal Trade Commission exercises responsibilities are listed in Section 1.2 entitled "Laws Administered" under Subpart A of Part 1 (setting forth general procedures and rules of practice of the Federal Trade Commission) 15 U. S. C. A. § 1.2 of the 1956 Cumulative Annual Pocket Part for Title 15, §§ 41 to 80.

States v. Legg, 157 F. 2d 990, 992. Some of its many meanings, depending upon its context, are discussed in 83 *C. J. S.* p. 771. As a rule it is used to refer to an antecedent. The respondent argues that its antecedent in the first setnence of Section 9 is "documentary evidence of any corporation being investigated or proceeded against." That contention might appear to be reasonable if we read only the language of the first sentence of Section 9 disregarding the other provisions of Section 9; the purpose and policy of the Federal Trade Commission Act; its legislative history; the Congressional intent; and the effect of respondent-appellee's construction of Section 9, if adopted, upon the Commission's functioning under the Act. "There is sufficient ambiguity here to permit consideration of relevant legislative history." *Mastro Plastics Corp. v. Labor Board,* 350 U. S. 270, 287. In that case the Court ruled on "a narrowly literal construction of the words" of Section 8(d) of the National Labor Relations Act, as the court observed in *Labor Board v. Lion Oil Co.,* 352 U. S. 282, 288.

[*FTC Act—Legislative History*]

The Federal Trade Commission Act was the work of the 63rd Congress, 2nd Session. In April 1914, a bill known as H. R. 15613 was introduced in the House of Representatives and was referred to its Committee on Interstate and Foreign Commerce. It was passed by the House on June 5, 1914. On June 13, 1914, the Senate Committee on Interstate Commerce, to which H. R. 15613 had been referred, reported as a substitute Senate Bill No. 4160 which had been reported favorably to the Senate on June 6th. The Senate and House bills went to conference and a conference bill emerged. The House conference report is No. 1142 and is dated September 4, 1914. The conference bill was passed by the Congress September 26, 1914, and as passed contained Section 9 in its present form.

H. R. 15613, in the Second paragraph of Section 10, provided:

> "For the purpose of prosecuting any investigation or proceeding authorized by this section the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against."

And in Section 16 provided:

> "Sec. 16. That for the purposes of this Act, and in aid of its powers of investigation herein granted, the commission shall have and exercise the same powers conferred upon the Interstate Commerce Commission in the Acts to regulate commerce to subpoena and compel the attendance and testimony of witnesses and the production of documentary evidence and to administer oaths."

Senate Bill 4160 provided, in the second paragraph of Section 3(g):

> "For the purpose of prosecuting any investigation or proceeding authorized by this section the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documents or writings of any corporation being investigated or proceeded against."

And in Section 8 provided:

> "Sec. 8. The commission shall have and exercise the powers possessed by the Interstate Commerce Commission to subpoena and compel the attendance and testimony of witnesses and the production of evidence, and to administer oaths."

From the above it appears that the second paragraph of Section 10 of H. R. 15613 and the second paragraph of Section 3(g) of Senate Bill 4160 are almost identical. The words "any documentary evidence" appear in the House Bill and the words "and documents or writings" in the Senate Bill.

The substance of Section 16 of the House Bill is the same as Section 8 of the Senate Bill.

When it came to drafting Section 9 of the conference bill (which became the Federal Trade Commission Act), the language of Section 10 of the House Bill was followed in the first half of the first sentence of Section 9 of the Act, and then recourse was had to the Interstate Commerce Commission Act, Section 12, for the second half of the first sentence of Section 9 of the Act. The conference committee decided to have the Federal Trade Commission Act contain its own subpoena powers, without reference to the Interstate Commerce Commission Act.

The last part of Section 12 of the Interstate Commerce Commission Act (T. 49 U. S. C. § 12) states:

> "* * * the commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation."

Compare this with the last part of the first sentence of Section 9 of the Federal Trade Commission Act which provides:

> "* * * the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation."

What the draftsman did in incorporating the subpoena provisions of the Interstate Commerce Commission Act into the conference bill, which became the Federal Trade Commission Act, was to substitute the words "Such documentary evidence," for the words "Books, papers, tariffs, contracts, agreements, and documents" of the Interstate Commerce Commission Act. But by moving the subpoena provision from its place in Section 16 of the House Bill (#15613) to a position in the conference bill where it would immediately follow Section 10 of the House bill, relating to the Commission's right of access to "any documentary evidence of any corporation being investigated or proceeded against," the draftsman introduced the word "such" which has given rise to the main issue on this appeal. The word "such" was placed in a position where it might be argued, as the respondents do here, that the word "such documentary evidence" in the second half of the first sentence of Section 9 of the Act were subject to the limitation that it must be the "documentary evidence of a corporation being investigated or proceeded against," mentioned in the first half of that sentence.

The draftsman of the conference bill that became the Federal Trade Commission Act took the first sentence of paragraph 2 of Section 12 of the Interstate Commerce Commission Act (without change) and made it the first sentence of the second paragraph of Section 9 of the Federal Trade Commission Act, so that it reads: "Such attendance of witnesses, and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing." In the Interstate Commerce Commission Act the words "such documentary evidence" refer to "all books, papers, tariffs, contracts, agreements, and documents." Section 12 of the Interstate Commerce Commission Act is also the source of other provisions of Section 9 of the Federal Trade Commission Act, including those relating to recourse to the District Court to enforce the Commission's subpoenas and the taking of testimony by deposition.

[*Construction of Section 9*]

Respondent's narrow construction of the first sentence of the first paragraph of Section 9 is in direct conflict with the broad provisions of the fifth paragraph of that section, relating to the taking of testimony by deposition "in any proceeding or investigation pending under this Act." The word "such" is not used in relation to "documentary evidence" in any part of the fifth paragraph. That paragraph contains no limitation on the origin of the "documentary evidence"; and any person "may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided." The compulsion would be supplied by an order of the District Court in the manner provided in the third paragraph of Section 9. If respondent's construction of the first sentence of Section 9 were correct, the result would be incongruous. A witness subpoenaed to produce documents at a hearing before an Examiner, could not be compelled to produce documents of persons other than the corporation under investigation; but if the testimony of the witness was being taken by deposition he could be compelled to produce the documents.

A provision appearing in the last paragraph of Section 9 of the Federal Trade Commission Act grants to natural persons testifying or producing documentary evidence under subpoena, immunity from prosecution or penalty or forfeiture "for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

A natural person does not have the protection of the Fifth Amendment of the Constitution in respect to books and papers

of a corporation which are in his physical possession, even though they contain matters which might tend to incriminate him. [*Wilson v. United States*, 221 U. S. 361.] The inference is warranted that the "immunity" provision was made part of Section 9 of the Federal Trade Commission Act, in order that the Commission might compel the production of books and papers belonging to natural persons, or to partnerships being examined through a resident partner (Ernst & Ernst through Mr. Tuttle). That conclusion negatives the idea that the subpoena power of the Commission under Section 9 is limited to documents of a corporation under investigation or being proceeded against.

The limited construction of the word "such," contended for by the respondents, would also result in this anomalous situation—that oral testimony could be elicited by the Commission in examining a witness under subpoena, concerning transactions reported in the books and records of the individual or partnership, but the books and records themselves could not be subpoenaed.

If the power of the Commission to subpoena records is limited to records of corporations being investigated or proceeded against, and if there is no right to subpoena records of individuals or partnerships under Section 9 of the Act, how could the Commission fulfill its duties under Section 5 of the Act, relating to "unfair methods of competition," which specifically includes violations by a "person, partnership or corportion"? (§ 45 of T. 15 U. S. C. A.) This is further evidence of the destructive effect which the construction the respondents herein place upon the word "such," in the first sentence of Section 9 of the Act, would have upon the proper functioning of the Commission.

Further, if the second half of the first sentence of Section 9 limits the subpoena power of the Commission to documents of the corporation under investigation, to which the Commission is given access and the right to make copies under the first half of the sentence, of what use is the grant of the power of subpoena? The Commission could get all the information it wanted from the corporation under the access and copying power. Respondent's construction of the language granting the subpoena power, would in effect render the subpoena power useless—an absurd result never contemplated by the Congress.

As the Supreme Court has repeated several times: "In expounding a statute we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and to its object and policy." *United States v. Boisdore's Heirs*, 8 How. 113, 121, quoted in *Mastro Plastics Corp. v. Labor Board*, 350 U. S. 270, 285, and in *Labor Board v. Lion Oil Co.*, 352 U. S. 282. To the same effect, see *United States v. American Trucking Ass'ns*, 310 U. S. 534, 542 and 543.

Finally, the respondent's narrow construction of the words "such documentary evidence" as used in the first paragraph of Section 9 of the Act would impair the proper functioning of the Commission. The accounting firm, having in its possession data supplied by third parties "relating to the matter under investigation" by the Commission, would be immune from subpoena for the production of the data, and the third parties themselves would likewise be immune. The Commission would be limited to the documentary evidence of the corporation being investigated, even though the investigation concerned the effect of the monopolistic acquisitions or unfair competitive practices of that corporation on others in the industry. Proof of the extent of the monopolistic trend of acquisitions by a corporation and their effect on the industry might well be found in the records of other corporations in the same industry. Without those records the Commission might fail to establish important allegations of its complaint.

It was clearly the purpose of the Congress that the Commission should have adequate subpoena power to perform its duties. In reporting *H. R. 15613* the House Committee stated (House Report 533):

> "In order that the Commission may have ample power of subpoena and production of books and papers the language of section 16 of the bill has been expressly made broad enough to permit a full exercise of that power in connection with any kind of investigation which may be undertaken."

The report of the Senate Committee (Senate Report No. 597) on the House bill as redrafted by the Senate, stated:

> "* * * it is indispensable that it (the Commission) should have extensive power

of inquiry, with the right to subpoena witnesses and to require the production of books and papers. The powers which, according to this bill are granted to the commission, are practically the same as those now granted to the Interstate Commerce Commission or the Bureau of Corporations * * *"[9]

In a report on the Conference Bill (Report No. 1142) made to the House on September 14, 1914, it was stated that in the Conference Bill "the administrative process for conducting investigations, summoning witnesses and punishing violations is substantially as in the House bill," i. e., the same as the power possessed by the Interstate Commerce Commission.

A correct interpretation of the long first sentence of Section 9 of the Federal Trade Commission Act should recognize the fact that it grants two separate powers to the Commission, and that the language granting those distinct powers is separated by a semi-colon. The first grants the right of access to and the right to copy any documentary evidence of the corporation being investigated or proceeded against. The second grants a subpoena power for the production of documentary evidence relating to any matter under investigation.

In the second half of the first sentence of Section 9 the words "the production of all such documentary evidence relating to any matter under investigation" should be construed to mean "the production of all documentary evidence relating to any matter under investigation," thus eliminating the word "such." That will comply with the policy and purposes of the Act itself.

The policy of the Act must be considered, and its purposes, in construing the powers given the Commission to function under the Act. Even if the plain meaning of the wording of a statute is apparent, the Supreme Court will not apply that meaning if that would lead to "absurd or futile results." The Court "has looked beyond the words to the purpose of the Act." And frequently, when the plain meaning produces "merely an unreasonable result which is plainly at variance with the policy of the legislation as a whole" the Supreme Court "has followed that purpose, rather than the literal words." *United States v. American Trucking Ass'ns*, 310 U. S. 534, and cases cited on p. 543.

[*Bowman Case*]

In the case of *Federal Trade Commission v. Fred J. Bowman, President, Wilson Athletic Goods Manufacturing Company*, decided by Judge Hoffman on February 15, 1957 [1957 TRADE CASES ¶ 68,647], the Federal Trade Commission had filed in the District Court, Northern District of Illinois, a petition for the enforcement of a subpoena *duces tecum* directing Wilson & Co. to produce certain records, in this same proceeding of *Federal Trade Commission v. A. G. Spalding & Bros. Inc.* In resisting the effort of the Federal Trade Commission to compel the production of the Wilson Company's records under subpoena in the "proceeding" against Spalding, the Wilson Company made the same contention advanced by the respondent in the case at bar, namely that the word "such" as used in the second half of the first sentence of Section 9 of the Federal Trade Commission Act, relates only to the records of a corporation being investigated or proceeded against. Judge Hoffman's opinion states:

> "It is unnecessary to decide whether the defendant's interpretation attaches more significance to the word 'such' than it can reasonably be made to bear. The argument fails upon another ground. Conceding that the Wilson company is not being 'proceeded against' within the meaning of the quoted portion of Section 9, the question remains whether the company is 'being investigated' as that term is used in the Act. Section 6 of the Federal Trade Commission Act, 38 Stat. 721, 15 U. S. C. § 46 * * *"

Judge Hoffman held that the Wilson company could be termed a corporation "being investigated."

Without expressing any opinion on the applicability of Section 6 of the Federal Trade Commission Act (relating to investigations by the Commission) to the records of a corporation whose officer is to be examined as a witness in a "proceeding" against another corporation, we conclude that the *Bowman* case is not a precedent contra to the construction we have given

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[9] The Act to establish the Department of Commerce and Labor (Ch. 552, 32 Stat. p. 827) enacted February 14, 1903, contained provisions for a Bureau of Corporations (§ 6); and that Bureau was given the same power to compel the attendance and testimony of witnesses and the production of documentary evidence as was conferred upon the Interstate Commerce Commission.

to the first sentence of Section 9 of the Federal Trade Commission Act.

[*Trade Secrets*]

Section 6(f) of the Federal Trade Commission Act gives the Commission the power

> "(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use."

The respondents contend that the information sought by the Commission under the subpoena in the case at bar would include the sales records of the individual companies and that those records may be properly classified as "trade secrets." Assuming, *arguendo,* that sales records of the individual companies are trade secrets under Section 6(f), all that that section forbids is the *publication* of "trade secrets and names of customers," in public reports that the Commission may make "from time to time" which it "shall deem expedient in the public interest." That does not mean that "trade secrets and names of customers" may not be subpoenaed by the Commission in any proceeding or investigation under the Act. They may be subpoenaed in litigation in the Federal Courts, if the information is relevant and necessary to the presentation of a case. 4 *Moore, Federal Practice,* § 26.22 p. 1087.

[*FTC Practice*]

The Clayton Act and the Federal Trade Commission Act have been in effect since 1914. The Commission has consistently followed the subpoena practice that is here challenged. Only within the last two years has the legality of that practice been questioned. An "administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction"; but an "administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful." (Judge Cardozo in *Norwegian Nitrogen Co. v. United States,* 288 U. S. 294, 315.) And "Courts are slow to disturb the settled administrative construction of a statute long and consistently adhered to" especially where "the declared will of the legislative body could not be carried out without the construction adopted." (Mr. Justice Stone in *Alaska Steamship Co. v. United States,* 290 U. S. 256, 262.)

[*Reversed*]

For the reasons stated in this opinion, the order of the District Court is reversed and the mandate will direct that the District Court enter an order compelling the respondent to comply with the subpoena *duces tecum* at a time and place to be fixed by the Court.

[Dissenting Opinion]

MEDINA, Circuit Judge (dissenting):

Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. Section 49, provides:

> "That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all *such documentary evidence* relating to any matter under investigation." (Emphasis added.)

I think it clear beyond cavil, and my brothers seem to agree, that the phrase "such documentary evidence" is susceptible of no interpretation other than "documentary evidence of any corporation being investigated or proceeded against." Were the words capable of some other interpretation, it should not be adopted, for "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Old Colony R. Co. v. Commissioner,* 284 U. S. 552, 560; *Lynch v. Alworth-Stephens Co.,* 267 U. S. 364, 370. See also *Crane v. Commissioner,* 331 U. S. 1, 6.

Nevertheless, my brothers have concluded that the word "such" crept into the statute inadvertently and that we have power to "eliminate" it in applying the statute. This they do, referring to the process as one of "construction." But the Supreme Court has

indicated the proper bounds of "construction," declaring it permissible "To let general words draw nourishment from their purpose," but not "To draw on some unexpressed spirit outside the bounds of the normal meaning of words." *Addison v. Holly Hill Co.,* 332 U. S. 607, 617. The Court condemned legislation in the guise of "construction," saying at p. 618:

> "While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.' *Kirschbaum Co. v. Walling,* 316 U. S. 517, 522. To blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation."

And the Court said in *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.,* 257 U. S. 563, at pp. 588-9:

> "Great stress is put on the legislative history * * *. Committee reports and explanatory statements of members in charge made in presenting a bill for passage have been held to be a legitimate aid to the interpretation of a statute where its language is doubtful or obscure. *Duplex Printing Press Co v. Deering,* 254 U. S. 443, 475. But when taking the act as a whole, the effect of the language used is clear to the court, extraneous aid like this can not control the interpretation. *Pennsylvania R. R. Co. v. International Coal Mining Co.,* 230 U. S. 184, 198. *Caminetti v. United States,* 242 U. S. 470, 490. Such aids are only admissible to solve doubt and not create it."

As the Court said in *Oklahoma Press Pub. Co. v. Walling,* 327 U. S. 186, at p. 201, "This case presents an instance of 'the most explicit language' which leaves no room for questioning Congress' intent."

My brothers seek to justify departure from this rule by finding that limiting the powers of the Commission to those granted by the statute "would lead to absurd or futile results." With this conclusion I cannot agree.

First, it is said that it would be "absurd or futile" to provide that witnesses may be subpoenaed to produce only certain documents, whereas the provision of 15 U. S. C. Section 49, that "Any person may be compelled to appear and depose and to produce documentary evidence * * *," "contains no limitation on the origin of the 'documentary evidence.'" This "incongruity," it is said, provides sufficient excuse and authority for a court to grant to the Commission a power not contained in the statute defining its powers. But the premise is faulty. My brothers' construction fails to take into account the qualifying words immediately following that part of the statute quoted above. The entire sentence reads as follows: "Any person may be compelled to appear and depose and to produce documentary evidence *in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.*" (Emphasis added.) Thus, there is no "incongruity," "absurdity" or "futility": the power to require production of documents in connection with depositions is precisely the same as the power to require production of documents by subpoena; it is unlimited only if the subpoena power is unlimited.

It is further said that it would be "absurd" for the Congress to authorize the Commission to subpoena only those documents to which it had access, for this "would in effect render the subpoena power useless." But my brothers' construction must fall before the same argument that engenders it, for if the point has merit would not then the access power be useless, and would this not be "an absurd result never contemplated by the Congress"? The language of the statute and the legislative history make it clear, however, that the Congress considered the powers of access and of subpoena separate and distinct. For example, different penalties are provided for violations of these powers. 15 U. S. C. Section 50. I see no force in the argument that the subpoena power must be broader than the access power.

"Finally," my brothers assert, "the respondent's narrow construction of the words 'such documentary evidence' as used in the first paragraph of Section 9 of the Act would impair the proper functioning of the Commission." This conclusion stems, I think, from an erroneous reading of the Act as it stands. The Commission is undoubtedly empowered to subpoena documents of corporations "being investigated." My brothers give this term a narrow meaning; they consider that a corporation is "being investigated" only if the Commission is contemplating a proceeding against it. Yet Section 6(a)

of the Federal Trade Commission Act, 38 Stat. 721, 15 U. S. C. Section 46, authorizes the Commission "to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce." Is not a corporation "being investigated" if it is the subject of a proper exercise of the Commission's powers under this section? It has been held that it is. *F. T. C. v. Bowman*, — F. Supp. — (N. D. Ill., decided February 15, 1957) [1957 TRADE CASES ¶ 68,647], and appellee agrees that this decision is correct. Nothing to the contrary may be found in *F. T. C. v. Hammond, Snyder & Co.*, 276 U. S. 586, affirming 284 Fed. 886, and *F. T. C. v. American Tobacco Co.*, 264 U. S. 298; those cases merely condemned "fishing expeditions into private papers on the possibility that they may disclose evidence of crime," 264 U. S. at 306, "when it [the Commission] has no reason to believe that any violation of law has been committed," 284 Fed. at 888. Thus, there is no need for a judicial redrafting of the statute, since the Commission is given ample power to obtain the documents of corporations. And this power is available in the case at bar. To the extent the Commission finds it necessary to investigate other corporations in connection with its proceeding against Spalding, it is empowered to subpoena their papers relating to the matter under investigation. The subpoena need not be addressed to the corporation being investigated; any person, including natural persons and partnerships, may be compelled to produce "such documentary evidence." Although there is a requirement that the documents belong to a "corporation being investigated or proceeded against," there is none that they be in the possession of such a corporation. Hence I would reverse the decision below and direct the enforcement of the subpoena insofar as it relates to documentary evidence of the member corporations pertinent to the matter at hand.

My brothers seem to be convinced that the word "such" was accidentally inserted by the Conference Committee and was unwittingly adopted by both Houses and by the President. While such a series of mistakes is of course not beyond the realm of possibility, it is not the only reasonable explanation for the late introduction of the word. As my brothers point out, in the earlier versions of the Act the access power and the subpoena power were found in different sections in different parts of the Act. It is not unlikely that when the Conference Committee incorporated both powers into a single section they noticed for the first time that the power to subpoena documents was broader that the access power and, since there was no apparent reason why that should be so, they deliberately correlated the two.

Although I agree there do exist indications that the Congress omitted to grant a power it had intended to grant, I am nevertheless unable to adopt the position taken by my brothers, for I do not understand that the intention of the legislators is law even though that intention has not found expression in legislation, or that the courts are free to grant to administrative agencies powers in excess of those specifically enacted by the Congress. "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive." *Addison v. Holly Hill Co., supra*, at 617. Under our Constitution, that is the business of the Congress and the President, not of federal judges. See *Schwegman Bros. v. Calvert Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384, 396-7 (concurring opinion):

> "The Rules of the House and Senate, with the sanction of the Constitution, require three readings of an Act in each House before final enactment. That is intended, I take it, to make sure that each House knows what it is passing and passes what it wants, and that what is enacted was formally reduced to writing. It is the business of Congress to sum up its own debates in its legislation. Moreover, it is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that, in signing a bill, the President endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation.
>
> "Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of

our people to live by; and the people go to law offices to learn what their rights under those laws are. * * * Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole legislative history. Moreover, if he could, he would not know any way of anticipating what would impress enough members of the Court to be controlling. To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.

"By and large, I think our function was well stated by Mr. Justice Holmes: 'We do not inquire what the legislature meant; we ask only what the statute means.' Holmes, Collected Legal Papers, 207."

My brothers find support in the statement of the Supreme Court that "administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful." *Norwegian Nitrogen Co. v. United States,* 288 U. S. 294, 315. I fully subscribe to this principle, but it has no application here, for the words of the statute "construed" are neither "indefinite" nor "doubtful." More in point are the accompanying statement that "administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction," and the language of the Court in *United States v. Morton Salt Co.* [1950-1951 Trade Cases ¶ 62,561], 338 U. S. 632 at p. 647:

"The fact that powers long have been unexercised may well call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, *any more than nonexistent powers can be prescripted by an unchallenged exercise.*" (Emphasis added.)

Hence I dissent from the broad ruling by my brothers but would reverse and remand the case with directions to require appellant to comply with the subpoena *duces tecum* only to the extent of producing documentary evidence of the various corporations which I believe fall into the classification of "any corporation being investigated," as I have defined that phrase in what I have already written, and in accord with the ruling of Judge Hoffman in the *Bowman* case. This interpretation of Section 9 of the Federal Trade Commission Act, 15 U. S. C. Section 49, harmonizes the various clauses of the Section and accords to the words, "such documentary evidence," their natural and plain meaning in their context.

[¶ 68,670] United States v. National Screen Service Corporation, et al.

In the United States District Court for the Southern District of New York. Civil Action No. 75-138. Filed March 29, 1957.

Case No. 1128 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Acquisitions—Motion Picture Advertising Trailers and Accessories.—A producer-distributor of motion picture advertising trailers and accessories was prohibited by a consent decree from acquiring the ownership or control of the business, its physical assets or good will, or any stock of any person engaged in the production or distribution of motion picture advertising trailers or accessories, until after it has shown to the court that such an acquisition would not substantially lessen competition or tend to create a monopoly in the production and distribution of such trailers or accessories.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.833; Monopolies, Vol. 1, ¶ 2610.120.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Exclusive Dealing.—A producer-distributor of motion picture advertising trailers and accessories was prohibited by a consent decree from (1) entering into any agreement with any producer or distributor of motion pictures which has the effect of preventing such producer or distributor from licensing any other person to produce and distribute advertising trailers or accessories, (2) demanding or securing from any motion picture producer or distributor any right or license to produce and distribute advertising trailers or accessories on the understanding that the terms or conditions of such right or license

shall not be available to any other person, or (3) entering into any agreement which prevents any person from licensing or obtaining advertising trailers or accessories from any other producer or distributor of such trailers or accessories, or which limits the distribution of such trailers or accessories licensed or obtained from the producer-distributor in a defined geographical area.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.690; Monopolies, Vol. 1, ¶ 2610.300.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Tying Arrangements.—A producer-distributor of motion picture advertising trailers and accessories was prohibited by a consent decree from (1) conditioning the lease of any motion picture advertising trailer or accessory upon the lease of any other trailer or accessory, or discriminating against any motion picture exhibitor to induce him to lease any other trailer or accessory, or (2) requiring, as a condition of any contract, that any motion picture exhibitor lease any motion picture advertising trailer or accessory other than those he had bargained or contracted to lease. Also, motion picture producers and distributors were prohibited from (1) requiring, as a condition to the granting of a license to produce and distribute any type of trailers, that the applicant produce and distribute either accessories or any other type of trailers or (2) requiring, as a condition to the granting of a license to produce and distribute accessories, that the applicant produce and distribute any type of trailers.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.848; Monopolies, Vol. 1, ¶ 2610.850.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Discrimination.—A producer-distributor of motion picture advertising trailers and accessories was prohibited by a consent decree from (1) coercing or discriminating against any motion picture exhibitor for using motion picture advertising trailers or accessories produced or distributed by any other person or (2) discriminating against any motion picture exhibitor to induce him to lease motion picture advertising trailers or accessories. Also, motion picture producers and distributors were prohibited from discriminating among persons applying for licenses or holding licenses for trailers or among persons applying for licenses or holding licenses for accessories, where the discrimination gives any licensee a substantial competitive advantage over any other person holding a similar license.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.630; Monopolies, Vol. 1, ¶ 2610.280.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Price Fixing.—Motion picture producers and distributors were each prohibited by a consent decree from entering into any agreement with a licensee of motion picture advertising trailers or accessories which establishes the price at which the licensee will service motion picture exhibitors with trailers or accessories of any other motion picture producer, or distributor.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.860; Monopolies, Vol. 1, ¶ 2610.600.

Department of Justice Enforcement and Procedure—Consent Decree—Specific Relief—Licensing of Copyrighted Material.—Motion picture producers and distributors were each ordered to grant to any qualified person a license (including a license under copyrights) to produce and distribute any type of motion picture advertising trailer or to produce and distribute motion picture advertising accessories relating to motion pictures released by any such producer or distributor so long as, and to the extent that, the producer or distributor licenses or otherwise authorizes any other person to produce and distribute the trailers or the accessories sought to be produced and distributed by the person applying for the license. A reasonable royalty could be charged for such licenses.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.30, 8421.

For the plaintiff: Victor R. Hansen, Assistant Attorney General, and W. D. Kilgore, Jr., Homer W. Hanscom, Richard B. O'Donnell, John D. Swartz, Walter K. Bennett, E. Winslow Turner, and Elliott H. Feldman, Attorneys.

For the defendants: Phillips, Nizer, Benjamin & Krim for Natl. Screen Service Corp.; Schwartz & Frohlich for Columbia Pictures Corp.; Louis Phillips for Paramount Pictures Corp.; Joseph J. Laub for RKO Teleradio Pictures, Inc.; Dwight, Royall, Harris, Koegel & Caskey for Twentieth Century-Fox Film Corp.; O'Brien, Driscoll & Raftery for United Artists Corp.; Adolph Schimel for Universal Pictures Co., Inc.; and Bernard G. Segal and Edward W. Mullinix, of counsel, for Paramount Pictures Corp., RKO Teleradio Pictures, Inc., Twentieth Century-Fox Film Corp., United Artists Corp., and Universal Pictures Co., Inc. R. W. Perkins (Louis Goffman, of counsel) for Warner Bros. Pictures, Inc.

For a prior opinion of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,605.

Final Judgment

[*Judgment as to Defendants Other Than Warner Bros. Pictures, Inc.*]

SUGARMAN, District Judge [*In full text*]: The United States of America, plaintiff, having filed its complaint herein on April 28, 1952 and a supplemental complaint on January 23, 1957 which, *inter alia,* added Twentieth Century-Fox Film Corporation as a defendant; the defendants signatory hereto having severally appeared and filed their respective answers thereto denying all of their substantive allegations; TCF Film Corporation (formerly known as and named in the original complaint herein as Twentieth Century-Fox Film Corporation, a New York corporation) having dissolved and sold its motion picture production and distribution assets to Twentieth Century-Fox Film Corporation; and the plaintiff and the defendants signatory hereto by their respective attorneys having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, no testimony having been taken, and without admission by any of the parties in respect of any such issue; and plaintiff having moved the Court for the entry of this Final Judgment,

It is hereby ordered, adjudged and decreed as follows:

I

[*Sherman Act*]

The Court has jurisdiction of the subject matter of this action and of the parties signatory hereto. The complaint states claims upon which relief may be granted under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Trailers" means motion picture films of short duration for the advertising of the exhibition of full length feature motion picture films, commonly referred to as "Coming Attractions", of the types generally known in the industry as "talking trailers" and "sound trailers", as well as any other type of trailer for the purpose stated above;

(B) "Accessories" means advertising materials used by motion picture theatres and generally known in the industry as "standard accessories" and "specialty accessories", including lithograph posters (in 1 sheet, 3 sheet, 6 sheet and 24 sheet sizes), 8 x 10 stills, photos [in sizes 11 x 14 (in sets), 22 x 28 and 14 x 36], window cards, slides, heralds, mats, 40 x 60's, 30 x 40's, 24 x 82 banners, 24 x 60 banners, 40 x 60 Hollywood displays, 40 x 60 specials, 40 x 60 transparencies, 30 x 40 specials, 8 x 10 title cards, 11 x 14 title cards, 24 x 24 title cards, standees, and any other similar materials;

(C) "Producer" means any person, including any affiliate thereof, controlling, controlled by or under common control with such person, engaged in the production or distribution, or both, of full length feature motion picture films;

(D) "Producer Defendants" means defendants Paramount Pictures Corporation; Twentieth Century-Fox Film Corporation; RKO Teleradio Pictures, Inc.; United Artists Corporation; Columbia Pictures Corporation; Universal Pictures Company, Inc., and each of them;

(E) "Exhibitor" means any person engaged in the operation of a motion picture theatre or theatres;

(F) "Person" means an individual, corporation, partnership, firm, association or any other legal or business entity;

(G) "Distribute" means to distribute to exhibitors;

(H) "Produce," when referring to trailers or accessories, means to design and manufacture or to assume responsibility for the procurement of design and manufacture;

(I) "National Screen" means the defendant, National Screen Service Corporation.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to any defendant shall apply to each such defendant, its officers, agents, servants and employes, and to those persons in active concert or participation with any such defendant who receives actual notice of this Final Judgment by personal service of otherwise.

IV

[*Practices Enjoined*]

National Screen is enjoined and restrained from:

(A) Entering into, adhering to or claiming any rights under any term of any agreement with any producer which has the purpose or effect of preventing such producer from licensing any other person to produce and distribute trailers or accessories;

(B) Demanding or securing from any producer any right or license to produce and distribute trailers or accessories on the understanding that the terms or conditions of such right or license shall not be available to any other person;

(C) Acquiring, by purchase, merger, consolidation or otherwise, ownership or control of the business, its physical assets or good will, or any part thereof, or any stock of any person engaged in the production or distribution of trailers or accessories, until after National Screen has, upon reasonable notice to the Attorney General and an opportunity on the part of the latter to be heard, shown to this Court that such an acquisition would not substantially lessen competition or tend to create a monopoly in the production and distribution of trailers or accessories;

(D) Coercing or discriminating against any exhibitor for using trailers or accessories produced or distributed by any other person, including any producer; Provided, however, that this Subsection (D) shall not prevent National Screen from contracting with any producer with which it may have a license for the production and distribution of trailers or accessories, that the producer will not itself engage in the business of furnishing such licensed materials to exhibitors directly;

(E) Entering into, adhering to or claiming any rights under any agreement which prevents any person from licensing or obtaining trailers or accessories from anyone other than National Screen, or which limits the distribution of trailers or accessories licensed or obtained from National Screen in a defined geographical area; Provided, however, that this Subsection (E) shall not restrict National Screen's right to limit the use of leased materials by an exhibitor to a particular theatre or theatres, or for a specific time;

(F) Conditioning the lease of any trailer or accessory upon the lease of any other trailer or accessory, or discriminating against any exhibitor to induce him to lease any other trailer or accessory; Provided, however, that this Subsection (F) shall not be construed to prohibit National Screen from entering into service contracts at prices varying with the quantity of materials to be furnished;

(G) Requiring, as a condition of any contract, that any exhibitor lease any trailer or accessory other than those he has bargained or contracted for.

V

[*Grant of Licenses—Prohibitions*]

(A) Subject to the other provisions in this Section V, each Producer Defendant is ordered and directed to grant to any qualified person applying therefor a license (including a license under the Producer Defendant's copyrights) to produce and distribute any type of trailers or to produce and distribute accessories relating to motion pictures released by the Producer Defendant, so long as and to the extent that the Producer Defendant or its distributor (as provided for below) licenses or otherwise authorizes any other person [other than an affiliate as described in Section

II(C) hereof] to produce and distribute the trailers or the accessories sought to be produced and distributed by the person applying for the license; Provided, however, that any such license so granted may require reasonable terms and conditions (including payment of a reasonable royalty) agreed to by the Producer Defendant. In the event a Producer Defendant turns over distribution of its motion pictures to a nonaffiliated distributor not a defendant herein, such Producer Defendant must either itself license pursuant to this Subsection (A) or require such distributor so to do.

(B) No Producer Defendant shall be required to regard any person as a qualified applicant within the meaning of Subsection (A) of this section unless:

(1) The applicant can meet and will agree to meet reasonable business standards as to reliability, financial responsibility, ability, production facilities and a national distribution organization and facilities to service, with respect to all feature motion pictures released by the Producer Defendant, all exhibitors desiring such service. Provided, however, that the size of the organization and facilities of National Screen shall not be used as the standards for determining the adequacy of the applicant's qualifications.

(2) The applicant, in the case of accessories, agrees to produce and distribute at least the following accessory items:

(a) Lithograph posters (in 1 sheet, 3 sheet, 6 sheet and 24 sheet sizes).
(b) 8 x 10 stills.
(c) Photos [in sizes 11 x 14 (in sets), 22 x 28, and 14 x 36].
(d) Window cards.
(e) Heralds.
(f) Mats.

Provided, however, that the Producer Defendant may, in the reasonable exercise of its discretion, with notice to the Attorney General which shall also be filed with this Court, substitute for any of the foregoing items (a) through (f) any other accessory item for which there is a substantial demand on the part of exhibitors.

(C) Each Producer Defendant is enjoined and restrained from:

(1) Requiring, as a condition to the granting of a license to produce and distribute any type of trailers, that the applicant produce and distribute either accessories or any other type of trailers; or

(2) Requiring, as a condition to the granting of a license to produce and distribute accessories, that the applicant produce and distribute any type of trailers.

(D) Each Producer Defendant is enjoined and restrained from discriminating among persons applying for licenses or holding licenses for trailers or among persons applying for licenses or holding licenses for accessories, as to the royalties or other terms required or offered, as to the facilities, rights or privileges made available, or as to dealings under licenses and the enforcement thereof, where the discrimination gives or would give any licensee of the Producer Defendant a substantial competitive advantage over any other person holding a similar license from the Producer Defendant.

(E) Notwithstanding the other terms of this Section V, any Producer Defendant may contract with National Screen for the performance by National Screen of any obligation to the Producer Defendant which is substantially similar to an obligation which National Screen has heretofore agreed in a written contract with the Producer Defendant (or any predecessor or affiliate) to perform either for the benefit of the Producer Defendant or for the benefit of exhibitors.

(F) Each Producer Defendant is enjoined and restrained from entering into, adhering to or claiming any rights under any provision of any agreement with a licensee of trailers or accessories which establishes the price at which the licensee will service exhibitors with trailers or accessories of any other producer; Provided, however, that this Subsection (F) shall not be deemed to prohibit any Producer Defendant from using a license provision in substantially the form attached to this Final Judgment as Exhibit A, or as such form may be hereafter modified by this Court.

VI

[*Foreign Activities*]

Nothing contained in this Final Judgment shall apply to operations or activities of any defendant outside of the United States of America, its territories and possessions, or to the production of trailers or accessories for distribution outside such territory.

VII

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized

representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to National Screen or any Producer Defendant, made to its principal office, be permitted, subject to any legally recognized privilege, (a) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment; and (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employes of such defendants, who may have counsel present, regarding any such matters. National Screen or any Producer Defendant, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the enforcement of this Final Judgment. No information obtained by the means provided in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

VIII

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment and their successors bound hereby, and no one else, to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, and for the purpose of enforcement of compliance therewith, and the punishment of violations thereof.

Exhibit A

Licensee agrees that in servicing exhibitors it will not discriminate in quality, service, price or otherwise against trailers or accessories licensed hereunder and in favor of trailers or accessories relating to motion pictures distributed by any person other than licensor, except that different prices may be charged where such difference reflects only differences in licensee's costs of production or service.

Final Judgment

[*Judgment as to Warner Bros. Pictures, Inc.*]

SUGARMAN, District Judge [*In full text*]: The United States of America, plaintiff, having filed its complaint herein on April 28, 1952 and a supplemental complaint on January 23, 1957 which, *inter alia,* added Warner Bros. Pictures, Inc., organized in 1953, only Count II of which referred to Warner Defendant; Warner Defendant having appeared and filed their answer to Count II thereof denying all of its substantive allegations; and the plaintiff and Warner Defendant by their respective attorneys having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, no testimony having been taken, and without admission by any of the parties signatory hereto in respect of any such issue; and plaintiff having moved the Court for the entry of this Final Judgment, it is hereby

Ordered, adjudged and decreed as follows:

I

[*Sherman Act*]

The Court has jurisdiction of the subject matter of this action and of the parties signatory hereto. The complaint states claims under Count II upon which relief may be granted under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Warner Defendant" means Warner Bros. Pictures, Inc., organized in 1953, and Warner Bros. Pictures Distributing Corporation, and each of them;

(B) "Accessories" means advertising materials used by motion picture theatres and generally known in the industry as "stand-

ard accessories" and "specialty accessories," including lithograph posters (in 1 sheet, 3 sheet, 6 sheet and 24 sheet sizes), 8 x 10 stills, photos [in sixes 11 x 14 (in sets), 22 x 28 and 14 x 36], window cards, slides, heralds, mats, 40 x 60's, 30 x 40's, 24 x 82 banners, 24 x 60 banners, 40 x 60 Hollywood displays, 40 x 60 specials, 40 x 60 transparencies, 30 x 40 specials, 8 x 10 title cards, 11 x 14 title cards, 24 x 24 title cards, standees, and any other similar materials;

(C) "Producer" means any person, including any affiliate thereof, controlling, controlled by or under common control with such person, engaged in the production or distribution, or both, of full length feature motion picture films;

(D) "Exhibitor" means any person engaged in the operation of a motion picture theatre or theatres;

(E) "Person" means an individual, corporation, partnership, firm, association or any other legal or business entity;

(F) "Distribute" means to distribute to exhibitors;

(G) "Produce" means to design and manufacture or to assume responsibility for the procurement of design and manufacture;

(H) "National Screen" means the defendant, National Screen Service Corporation.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to Warner Defendant shall apply to each such defendant, its officers, agents, servants and employees, and to those persons in active concert or participation with such defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Grant of Licenses—Prohibitions*]

(A) Subject to the other provisions of this Section IV, Warner Defendant is ordered and directed to grant to any qualified person applying therefor a license (including a license under Warner Defendant's copyrights) to produce and distribute accessories relating to motion pictures released by Warner Defendant, so long as and to the extent that the Warner Defendant or its distributor (as provided for below) licenses or otherwise authorizes any other person [other than an affiliate as described in Section II(C) hereof] to produce and distribute the accessories sought to be produced and distributed by the person applying for the license; Provided, however, that any such license so granted may require reasonable terms and conditions (including payment of a reasonable royalty) agreed to by the Warner Defendant. In the event Warner Defendant turns over distribution of its motion pictures to a non-affiliated distributor not a defendant herein, such Warner Defendant must either itself license pursuant to this subsection (A) or require such distributor so to do;

(B) Warner Defendant shall not be required to regard any person as a qualified applicant within the meaning of subsection (A) of this Section unless:

(1) The applicant can meet and will agree to meet reasonable business standards as to reliability, financial responsibility, ability, production facilities and a national distribution organization and facilities to service, with respect to all feature motion pictures released by Warner Defendant, all exhibitors desiring such service. Provided, however, that the size of the organization and facilities of National Screen shall not be used as the standard for determining the adequacy of the applicant's qualifications.

(2) The applicant agrees to produce and distribute at least the following accessory items:

(a) Lithograph posters (in 1 sheet, 3 sheet, 6 sheet and 24 sheet sizes).

(b) 8 x 10 stills.

(c) Photos [in sizes 11 x 14 (in sets), 22 x 28, and 14 x 36].

(d) Window cards.

(e) Heralds.

(f) Mats.

Provided, however, that Warner Defendant may, in the reasonable exercise of its discretion, with notice to the Attorney General which shall also be filed with this Court, substitute for any of the foregoing items (a) through (f) any other accessory item for which there is a substantial demand on the part of exhibitors;

(C) Warner Defendant is enjoined and restrained from discriminating among persons applying for licenses or holding licenses for accessories, as to the royalties or other terms required or offered, as to the facilities,

rights or privileges made available, or as to dealings under licenses and the enforcement thereof, where the discrimination gives or would give any licensee of Warner Defendant a substantial competitive advantage over any other person holding a similar license from Warner Defendant;

(D) Notwithstanding the other terms of this Section IV, Warner Defendant may contract with National Screen for the performance by National Screen of any obligation to Warner Defendant which is substantially similar to an obligation which National Screen has heretofore agreed in a written contract with Warner Defendant (or any predecessor or affiliate) to perform either for the benefit of Warner Defendant or for the benefit of exhibitors;

(E) Warner Defendant is enjoined and restrained from entering into, adhering to or claiming any rights under any provision of any agreement with a licensee of accessories which establishes the price at which the licensee will service accessories of any other producer; Provided, however, that this subsection (E) shall not be deemed to prohibit Warner Defendant from using a license provision in substantially the form attached to this Final Judgment as Exhibit A, or as such form may be hereafter modified by this Court.

V

[*Foreign Activities*]

Nothing contained in this Final Judgment shall apply to operations or activities of Warner Defendant outside of the United States of America, its territories and possessions, or to the production of accessories for distribution outside such territory.

VI

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notices to Warner Defendant, made to its principal office, be permitted, subject to any legally recognized privilege, (a) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment; and (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters. Warner Defendant, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the enforcement of this Final Judgment. No information obtained by the means provided in this Section VI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

VII

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties signatory to this Final Judgment and their successors bound hereby, and no one else, to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, and for the purpose of enforcement of compliance therewith, and the punishment of violations thereof.

Exhibit A

Licensee agrees that in servicing exhibitors it will not discriminate in quality, service, price or otherwise against trailers or accessories licensed hereunder and in favor of trailers or accessories relating to motion pictures distributed by any person other than licensor, except that different prices may be charged where such difference reflects only differences in licensee's costs of production or service.

[¶ 68,671] Frank Solinski v. General Electric Company.

In the United States District Court for the District of New Jersey. Civil Action No. 855-56. Filed March 26, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Defenses—Federal Statute of Limitations—Applicability—Pendency of Government Action.—A treble damage action was held to be barred by the four-year Federal statute of limitations where (1) the plaintiff's claim for damages accrued in October, 1940, (2) the United States commenced a suit against the defendant in the instant action in January, 1941, (3) a final judgment in favor of the United States against the defendant was entered in December, 1953, and (4) the plaintiff commenced his action against the defendant in October, 1956. The Federal statute of limitations, which was enacted and became effective after the termination of the Government action but before the institution of the instant action, was applicable. Congress may shorten the time within which suits to enforce existing causes of action may be commenced, provided a reasonable time is given by the new law for the commencement of suit before the bar takes effect. The Federal statute of limitations did not become effective until six months after its enactment, and this left ample time for the plaintiff to institute his action, which was not commenced until after the effective date of the statute. Under the Federal statute of limitations, the plaintiff had to commence his suit within one year after the conclusion of the Government's action against the defendant because more than four years had elapsed since the date of accrual of the plaintiff's right of action. The wartime suspension of limitations was not applicable to the instant suit.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.

For the plaintiff: Louis Kraemer.

For the defendant: Toner, Crowley, Woelper & Vanderbilt (Simpson, Thacher & Bartlett, of counsel).

Opinion

[*Statute of Limitations*]

THOMAS F. MEANEY, District Judge [*In full text*]: This is an action for treble damages brought by Frank Solinski against General Electric Company for alleged violations of the so-called antitrust laws, under section 4 of the Clayton Act. The question to be determined at this juncture is whether the action is barred by the statute of limitations applicable to the facts of the case.

It may clarify matters somewhat if a partial calendar of events be set up.

1. The claim for damages accrued in October, 1940.

2. The United States started suit against the defendant for violations of the Clayton Act on January 27, 1941.

3. There was a final judgment in favor of the United States against General Electric Company on December 6, 1953.

4. The plaintiff in the instant suit commenced his action against the defendant on October 26, 1956.

[*Clayton Act*]

Originally the Clayton Act provided that the statute of limitations obtaining in the state in which the action was initiated should apply to any case brought under the said Act. In New Jersey the statute is six years. The Act provided, however, that the running of the statute of limitations in respect of all private rights of action should be suspended during the pendency of any suit or proceeding, whether civil or criminal, brought by the United States for violation thereof. 15 U. S. C. A. § 16. (October 15, 1914). This section of the Act was amended July 7, 1955, continuing the suspension of the statute during the pendency of the Government's proceeding *and for one year thereafter,* with the proviso that the action must have been brought during the period of suspension *or within four years after the cause of action accrued,* else it would be barred forever. 15 U. S. C. A. § 16(b). (Italics supplied.)

[*Issue*]

In the case of *Bascom Launder Corp. v. Farny* [1950-1951 TRADE CASES ¶ 62,706], 10

F. R. D. 421, *Electric Theatre Co. v. Twentieth Century-Fox F. Corp.* [1953 TRADE CASES ¶ 67,560], 113 F. Supp. 937, *loc. cit.* 944, and *Leonia Amusement Corp. v. Loew's, Inc.* [1953 TRADE CASES ¶ 67,592], 117 F. Supp. 747, all decided before the 1955 amendment to the Clayton Act, it was held that the statute of limitations was tolled by the provisions of the Clayton Act then prevailing and before the amendment above referred to, and that the total elapsed time was to be computed by deducting from the number of years since the accrual of the action to the time of beginning the suit, the time during which the Government's suit was pending.

The instant situation is complicated by the fact that after the determination of the Government's suit and before the institution of this suit, section 16 of the Clayton Act was amended as hereinbefore indicated.

What is now to be passed on is whether the amendment alters the situation to the extent that the suit must be brought within one year after the conclusion of the Government's suit against General Electric Company (more than four years having elapsed since the date of accrual of the plaintiff's right of action) or whether such part of the four-year period which had not elapsed at the time of commencement of the Government's suit was suspended by the federal statute of limitations, leaving the balance of the four years after the windup of the Government's suit as a period during which suit might be brought, and not the one year mentioned in the statute before the proviso in section 16(b).

[*Wartime Suspension*]

The 1942 Act and its 1945 amendment, providing for wartime suspension of limitations (Act Oct. 10, 1942, c. 589, 56 Stat. 781, as amended June 30, 1945, c. 213, 59 Stat. 306), have no bearing on the question at issue.

[*Clayton Act Amendment*]

While there may be seeming inconsistencies in the conclusions arrived at by this court, the legislative history of the amendment sheds much light on the purpose and effect of the amendment. There is no question that the tolling of the statute of limitations, whatever be its extent, is continued during the pendency of any action brought by the Government concerning the same subject matter as that which is the basis of a private action. But the Congress, while recognizing the desirability of such temporary defeasance of limitation, was concerned about any undue prolongation of proceedings and therefore decided to establish a uniform statute of limitations arriving at an average of all state periods, or four years. But the law-making body did not rest there. Having in mind the shortening of the time over which private treble damage actions might extend, it unequivocally required that such actions be brought within four years after their accrual or within one year after the Government's case has been concluded. Anomalous situations may be created by such a construction of the law, but it is the opinion of this court that Congress felt sufficient protection would be given to a potential litigant by the establishment of a four-year period, after accrual of a right of action, during which an action must be brought, with the additional safeguard that if before the expiration of that time a suit were begun by the Government, the private plaintiff would have such further time as the Government might take before conclusion of its case, plus one year, for the preparation and filing of such litigant's case.

From the legislative history and the express wording of the statute, it would seem clear that Congress intended to establish a uniform statute of limitations (*Carter v. Atlanta Enterprises, Inc.* [1956 TRADE CASES ¶ 68,312], 19 F. R. D. 362, and cases cited at 364; decided March 24, 1956), and a new method of calculation in its working.

[*New Rule Applicable*]

There remains the final question of whether the new rule applies to the case at bar. It is well settled that Congress "may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, provided, in each case, a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect." *Wheeler v. Jackson,* 137 U. S. 245. The amendment establishing the new limitation in the Clayton Act, passed July 7, 1955, was not to become effective until six months after its enactment. This left ample time for the plaintiff in the case at bar for the institution of suit. Suit was not begun until October

26, 1956, many months after the date upon which the amendment under discussion became effective.

[*Action Barred*]

Under all the circumstances obtaining, the plaintiff's action against the General Electric Company is barred by the statute of limitations, and the defendant's motion for summary judgment is granted.

This opinion may serve as findings of fact and conclusions of law.

Let an order be submitted.

[¶ 68,672] The California Oil Company v. Forrest W. Fitzgerald, individually and t/a Fitzgerald Service and Repair Center, and also t/a Montgomeryville Calso Station.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 21779. Filed January 7, 1957.

Pennsylvania Fair Trade Act

Fair Trade—Enforcement of Fair Trade Prices—Suit for Injunctive Relief—Proof of Damage—Federal Court Action.—In a Federal court action, an oil company's motion for a preliminary injunction to enjoin a dealer from selling the company's gasoline below its established fair trade prices was denied because there was no sufficient credible evidence that the matter in controversy exceeded the amount of $3,000, and that the company was threatened with irreparable injury. The only witness for the company who testified as to the extent of the company's investment in promoting good will for its trade-mark, or as to the extent of harm done to the company's good will by the dealer's sales, was not an officer or director of the company and was not a person who was in a position to have personal knowledge of the facts to which he testified.

See Fair Trade, Vol. 1, ¶ 3362.40, 3410.40.

For the plaintiff: Montgomery, McCracken, Walker & Rhoads, by John W. Fawcett, III, Philadelphia, Pa.

For the defendant: Paul R. Beckert, Levittown, Pa., and William J. Toy, Philadelphia, Pa.

Findings of Fact

Conclusions of Law and Order

KRAFT, District Judge [*In full text*]: Hearing was had and argument heard on the plaintiff's motion for preliminary injunction to enjoin alleged violation of the Pennsylvania Fair Trade Law[1], and on the defendant's motion to dismiss this motion. From the evidence and the stipulations of the parties, the court makes the following

Findings of Fact

1. The plaintiff is a Delaware corporation.

2. The plaintiff has a valid trade-mark covering the names "Calso" and "Calso Supreme."

3. The plaintiff has sold and now sells gasoline in Pennsylvania to distributors but not to dealers.

4. A substantial part of this gasoline, directed to be made to the plaintiff's specifications, is obtained from the bulk plants of other refiners by the plaintiff's distributors, pursuant to exchange agreements, and the plaintiff furnishes to its distributors certain additives intended to be added to the gasoline by the distributor in conformity with plaintiff's instructions.

5. On September 4, 1956 the plaintiff executed a written agreement with one of the more than 350 Pennsylvania dealers who vend this gasoline. This agreement provided, *inter alia*, that this dealer would sell Calso (regular) gasoline at 27.9 cents per gallon and Calso Supreme gasoline at 30.9 cents per gallon unless and until otherwise instructed by the plaintiff; and, that this dealer would not sell such gasoline except at prices fixed by the plaintiff.

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[1] Act of June 5, 1935, P. L. 266; 73 P. S. §§ 7-11, as amended by Act No. 589, May 25, 1956.

6. The defendant is a Pennsylvania dealer who sells gasoline so purchased from plaintiff's distributor.

7. There is no agreement, written or oral, between plaintiff and defendant.

8. On or about September 5, 1956 defendant received from plaintiff written notice of the aforesaid agreement.

9. The defendant was advised by letter, dated November 27, 1956, that defendant's failure to abide by the prices fixed by the plaintiff pursuant to the aforesaid agreement would result in legal action by plaintiff against defendant.

10. The defendant thereafter sold gasoline purchased from plaintiff's distributor at prices other than those fixed by the plaintiff in or under the terms of the aforesaid agreement.

11. The plaintiff seeks to prevent sales by the defendant at any prices other than those fixed by the plaintiff, from time to time, in accordance with the aforesaid agreement.

12. There is no sufficient credible evidence on the present record which convinces the court that the matter in controversy exceeds $3,000.

13. There is no sufficient credible evidence on the present record which convinces the court that the plaintiff is threatened with irreparable injury.

Discussion

The only witness for the plaintiff who testified to the extent of plaintiff's investment in promoting good will for its trademark, or to the extent of harm done to plaintiff's good will by the defendant's sales, was neither an officer nor director of the plaintiff nor one who was in a position to have or who did have personal knowledge of the facts to which he testified. Most of his testimony in this area was based on knowledge gleaned from reports by or conversations with others. While the testimony was admitted over objection, its probative value was for the court. See *Olin Industries, Inc. v. Danoff et al.* [1954 Trade Cases ¶ 67,820], 122 F. Supp. 645 (D. C. M. D. Pa. 1954).

Defendant's counsel raised legal questions respecting the interpretation of the Pennsylvania Fair Trade Law, as sought to be applied in the instant case, sufficient to raise serious doubt as to the extent of the plaintiff's ultimate rights against this defendant. See *Henis et al. v. Compania Agricola de Guatemala et al.*, 116 F. Supp. 223, (D. C. D. Del. 1953, aff'd. 210 F. 2d 950 (Cir 3 1954)).

Conclusions of Law

I. Jurisdiction of this action, based on 28 U. S. C. § 1332(a)(1) is, on the present record, at best doubtful.

II. Plaintiff, on the present record, is threatened with no irreparable injury.

III. On the present record doubt exists as to the merits of the claim for relief.

Order

Now, January 7, 1957, the plaintiff's motion for preliminary injunction is denied and defendant's motion for dismissal thereof is granted.

[¶ 68,673] Federal Trade Commission v. Scientific Living, Inc.

In the United States District Court for the Middle District of Pennsylvania. Civil Action No. 5614. Filed April 9, 1957.

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Unfair Practice Proceeding—Production of Documentary Evidence—Compliance with Cease and Desist Order—Power To Issue Subpoena *Duces Tecum*.—A corporation was ordered by a Federal District Court to comply with a subpoena *duces tecum* served on the corporation by the Federal Trade Commission in the course of an investigation to ascertain whether or not the corporation was complying with a cease and desist order issued against the corporation under the Federal Trade Commission Act. Under Section 9 of the FTC Act, the Commission can have access to any documentary evidence of any corporation being investigated or proceeded against and has the power to require by subpoena the production of documentary evidence relating to any matter under investigation. Having such power, the Commission can make rules regulating the procedure in connection with such power.

While such a subpoena is no more than a notice, a Federal District Court has the power to enforce the subpoena through its contempt powers. The Constitution does not forbid Congress to do this, and, without violating constitutional provisions concerning separation and delegation of powers or due process, an administrative agency may be given the power to require the attendance of witnesses in proceedings of a purely investigatory nature. The documentary evidence requested related to the matter under investigation over a reasonable period of time within a field of inquiry covered by the Act, and the demand did not amount to an unreasonable search and seizure under the Fourth Amendment. The corporation's contention that the subpoena violates the due process clause of the Fifth Amendment and the requirements of the Administrative Procedure Act because it was not returnable before a member of the Commission or a qualified examiner or before one who was unbiased and independent was rejected. The Commission's rules of practice concerning the matter observed the requirements of the Administrative Procedure Act and afforded a fair hearing. Also, a showing of probable cause preliminary to the issuance of the subpoena need not be made by the Commission, and the Federal Rules of Civil Procedure are not applicable. The Commission had the power to issue the subpoena for the above purpose, and the Commission's subpoena power is not limited only to formal hearings under Section 5(b).

See FTC Enforcement and Procedure, Vol. 2, ¶ 8741.10, 8741.55.

Federal Trade Commission Enforcement and Procedure—Unfair Practice Proceeding —Production of Documentary Evidence—Compliance With Cease and Desist Order— Validity of Subpoena Directed to Corporation and to a Party Not a Witness.—A subpoena *duces tecum* served on a corporation by the Federal Trade Commission in the course of an investigation to determine whether or not the corporation was complying with a cease and desist order issued under the Federal Trade Commission Act was valid. While a corporation is incapable of testifying except through its authorized officers and agents, there is no reason why a subpoena *duces tecum* may not be directed to the corporation itself. A command to a corporation is, in effect, a command to those who are officially responsible for the conduct of its affairs. Also, the contention that the subpoena was invalid because it was addressed to a party and not to a witness was rejected.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8741.

Federal Trade Commission Enforcement and Procedure—Unfair Practice Proceeding —Production of Documentary Evidence—Compliance with Cease and Desist Order— Service of Subpoena *Duces Tecum* on Corporation—Immunity from Prosecution.—Where a subpoena *duces tecum* was served on a corporation by the Federal Trade Commission in the course of an investigation to determine whether or not the corporation was complying with a cease and desist order issued under the Federal Trade Commission Act, a Federal District Court, which was requested by the Commission to enforce compliance with the subpoena, ruled that the Fifth Amendment to the United States Constitution gives no protection to corporations or their officers against the production of corporate records, that an officer of a corporation cannot refuse to produce such records upon the plea that they may either incriminate the corporation or himself, and that Section 9 of the FTC Act offers immunity to individual witnesses but not to corporations.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8741.20.

Federal Trade Commission Enforcement and Procedure—Unfair Practice Proceeding —Production of Documentary Evidence—Compliance with Cease and Desist Order— Issuance of Subpoena *Duces Tecum*—Reasonableness of Return Day.—Where a subpoena *duces tecum* was served on a corporation by the Federal Trade Commission in the course of an investigation to determine whether or not the corporation was complying with a cease and desist order issued under the Federal Trade Commission Act, the corporation's contention that the time fixed for the return day was unreasonable because the subpoena was returnable the day before the corporation and its principal officers were to appear before a court for sentence in a criminal action was rejected. The documents could be produced by another agent, officer, or representative of the corporation.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8741.

Federal Trade Commission Enforcement and Procedure—Unfair Practice Proceeding —Production of Ducumentary Evidence—Compliance with Cease and Desist Order— Motion To Quash before the Federal Trade Commission.—Where a motion by a respondent to quash a Federal Trade Commission subpoena *duces tecum* was denied by the Commission and the respondent was ordered to comply at a later hour on the return date, the respondent's contentions that the motion to quash stayed the subpoena, that the Commission did not deny the motion until after the return day, that the order to appear later that day was of no binding effect, and that the time fixed for the later appearance was unreasonable were rejected. The record did not support the respondent's contentions, and the respondent did not offer to appear at a more convenient time but merely denied the Commission's right, authority, and power to proceed.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8741.

For the petitioner: Joseph J. Gercke, Federal Trade Commission, Washington, D. C., and J. Julius Levy, United States Attorney, Scranton, Pa.

For the defendant: Raymond Bialkowski, Scranton, Pa., and Horace J. Donnelly, Jr., Washington, D. C.

Ordering compliance with a Federal Trade Commission subpoena *duces tecum* issued in Dkt. 6099.

Opinion

[*FTC Subpoena*]

JOHN W. MURPHY, Chief Judge [*In full text*]: This is an application by the Federal Trade Commission, an administrative agency of the United States, pursuant to § 9 of the Federal Trade Commission Act of 1914, 15 USCA § 41-46 and 47-58, see *Id.* § 49, for an order requiring Scientific Living, Inc., a Pennsylvania corporation, having its office and principal place of business in this district, to comply with a subpoena *duces tecum* of the Commission duly authorized and served on the corporation in the course of an investigation, § 6(a), *Id.* § 46 (a), instituted to ascertain whether or not the corporation was complying with a cease and desist order of the Commission made at the conclusion of a formal hearing under § 5(b) of the Act, *Id.* § 45(b) and rules and regulations adopted by virtue of authority granted by § 6(g), *Id.* § 46(g).

The corporation, its officers and counsel having repeatedly refused to answer pertinent questions or to provide access to relevant specified corporate documents for inspection and copying, the Commission issued and served upon the corporation a subpoena *duces tecum* directing it to appear at a fixed time and place in this district to testify and produce documentary evidence specified therein, before a duly designated representative of the Commission.[1]

[*Motion to Quash*]

A motion by defendant to quash the subpoena was denied by the Commission and defendant ordered to comply at a later hour on the return date. Defendant did not comply on the date in question or at any time thereafter.

Defendant contends the motion to quash stayed the subpoena; that the Commission did not deny it until after the return day and that the order to appear later that day was of no binding effect, and, at all events, that the time fixed for the later appearance was unreasonable. There is nothing in the record to support defendant's contention. The evidence appears to be to the contrary. Defendant made no issue of the matter before the Commission or offered to appear at a more convenient time. On the contrary, it denied the Commission's right, authority or power to proceed. Defendant should have made reasonable efforts before the Commission to fix a more reasonable time. *Cf. United States v. Morton Salt Co.,* 1950 [1950-1951 TRADE CASES ¶ 62,561], 338 U. S. 632 at 653, 70 S. Ct. 357, 94 L. Ed. 401. Administrative remedies must be exhausted. *Goodyear Tire and Rubber Co. Inc. v. FTC,* D. C. D. C. 1950 [1950-1951 TRADE CASES ¶ 62,554], 88 F. Supp. 789, 790, and cases cited; *Perkins v. Endicott Johnson Corpn.,* 2 Cir. 1942, 128 F. 2d at 213, affd. 1943, 317 U. S. 501, 63 S. Ct. 339, 87 L. Ed. 424;

[1] Compliance Order FTC Docket No. 6099, Scientific Living Inc., Adolph Hohensee, Mildred J. Walsh, Viola Heinzerling, individually and as corporate officers, Investigation FTC File No. 0206099.

Hagen v. Porter, 9 Cir. 1946, 156 F. 2d 362 at 366; *Miles Laboratories Inc. v. FTC,* D. C. D. C. 1944 [1944-1945 TRADE CASES ¶ 57,206], 140 F. 2d 683 at 685.

Defendant moves to dismiss the application and to quash the order to show cause why an order to comply should not issue.

[*Jurisdiction*]

Jurisdiction arises once the circumstances fit into the provisions of § 9 and service is made upon the defendant within this district. A summary proceeding—making application through an authorized agent as provided by § 9, Par. 1, 2 and 3—is the approved method. *Oklahoma Press Pub. Co. v. Walling,* 1946, 327 U. S. 186 at 200, 66 S. Ct. 494, 90 L. Ed. 614, 166 A. L. R. 531; *United States v. Morton Salt Co., supra* [1950-1951 TRADE CASES ¶ 62,561], 338 U. S. 632 at 635, 640, 642; *Cudahy Packing Co. v. Fleming,* 8 Cir. 1941, 122 F. 2d 1005, 1007; *Fleming v. Easton Pub. Co.,* D. C. E. D. Pa. 1941, 38 F. Supp. 677, 679. The Federal Rules of Civil Procedure are not applicable. *Porter v. Mueller,* 3 Cir. 1946, 156 F. 2d 278, 279; *Goodyear Tire and Rubber Co. v. NLRB,* 6 Cir. 1941, 122 F. 2d 450 at 451; *Perkins v. Endicott Johnson Corpn., supra,* 128 F. 2d at 227; *In re Wolrich,* D. C. S. D. N. Y., 1949, 84 F. Supp. 481-482; see and *cf.* Comment, Advisory Committee Rule 45 and 81, and see *NLRB v. Kingston Trap Rock Co.,* 3 Cir. 1955, 222 F. 2d 299 at 302. There was no need to tender witness fees and mileage upon service of the subpoena. See and *cf.* 28 USCA § 1825, § 1821; *United States v. Durling,* D. C. Ill. 1869, Fed. Cas. No. 15010, 25 Fed. Cases 944; *Norris v. Hassler,* C. C. N. J. 1885, 23 Fed. 581.[2]

[*Right to Enforcement*]

Defendant urging failure to state a claim upon which relief can be granted challenges applicant's right to enforcement contending: (1) that the Commission had no authority to issue a subpoena in an investigation under § 6(a) and § 9, Par. 1, 2, 3; a subpoena could only be used in connection with a formal hearing under § 5(b), and that § 1.35 of the Commission rules providing for the issuance of a subpoena for such purposes is contrary to Art. I and III of the United States Constitution; (2) that the subpoena was issued without notice or a showing of good cause; (3) did not show relevancy of the documents called for, and was nothing more than a "fishing expedition", citing *FTC v. American Tobacco Co.* (1924), 264 U. S. 298, 44 S. Ct. 336, 68 L. Ed. 696, 32 A. L. R. 786, and therefore constituted an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States; (4) was served upon a party not a witness, citing *United States v. Minker,* 1956, 350 U. S. 179, 76 S. Ct. 281, 100 L. Ed. 185; (5) violates the due process clause of the Fifth Amendment and the requirements of the Administrative Procedure Act of 1946, as amended, 5 USCA § 1001 *et seq.,* because it was not returnable before a member of the Commission or a qualified examiner as required by § 9, or before one who was "unbiased" and "independent"; finally, that the time fixed for the return day was unreasonable because the corporation and its principal officer were scheduled to appear before the court the following day for sentence in a criminal action.

[*FTC Act, Section 9*]

§ 9 specifically provides that the Commission or its duly authorized agent shall have access to any documentary evidence of any corporation being *investigated or proceeded against* and that ". . . the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence *relating to any matter under investigation. . . .*" (Italics supplied.) Having such power the Commission could make rules under § 6(g), *Id.* 46(g) regulating the procedure in connection therewith. See *United States v. Morton Salt Co., supra,* at 647-651. Without the subpoena the power of investigation would in effect be only that of inspection, exercised only upon consent. See *Cudahy Packing Co., Ltd. v. Holland,* 1942, 315 U. S. 357 at 364, 62 S. Ct. 803, 86 L. Ed. —. The intention of Congress is clear. The subpoena power is given in aid of investigations by the Commission. As

[2] As to mandamus by the Attorney General, see § 9, Par. 4, *Chamber of Commerce of Minneapolis v. FTC,* 8 Cir. 1922, 280 Fed. 45, 48; *Fleming v. Easton Pub. Co., supra,* 38 F. Supp. 677, Id. *Fleming v. Lowell Sun Co.,* D. C. D. Mass. 1940, 36 F. Supp. 320 at 325, rev. on other grounds, 1 Cir. 1941, 120 F. 2d 213, affd. 1942, 315 U. S. 784, 62 S. Ct. 793, 86 L. Ed. 1187, and see FRCP Rule 45.

such the subpoena is no more than a notice. *Federal Power Comm. v. Metropolitan Edison Co.,* 1938, 304 U. S. 375 at 386, 58 S. Ct. 963, 82 L. Ed. 1408; *Myers v. Bethlehem Shipbuilding Corp.,* 303 U. S. 41 at 49, 58 S. Ct. 459, 82 L. Ed. 638. See dissent Mr. Justice Douglas, *Cudahy Packing Co. Ltd. v. Holland, supra,* 315 U. S. at 371. In case of disobedience the district court may be called upon to enforce the subpoena through its contempt powers. "No constitutional provisions forbids Congress to do this. On the contrary, its authority would seem clearly to be comprehended in the 'necessary and proper' clause, as incidental to both its general legislative and its investigative powers." *Oklahoma Press Pub. Co. v. Walling, supra,* 327 U. S. at 214, and see *Id.* at 198, 199-201, and see *United States v. Morton Salt Co., supra,* 338 U. S. at 635, 640, 642-643; *FTC v. Smith,* 1929, D. C. S. D. N. Y., 34 F. 2d 323.

[*Power of Investigation*]

Despite some indications to the contrary in earlier cases, it is now well settled that, without violating constitutional provisions bearing upon separation and delegation of powers or due process, an administrative agency may be given and may exercise the power to require the attendance of witnesses in proceedings of a purely investigatory nature." Note 27 A. L. R. 2d 1208, cited many cases.[3] *Porter v. Mueller,* 3 Cir. 1946, 156 F. 2d 278 at 280, and see *FCC v. Pottsville Broadcasting Co.,* 1940, 309 U. S. 134 at 142-144, 60 S. Ct. 437, 84 L. Ed. 656.

[*Reasonableness of Subpoena*]

There is no subpoena here such as that involved in *FTC v. American Tobacco Co., supra,* 264 U. S. 298. The documentary evidence requested, see § 4, 15 USCA § 44, related to the matter under investigation over a reasonable period within a field of inquiry covered by the Act. See *NLRB v. Northern Trust Co.,* 7 Cir. 1945, 148 F. 2d 24 at 29; *Cudahy Packing Co. v. Fleming, supra,* 122 F. 2d at 1009; *Perkins v. Endicott Johnson Co., supra,* 128 F. 2d at 211; *Hagen v. Porter, supra,* 156 F. 2d at 364-365; *United States v. Morton Salt Co., supra,* 338 U. S. at 642, 649, 650; *Oklahoma Press Pub. Co. v. Walling, supra,* 327 U. S. 200-201, 209, 215-216.

Defendant was fully apprised and cognizant of the purpose, nature and scope of the investigation, of the demands made upon it and of the provisions of §§ 6, 9 and 10. While the Commission resolution asserts reason to believe the corporation may have violated the cease and desist order, and that it was in the public interest to investigate the manner and form of compliance, a showing of probable cause preliminary to issuance of the subpoena was not required. *United States v. Morton Salt Co., supra,* 338 U. S. at 641-643; *Oklahoma Press Pub. Co. v. Walling,* 327 U. S. at 209; *NLRB v. Kingston Trap Rock Co., supra,* 222 F. 2d at 301, 302; *Fleming v. Montgomery Ward & Co.,* 7 Cir. 1940, 114 F. 2d 384 at 387-388.

Where relevant questions are asked in an authorized inquiry and a reasonable number of definitely described documents requested in a subpoena under § 9, it does not amount to an unreasonable search and seizure under the Fourth Amendment. *Bowles v. Insel,* 3 Cir. 1945, 148 F. 2d 91; *A. Guckenheimer & Bros. Co. v. United States,* 3 Cir. 1925, 3 F. 2d 786 at 789; *Hagen v. Porter, supra,* 156 F. 2d at 366; *Bowles v. Glick Bros. Lumber Co.,* 9 Cir. 1945, 146 F. 2d 566 at 570-571; *Wilson v. United States,* 1911, 221 U. S. 361 at 380-382, 31 S. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D 558; *Oklahoma Press Pub. Co. v. Walling,* 327 U. S. at 194, 195. Here it is really not a question of unreasonable search and seizure but a claim of immunity from the Act's provisions requiring it to submit its records for inspection "under every judicial safeguard . . . after an order of court made . . . in exact compliance with authority granted by Congress." *Id.* 196.

As to private corporations, see *Id.* at 204, ". . . it long has been established that Congress may exercise wide investigative power over them . . . when their activities take place within or affect interstate commerce."

"The gist of the protection is in the requirement . . . that the disclosure sought shall not be unreasonable . . ." *Id.* 208. Also see *United States v. Morton Salt Co., supra,* 338 U. S. at 651-653; *Porter v. Mueller, supra,* 156 F. 2d at 279, 280.

[3] For analogous situations see Securities and Exchange Commission Act of 1934, 15 USCA § 78u(a)(b); *McMann v. Engel,* D. C. N. Y. 1936, 16 F. Supp. 446, affd. 87 F. 2d 377, 109 A. L. R. 1445; *SEC v. Vacuum Can Co.,* 7 Cir. 1946, 157 F. 2d 530; *Genecov v. Federal Petroleum Board,* 5 Cir. 1945, 146 F. 2d 596; *Application of Barnes,* 2 Cir. 1955, 219 F. 2d 137, 143; Int. Rev. Code, 1954, § 7602, 26 USCA; Atomic Energy Act, 42 USCA § 1812(a)(3), now 42 USCA § 2201; Civil Aeronautics Act, 49 USCA §§ 642, 644(b); Public Utility Holding Act, 15 USCA § 79(r).

[*Subpoena Directed to Corporation*]

While a corporation is incapable of testifying except through its duly authorized officers and agents, *McGarry v. SEC,* 10 Cir. 1945, 147 F. 2d 389 at 391, 392, there is no reason why a subpoena *duces tecum* may not be directed to the corporation itself. See *Wilson v. United States, supra,* 221 U. S. at 374. A command to a corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt. *Wilson v. United States, supra,* 221 U. S. at 376.

[*Immunity*]

The Fifth Amendment "gives no protection to corporations or their officers against the production of corporate records pursuant to lawful judicial order . . ." *Oklahoma Press Pub. Co. v. Walling, supra* at 196. ". . . an officer of the company cannot refuse to produce its records in his possession, upon the plea that they either will incriminate him or may incriminate it." *Id.* 205, 208. *Porter v. Mueller, supra,* 156 F. 2d at 280; *A. Guckenheimer v. United States, supra,* 3 F. 2d at 789; *Genecov v. Federal Petroleum Board,* 5 Cir. 1944, 146 F. 2d 596 at 597-598; *Wilson v. United States, supra,* 221 U. S. at 379, 382.

As to individual witnesses, § 9 offers immunity, see *Lansky v. Savoretti,* 5 Cir. 1955, 220 F. 2d 906 at 910; *Sherwin v. United States,* 1925, 268 U. S. 369, 45 S. Ct. 517, 69 L. Ed. 1001, not to corporations, *United States v. Frontier Asthma Co.,* D. C. W. D. N. Y. 1947, 69 F. Supp. 994.

[*"Due Process"*]

"When the Constitution requires a hearing, its requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." *Wong Yang Sung v. McGrath,* 1950, 339 U. S. 33 at 50, 70 S. Ct. 445, 94 L. Ed. 616.

The absence of merit in defendant's position as to lack of due process under the Fifth Amendment and the inapplicability of the Administrative Procedure Act of June 11, 1946, as amended, 5 USCA § 1001, *et seq.,* which ". . . created safeguards even narrower than the constitutional ones . . .", *United States v. Morton Salt Co., supra,* 338 U. S. at 644, is clear when they are placed in their proper context and upon an understanding of the distinction between an investigation and a hearing which might eventuate in an order. *Edwards v. United States,* 1941, 312 U. S. 473 at 481, 61 S. Ct. 669, 85 L. Ed. 957; see *FCC v. Pottsville Broadcasting Co., supra,* 309 U. S. at 143, 144,[4] ". . . The laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion." But see *Id.* as to the distinction between an investigation and a hearing, at p. 144. "Unless these vital differentiations between the functions . . . are observed courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine."

See *Morgan v. United States,* 1936, 298 U. S. 468 at 476, 56 S. Ct. 906, 80 L. Ed. 1288, as to the constitutional requirements of due process, and at 480, 481, "The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlies the order has not considered evidence or argument it is manifest that the hearing has not been given . . . The one who decides must hear . . ."

"This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants . . . Assistants may prosecute inquiries. Evidence may be taken by an examiner . . ." *Id.* 481. ". . . to give the substance of a hearing which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them . . ." *Id.* 481, 482. See *Southern Garment Mfrs. Assn. Inc. v. Fleming,* 1941, D. C. D. C. 122 F. 2d 622 at 626, 627.

[4] *In re SEC,* S. D. N. Y. 1936, 14 F. Supp. 417, affd. 2 Cir. 1936, 84 F. 2d 316, reversed as moot, *Bracken v. SEC,* 299 U. S. 504, 57 S. Ct. 18, 81 L. Ed. 374; *Bowles v. Baer,* 7 Cir. 1944, 142 F. 2d 787; *Genecov v. Federal Petroleum Board, supra,* 146 F. 2d at 597; *Boehm v. United States,* 8 Cir. 1941, 123 F. 2d 791 at 801, 807; *Woolley v. United States,* 1938, 9 Cir., 97 F. 2d 258 at 262; *SEC v. Torr,* D. C. S. D. N. Y. 1936, 15 F. Supp. 144; *cf. Brown v. Baer,* D. C. N. D. Ill. 1943, 54 F. Supp. 887, and see Annotations 85 L. Ed. 506 et seq.

As to the Administrative Procedure Act, *cf. Tractor Training Service v. FTC,* 9 Cir. 1955 [1955 TRADE CASES ¶ 68,196], 227 F. 2d 420, where an investigation preceded a hearing. See *Wong Yang Sung v. McGrath, supra,* 339 U. S. at 36-45, particularly at 44, quoting from the Final Report of the Attorney General's Committee on Administrative Procedure, ". . . commingling of functions . . . should be avoided by appropriate internal division of labor . . ." While the minority favored an even more thorough separation, "The Act . . . adopts in general this recommended form of remedial action."

"The Administrative Procedure Act did not go so far as to require a complete separation of investigating and prosecuting functions from adjudicating functions." *Id.* 46. "The Administrative Procedure Act, § 5, establishes a number of formal requirements to be applicable 'In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing' . . ." *Id.* 48. That requirement is not applicable to an investigation as to compliance with an order of the Commission. *Cf. United States v. Morton Salt Co., supra,* 338 U. S. at 648.

[*FTC Rules of Practice*]

Over the years the Federal Trade Commission has separated these functions and pursuant to § 6 *Id.* 46, adopted rules of practice and procedure observing the requirements of the Administrative Procedure Act. See *United States v. Morton Salt Co., supra,* 338 U. S. at 644. See Procedure and Rules of Practice for the Federal Trade Commission, published as revised on May 6, 1955, 20 F. R. 3055, effective May 21, 1955, and amended May 14, 1955, 20 F. R. 3303, effective May 21, 1955, Parts 1, 2 and 3, Code of Federal Regulations, Title 16, Commercial Practices, Federal Trade Commission, 15 USCA, following § 45, pocket supplement. Part I, General Procedure—Sub-Part D, Investigations, 1.31 to 1.42, pp. 30-31, Part 2, Rule Making Procedures, Sub-Part D, Rules of Practice and Procedure, § 2.41 at p. 43; Part 3, Rules of Practice for Adjudicative Proceedings; Sub-Parts A to G, pp. 43-56, as to hearings, see Sub-Part E at p. 49, *Id.* 15 USCA, pocket supplement.

In many respects the practice under the Federal Trade Commission Act was modeled after that of the Interstate Commerce Commission Act, see *FTC v. Gratz,* 1920, 253 U. S. 421, 40 S. Ct. 572, 64 L. Ed. 693, dissenting opinion by Mr. Justice Brandeis at 430, citing cases. Section 20 of the latter Act, 49 USCA § 20, Par. 10, provides, ". . . to carry out and give effect to the provisions of this chapter, . . . the commission is authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence."

Section 3 of the FTC Act ". . . the commission may, by one or more of its members or by such examiner as it may designate, prosecute any inquiry necessary to its duties . . ."

Section 5 was a novelty. See *FTC v. Gratz, supra* at 432. Section 9 provides that inquiries may be conducted by the commission or duly authorized agent and that members and examiners may administer oaths, examine witnesses and receive evidence. While the distinction between a hearing under § 5 and an investigation under § 6 and § 9 has been maintained over the years "examiner" has on occasion been used to describe the person conducting the § 5 proceeding, see e. g., *California Lumbermen's Council v. FTC,* 9 Cir. 1940 [1940-1943 TRADE CASES ¶ 56,307], 115 F. 2d 178 at 183, but see *Arrow-Hart and Hegeman Elec. Co. v. FTC,* 1933, 63 F. 2d 108 at 109.[5]

To remove any misunderstanding after passage of the Administrative Procedure Act, the commission changed its rules so that a person conducting an examination would be designated as representative rather than examiner. See and *cf.* 15 USCA following § 45, Rule 1, Sessions, ". . . or by such examiners . . ." with *Id.* pocket part § 1.8 ". . . or by such representatives as it may designate . . ." In the 1951 rules, *supra,* 3(b), investigational hearings are to be held before a "duly designated representative". Similarly in the rules adopted in 1955, *supra,* § 1.32, § 1.34(b), § 1.35.

The construction of this chapter presents a unique problem in which words derive vitality from the aim and nature of specific legislation. *FTC v. Bunte Bros. Inc.,* 1941 [1940-1943 TRADE CASES ¶ 56,098], 312 U. S. 349, 61 S. Ct. 580, 85 L. Ed. 881. In view

[5] The Trial Examiner's report is a part of the record on appeal. See *Minneapolis-Honeywell Regulators Co. v. FTC,* 7 Cir. 1951 [1950-1951 TRADE CASES ¶ 62,881], 191 F. 2d 786, and the rules of *Universal Camera Corp. v. NLRB,* 1951, 340 U. S. 474, 476, 71 S. Ct. 456, 95 L. Ed. 456.

of the long practice under the Act, see *E. Griffiths Hughes Inc. v. FTC,* D. C. D. C. 1933 [1932-1939 Trade Cases ¶ 55,021], 63 F. 2d 362, 363; *United States v. Public Utility Comm. of Cal.,* 1953, 345 U. S. 295, 73 S. Ct. 706, 97 L. Ed. 1020; *Sterrett v. United States,* 1954, 216 F. 2d 659, and a study of the statute itself, see *FTC v. Smith,* D. C. S. D. N. Y., 1929, 34 F. 2d 323 at 325, we find the subpoena properly returnable before a duly designated representative.

While a proceeding must be before one who is unbiased and independent, see *NLRB v. National Paper Co.,* 5 Cir. 1954, 216 F. 2d 859 at 868, there is nothing here to indicate any such situation. *Cf. United States v. O'Rourke,* 8 Cir. 1954, 213 F. 2d 759 at 763.

[*Return Day*]

We find no merit in defendant's claim of unreasonableness because the subpoena was returnable the day before the corporation and its principal officer were to appear in the District Court for sentence in a criminal proceeding. See and *cf. NLRB v. Kingston Trap Rock Corp., supra,* 222 F. 2d at 302; *FTC v. Cement Institute,* 1948 [1948-1949 Trade Cases ¶ 62,237], 333 U. S. 683 at 692-695, 68 S. Ct. 793, 92 L. Ed. 1010. The documents could be produced by another agent, officer or representative.

[*Subpoena Served on "Party"*]

There is a similar lack of merit in the claim that the subpoena was invalid because it was addressed to a party not to a witness, citing *United States v. Minker,* 1956, 350 U. S. 179, 76 S. Ct. 281, 100 L. Ed. —, an investigation which was in effect a final step toward possible denaturalization, a proceeding calling for strict construction and in which the government carries a heavy burden. By contrast the present statute is aimed at requiring production of corporate records. The district court is authorized to require the "corporation or other person" to comply. As we have pointed out, *supra,* the corporation was amenable to service. It could only appear through agents or witnesses. Comparing the comparable powers of subpoena, see *United States v. Minker,* 3 Cir. 1955, 217 F. 2d 350 at 351, we find no analogy between the two situations.[6]

[*Compliance*]

In view of the foregoing, we have no alternative, see *Bowles v. Baer, supra,* 142 F. 2d at 789, but to order compliance.

[¶ 68,674] The Flintkote Company v. Elmer Lysfjord and Walter R. Waldron, doing business as Aabeta Co.

In the United States Court of Appeals for the Ninth Circuit. No. 15,005. Filed March 29, 1957.

Appeal from the United States District Court for the Southern District of California, Central Division. Ernest A. Tolin, District Judge.

Sherman Antitrust Act

Combinations and Conspiracies—Refusal to Deal—Knowledge of and Participation in Conspiracy—Sufficiency of Evidence.—In an action charging that a supplier of acoustical tile refused to sell tile to an acoustical tile contractor pursuant to a conspiracy between the supplier and other acoustical tile contractors to restrain and monopolize trade in such tile, a reviewing court held that, assuming that all evidence which was introduced was properly before the jury, it could not hold as a matter of law that there was no substantial evidence from which a trier of fact could not have inferred the existence of the alleged conspiracy and that the supplier knowingly participated in the conspiracy. There was no direct evidence that the supplier had knowledge of or participated in the alleged conspiracy. However, neither knowledge of the conspiracy alleged nor participation therein need be proved by direct evidence. There was evidence from which an inference might have been drawn warranting the belief that the supplier, through acting as a supplier to the contractors, could have acquired knowledge of the conspiracy, and there was evidence which warranted the conclusion that the supplier, with such inferred knowledge, participated in the conspiracy and aided it by refusing to sell to the plaintiff-contractor. If the refusal to sell was not the result of the exercise of ordinary business judgment, but

[6] There is no merit in defendant's claim to a copy of an unpublished dissent, said to have been written by a member of the Commission, but never filed, in another proceeding.

the result of threats made and pressure applied by the members of the known conspiracy to and against the supplier, the act of refusing to sell would constitute knowing participation.

Jury instructions which would permit a recovery against a defendant who refuses to deal if there has been a conspiracy, irrespective of whether or not the defendant participated in the conspiracy, and which authorized the return of a verdict against a defendant irrespective of whether or not the defendant ever participated in the conspiracy, were held to be misleading.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.355, 2005.785; Monopolies, Vol. 1, ¶ 2610.720.

Combinations and Conspiracies—Evidence and Proof of Unlawful Conspiracy—Defendant Charged with Joining Existing Conspiracy—Order of Proof—Admissibility of Evidence.—In an action in which a supplier of acoustical tile was charged with joining an existing conspiracy, it was incumbent on the plaintiffs to establish (1) the prior existence of the conspiracy, who were its supposed members, how they supposedly operated, what their conspiratorial purposes were, and how they brought about their alleged purposes; and (2) the supplier's subsequent connection with the conspiracy before evidence of the acts or statements of the alleged co-conspirators would be admissible against the supplier. However, it was not error for a trial court to admit statements of co-conspirators which were made in furtherance of the conspiracy before the conspiracy itself was established, where such statements were admitted subject to a motion to strike if the conspiracy was not subsequently established.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.355.

Combinations and Conspiracies—Evidence and Proof of Unlawful Conspiracy—Admissibility of Evidence—Declarations of Co-conspirator and Defendant's Employees.—A trial court erred in permitting the introduction of hearsay evidence, concerning a conversation between the plaintiffs and an employee of the defendant, without any foundation showing the extent and scope of the authority resting in the employee, if any, to act for and bind the defendant, and in refusing to grant the defendant's motion to strike such evidence. The statements of the employee could not be admitted either as an admission of a party's authorized agent or as a statement of a co-conspirator. The admission of the statements constituted prejudicial error in view of the importance of the statements to the establishment of the plaintiff's case. As to statements made by an alleged co-conspirator, it was held that if the plaintiff had made a prima facie showing that there was a conspiracy and that the defendant had joined the conspiracy, then statements made by a co-conspirator, if made during the existence of the conspiracy and in the execution of the common design, were admissible against all of the conspirators. Since the conspiracy was not established by admissible evidence and since the statements were made after the claimed termination of the conspiracy, the statements were inadmissible.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.355, 2005.380.

Private Enforcement and Procedure—Suit for Civil Damages—Damages Recoverable—Loss of Profits, Business Expenses, and Additional Expense of Purchasing Product.—In an action charging that a supplier of acoustical tile refused to sell to the plaintiffs pursuant to an unlawful conspiracy, a jury verdict awarding the plaintiffs damages for loss of profits was held not to be supported by the evidence. "Where, as here, the sole evidence as to loss of profits is the testimony of the plaintiffs, both inexperienced in business operations, stating what they had expected to make during the infancy of a newly-created enterprise based on inaccurate computations of the most money they had made working as salesmen for an established firm in years preceding those in question, with no attempt having been made to establish a comparison as to either the businesses or the years the jury verdict predicated on such evidence cannot stand." In seeking damages for loss of profits, a plaintiff is required to establish with reasonable probability the existence of some causal connection between the defendant's wrongful act and some loss of anticipated revenue. The fact of injury must first be shown before the jury is allowed to estimate the amount of damage. The plaintiffs, in the instant action, could not

introduce evidence concerning their business or the business of a predecessor before the conspiracy arose, and they failed to introduce business records of comparative but unrestrained businesses during the particular period in question. However, evidence supported awards for out-of-pocket expenses incurred in establishing a business and for out-of-pocket expenses resulting from the increased cost of acoustical tile caused by the plaintiffs' inability to purchase their supplies from the defendant.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011, 9011.325.

Private Enforcement and Procedure—Suit for Civil Damages—Damages Recoverable —Damage Period.—In an action in which a supplier of acoustical tile was charged with refusing to sell to the plaintiffs pursuant to an unlawful conspiracy, the trial court erroneously instructed the jury that it could award damages for injuries incurred up to the date the trial of the action began. As a general rule, a plaintiff is entitled to recover all damages for injuries proximately caused by the wrongful acts committed prior to the filing of the action, and, conversely, a plaintiff is not entitled to recover damages for injuries resulting from wrongful acts committed subsequent to the filing of the action. The time of the wrongful act controls the measure of damages. Therefore, it is necessary to ascertain whether the plaintiffs' injuries were caused by a prior act or whether they are attributable to protracted conduct and repetitive acts which continued beyond the date the action was filed. In the instant action, the cause of action is founded on an act of a continuing nature. The express refusal to deal constituted no more than a refusal to deal at that time; therefore, the plaintiffs' injuries were not caused just by the announced refusal to deal but rather resulted from the explicit refusal coupled with the implied persistence in the announced course of conduct. Therefore, the plaintiffs could not recover for injuries incurred up to the date of trial. The proper procedure to be followed in seeking recovery for injuries caused by acts occurring after the filing of the action is to file a separate suit or a supplemental action or, as the administration of justice dictates upon the remand of the instant case, by a supplemental complaint.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.115.

Private Enforcement and Procedure—Suit for Civil Damages—Damages Recoverable —Deductibility of Settlement with Joint Tortfeasors.—Where, prior to the trial of a treble damage action charging a conspiracy, the plaintiffs withdrew their action against certain of the alleged co-conspirators in consideration of the sum of $20,000, and expressly reserved their rights against one of the alleged conspirators, the amount of $20,000 should be deducted from a $150,000 treble damage judgment entered against the conspirator found guilty by a jury and should not be deducted from the jury's verdict of $50,000 before being trebled. Co-conspirators are jointly and severally liable, and the non-compensatory share of an award under the antitrust laws is akin to an award for punitive damages. In the case of punitive damages, joint tortfeasors are liable for the entire amount, not merely for the compensatory part. The collective liability for the alleged conspiracy was $150,000, and if no error was committed, this is the amount which the plaintiffs should receive. The plaintiffs having already received $20,000, it was proper to deduct that sum from the trebled amount. Any other method would result in the plaintiffs receiving less than the whole to which they were entitled under the antitrust laws.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.

For the appellant: Harold A. Black; G. Richard Doty; McCutchen, Black, Harnagel and Greene, Los Angeles, Cal.

For the appellees: Alfred C. Ackerson, Los Angeles, Cal.

Before: STEPHENS, BARNES and HAMLEY, Circuit Judges.

[*Complaint*]

BARNES, Circuit Judge [*In full text*]: Appellees as plaintiffs on July 21, 1952, filed a complaint under the Sherman Antitrust Act[1] against the Acoustical Contractors Association of Southern California, Inc., and

[1] Title 15 U. S. C. A. § 1, *et seq.* (Sec. 1, 2 and 7 of Sherman Act. Sec. 4, 5, 12 and 16 of Clayton Act.) 26 Stat. 209; 50 Stat. 693.

certain members thereof, (six individuals, and eight corporations, individuals, or partnerships doing business under a fictitious firm name). The Flintkote Company and four John Does were also joined as defendants. The essential interstate commerce was alleged to have been in acoustical tile.

To understand this case, it is first necessary to look at the pleadings. All defendants, other than Flintkote, were charged with violating the law in the following particulars:

> "For some time prior to the date of the filing of this complaint and continuously since prior to January 1, 1951, the defendants herein, with the exception of Flintkote, well-knowing all of the foregoing facts have been engaged in a combination and conspiracy to restrain and to monopolize trade and commerce in acoustical tile in violation of . . ."

the Sherman Act. The general plan and purpose was:

> "1. To maintain and adhere to non-competitive prices . . .
>
> "2. To refrain from competing with each other . . .
>
> "3. To allocate the sale and installation of acoustical tile among members of the defendant, The Association, . . .
>
> "4. To exclude non-member acoustical tile contractors from their legal right to compete in the purchase, sale, and installation of acoustical tile in Los Angeles and surrounding areas by use of the following means among others:
>
> "(a) By boycotting, threatening to boycott, and otherwise coercing manufacturers . . .
>
> "(b) By concertedly entering inordinately low bids for jobs . . ." [Tr. 10, 11]

It was then alleged that plaintiff entered into an agreement shortly prior to January 1, 1952, to buy from Flintkote "a continuous supply of a complete line of acoustical tile;" and that:

> "In or about March 1952, and solely because of the active and successful competition of plaintiffs with members of the defendant, The Association, and the effect of such competition on the illegal, non-competitive price fixing policies and activities of said members, the defendant Flintkote was induced to terminate its agreement to supply plaintiffs with acoustical tile products by reason and because of the concerted action and coercion exerted upon said defendant by members of the defendant, The Association, in the form of threats to boycott Flintkote products in the Los Angeles area and elsewhere in the State of California by said defendants in the event Flintkote continued supplying said products to plaintiffs." [Tr. 13, 14]

A First Amended Complaint was lodged January 28, 1953, and filed March 23, 1953, by appellees. Plaintiffs' theory of their case was changed to directly charge the defendant Flintkote Company, with agreeing to sell acoustical tile to plaintiffs in the latter part of 1951, and that "all defendants" from an unknown date "prior to the year 1951, and continuously thereafter to date of filing the complaint" conspired to restrain and have restrained trade and commerce, in violation of Sections 1 and 2 of the Sherman Act. Thus, the amended complaint charges Flintkote with being a member of the conspiracy.

In their original complaint, plaintiffs asked for $75,000 damages; that any award be trebled, for costs of suit and attorney's fees; and that defendants be enjoined from continuing any of the alleged unlawful practices.

In their amended complaint, plaintiffs asked for $100,000 damages, without any prayer for trebling the same; for costs of suit and attorney's fees; that defendants be enjoined from continuing any of the alleged unlawful practices; that the defendant Flintkote be enjoined from any agreement with other defendants to refuse to sell to plaintiffs, or in any way agreeing with other defendants, to perpetuate or assist in perpetuating the alleged conspiracies, their purposes or objects; and that Flintkote, finally, be required to

> ". . . continue said contract and agreement so long as there exists no reason under sound business principles and practices for terminating the same."

[*Answer*]

Flintkote, answering the Amended Complaint, asserted with care and verbosity common to pleadings, a general denial; alleged it had not participated in any conspiracy in restraint of trade, or to create or maintain

a monopoly; set forth that it sold tile to three of the defendant's contractors, and had at times sold to three others and to plaintiffs; admitted several sales of acoustical tile to plaintiffs; alleged it made no contract with plaintiffs of any kind, nor any contract to supply plaintiffs, either on any continuing basis, or any basis, or at all.

[*Defense*]

As a first and separate defense, Flintkote alleged that it sold one carload lot to plaintiffs for resale in the San Bernardino-Riverside area, (as distinguished from the Los Angeles area); that said sale was conditioned upon an understanding that plaintiffs would use the tile so sold in the San Bernardino-Riverside area, and not engage in the contracting business in the Los Angeles metropolitan area; that when plaintiffs breached said condition of sale, and contracted for installations in the Los Angeles metropolitan area, the defendant Flintkote Company refused to sell plaintiffs further tile.

[*Partial Settlement*]

This anwser was filed on June 26, 1953. On July 31, a stipulation and order was entered dismissing the cause of action as to all named defendants except Flintkote. On May 4, 1955, the jury trial commenced. At the start of the trial, it was brought to the court's attention that $20,000 had been paid to the plaintiffs in exchange for a covenant not to sue, running in favor of all defendants except Flintkote. It was stipulated that the court could advise the jury

> "that a settlement of the action had been made as between the plaintiff and all defendants except the defendant Flintkote, but the Court shall not state the monetary consideration, keeping that away from the attention of the jury."

Because of this settlement, some of the jury instructions requested by plaintiffs and filed by them on April 29, 1955, in their reference to defendants, were not accurate. Before the jury was empanelled, counsel for defendant called to the court's and opposing counsel's attention, "that it would be almost imperative that plaintiffs' instructions be recast," [Tr. 155] "because in some instances we even have a situation where you tell the jury that they could find against some but not all the defendants . . ."

[*Trial*]

It was further agreed by court and counsel, before trial, that because there were both legal and equitable issues in the case, the "first were to be handled by the jury and the latter by the judge." [Tr. 158 to 161, incl.] The record does not disclose that any action, affirmative or negative, was taken on the demand for injunctive relief.

[*Trial Court Judgment*]

Flintkote Company now appeals from a judgment against it, based on a jury verdict for $50,000, trebled by the court to $150,000, plus $25,000 attorney's fees, plus $165.70 costs, minus the $20,000 received by plaintiff-appellees from certain original parties defendant other than appellant, or a total judgment of $155,165.70.

[*Grounds for Reversal*]

Appellant urges fifteen grounds for reversal.

We believe we can best discuss these fifteen alleged errors by grouping them as follows:

First: The sufficiency of the evidence, (particularly as to *knowledge* by the defendant of the conspiracy, and its participation therein) to support a verdict of violation of the Antitrust Laws.

Second: Alleged errors in admission of evidence.

Third: Alleged errors in instructions, other than damages.

Fourth: Alleged error in refusing to grant a new trial, in instructions respecting damages, in the fixing of attorney's fees, and in the method of crediting the $20,000 payment.

FIRST: THE SUFFICIENCY OF THE EVIDENCE

[*Knowledge and Participation*]

Was there any substantial evidence properly before the jury from which it could reasonably draw the conclusion on an issue of fact, that defendant Flintkote had violated the Antitrust Laws?

Defendant maintained its refusal to deal with plaintiff was a legitimate business decision; that it had no part in the alleged conspiracy among the original "Association defendants" to restrain trade. Hence it is urged, the Flintkote refusal to sell cannot

be *participation* in a conspiracy, and Flintkote having no *knowledge* that such a conspiracy existed, could much less have *knowingly participated* therein.

"The requirement is dual," says appellant, "It requires both knowledge and participation, and neither is sufficient without the other," relying on *United States v. Falcone,* 311 U. S. 205, 61 S. Ct. 204 (1910), where the court said at page 210:

> "The gist of the offense of conspiracy . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. [Citing cases] Those having no knowledge of the conspiracy are not conspirators, [citing cases]; and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge.";

and on *Wenigor v. United States,* 47 F. 2d 692 at 693 (9 Cir.) where this Court said:

> "The failure of a person to prevent the carrying out of a conspiracy, even though he has the power so to do, will not make him guilty of the offense without further proof that he has in some affirmative way consented to be a party thereto. Neither will the commission of an overt act, though unlawful in itself, be enough to show that the actor was a party to the conspiracy. The law requires proof of the common and unlawful design and the knowing participation therein of the persons charged as conspirators before a conviction is justified."

[*Direct Evidence*]

We should first recognize that the cases cited by appellant correctly state the law. We must also agree that on the question of Flintkote's knowledge as to whether the admitted conspiracy did or did not exist, all *direct* evidence is that the officers and employees of Flintkote did *not* know. That is the unvarying testimony of all defendant's employees.

[*Circumstantial Evidence*]

But the problem is not that simply solved. Neither knowledge of the conspiracy alleged, nor participation therein, need be proved by *direct* evidence, even in criminal prosecutions where the rule of proof is more strict than in civil conspiracy cases, *United States v. Univis Lens Co.* [1950-1951 TRADE CASES ¶ 62,571], 66 [88] Fed. Supp. 809, 813. As noted by the Supreme Court in *Paoli v. United States,* 352 U. S. 232, 25 L. W. 4077, 4078, note 4, decided January 14, 1957,

> "Participation in a criminal conspiracy may be shown by circumstantial as well as direct evidence. See, *e.g., Blumenthal v. United States,* 332 U. S. 539, 557; *Glasser v. United States,* 315 U. S. 60, 80; *Direct Sales Co. v. United States,* 319 U. S. 703; *United States v. Manton,* 107 F. 2d 834, 839."

It is likewise true that:

> "A conviction resting solely upon circumstantial evidence is not an innovation. It is, we think, well established that the proof and evidence in an anti-trust conspiracy case is, in most cases, circumstantial. Proof of a formal agreement is unnecessary, and were the law otherwise such conspiracies would flourish; profit, rather than punishment, would be the reward. See *American Tobacco Co. v. U. S.,* 6 Cir., 147 F. 2d 93, affirmed 328 U. S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575." [*C-O. Two Fire Equipment Co. v. United States,* 9 Cir. [1952 TRADE CASES ¶ 67,290] 197 F. 2d 489 at 494.]

And see cases cited: *Wharton's Criminal Evidence,* § 179, p. 354, Note 20. Here the evidence before the jury showed the existence and operation of an allocation arrangement, by which acoustical jobs were assigned in rough rotation to one or another of the acoustical contractors who were members of the Acoustical Contractor's Association. There was evidence that bidders were told what to bid, not based upon what the cost of the job was, but to enable a certain contractor to get the job. Considerable time was spent in introducing and interpreting the contractor's "take off sheets," [1a] and what they meant to the workings of the conspiracy. Complimentary bidding by members of the group, other than the one designated to get the job, was engaged in. In fact, both plaintiffs had at one time worked for an employer engaged in such a conspiracy, and plaintiff Lysfjord had protested to his employer his inability to *com-*

[1a] "Take off sheets" may be defined in the acoustical tile trade as referring to written estimates of the amount of acoustical tile required for a particular project. The contractor with the lowest figure on his take-off sheet would be dropped from the bidding list and the contractor with the next lowest estimate would be instructed to take the job. [Tr. 304, 494].

pete for installation jobs because of such conspiracy. There was no direct evidence that Flintkote, as a seller of tile and not an installer, participated directly in that original conspiracy between the dealers, but there was evidence from which an inference might have been drawn by the trier of fact warranting the belief that the defendant Flintkote, through acting as supplier to the conspirators on some of the jobs, could have acquired knowledge of the conspiracy; and there was evidence which warranted the conclusion that Flintkote, with such inferred knowledge, participated in the conspiracy, and aided it, by its refusal to sell to plaintiffs. If that refusal was not the result of the exercise of ordinary business judgment, but the result of threats made and pressure applied by members of the known conspiracy to and against Flintkote, the act of refusing to sell would constitute knowing participation. Because one is coerced by economic threats to participate in or aid and abet an illegal scheme does not excuse the actor.[2]

[*Substantial Evidence*]

There was before the jury substantial inferential evidence that Flintkote had knowledge of the conspiracy, and joined it and had acted in furtherance of it, when we view the evidence in the light most favorable to the plaintiffs. The verdict of a jury will be sustained if there is substantial evidence, properly before the jury, to support it. *Glasser v. United States,* (1942) 315 U. S. 60, 69; *Woodard Laboratories v. United States,* 9 Cir., 198 F. 2d 995; *Las Vegas Merchants Plumbers v. United States,* 9 Cir. [1954 Trade Cases ¶ 67,673], 210 F. 2d 732, 742.

[*Refusal to Deal*]

Appellant, relying primarily on *Johnson v. J. H. Yost Lumber Co.* [1940-1943 Trade Cases ¶ 56,088], 117 F. 2d 53, 61-2, urges that the facts of threats (assuming there were threats), will not support an inference of knowledge of a conspiracy. Such a broad statement is too general and sweeping. Proof of the fact of threats might infer knowledge, or it might not, depending on the nature of the threats, their number, their frequency, and more directly and importantly, their content and what they disclosed, directly or by inference, to the defendant Flintkote, viewed in the then existing factual situation under which they were made and received.

Where there has been proof (a) that a conspiring group of tile dealers disclosed to a supplier, directly or by inference, an accomplished unlawful purpose and intent to boycott non-participating dealers, (and hence disclosed the existence of a conspiracy) and (b) thereafter one or more dealers had threatened the supplier on numerous occasions that they intended jointly and severally to refuse to buy from the supplier if the supplier continued to sell acoustical title to plaintiffs, and (c) if the supplier, having been selling to non-conspirators, thereafter refused to sell to non-conspiring dealers because of the threats, it could never be maintained, as a matter of law, that such decision not to sell was a lawful exercise of the supplier's business judgment.

It is true that one engaged in private enterprise may select his own customers, and in the absence of an illegal agreement, may sell or refuse to sell to a customer for good cause, or for no cause whatever. But it is not for the seller to finally decide that it was for a good business reason, or no reason, that he refused to deal. That decision, placed in its proper perspective of circumstances and facts known to the seller, must be judged by the trier of facts, to determine if it was an innocent and lawful exercise of the seller's private right, or an act which showed knowing participation in an unlawful conspiracy.

Were it otherwise, there could never be a civil judgment nor any criminal conviction against any manufacturer of products flowing in interstate commerce. He could merely state—"despite my knowledge of a conspiracy which existed, which I knew to be unlawful, I'm innocent and cannot be held liable because I say I exercised my business judgment, and I can refuse to sell to anyone, and that is lawful, no matter what the circumstances may be."

Our conclusion in this matter does no violence to the *Yost* case. There the court says:

> "From *the mere fact* of refusing to sell to plaintiffs, there can therefore arise no

[2] *United States v. Paramount Pictures, et al.* [1946-1947 TRADE CASES ¶ 57,470], 66 Fed. Supp. 323, 352; approved [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131, 161, 68 S. Ct. 915, 92 L. Ed. 1260.

inference of an unlawful agreement, because one may lawfully select his own customers. (cases cited) There must be *substantial evidence furnishing some basis* from which the alleged fact of such an agreement may *reasonably be inferred.* A fraudulent conspiracy may be shown by circumstantial evidence, but the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion. Here, it appears that a number of these defendants had already refused to sell the plaintiffs even before the date of the alleged conspiracy. Others thought it bad business to sell them, and as plaintiffs themselves alleged, these defendants were coerced. Where there were two dealers in the same product at the same city, it was not thought good business to sell to both plaintiffs and the other dealer. In most instances, the other dealer had been handling the products before the arrival of plaintiffs. In some cases, plaintiffs had invaded the trade territory of established dealers handling products of these suppliers, and that was at least distasteful to these defendants and there seemed to have been ample reason of a business character for the suppliers to refuse to sell to plaintiffs." (Italics added.)

[*Johnson v. J. H. Yost Lumber Co., supra,* p. 61.]

The *Yost* case, relying on the *Beech-Nut* case (257 U. S. 441) specifically refers to *facts* which "went beyond the simple refusal to sell."

The rule of freedom of sale to anyone or no one is not absolute. Nor can it be tested in a vacuum. The *Colgate* case (250 U. S. 300),

"was not intended to give blanket sanction for individual discretion in refusal to deal. The Court soon determined that its holding did not extend to protect a course of dealing which *inferentially* spelled out the factor of agreement that Colgate lacked. More important, the Court's landmark decision in *Federal Trade Commission v. Beech-Nut Packing Co.* places any refusal to deal in its business perspective and then against the full facts scrutinizes all pertinent antitrust prohibitions the trade pattern suggests.

"Viewed in the larger business setting, even individually conceived refusals to deal may become an integral element in a violation of Section 1 of the Sherman Act . . . Also, Section 2 may forbid refusals to deal for monopolistic ends.

(*Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U. S. 359 (1927).)" [*Report of the Attorney General's National Committee to study the Antitrust Laws, March* 21, 1955.] [3]

[*Jury Question*]

The decisions have placed and evaluated refusals to deal in the business setting in which they appear. While refusals to deal in themselves are legally protected, they are examined in their market context. Only thorough-going factual inquiry into the surrounding business circumstances can characterize a refusal to deal as part of a restrictive course of conduct incompatible with antitrust objectives. If we assume, therefore, that all evidence which was introduced was properly before the jury, we cannot hold as a matter of law that there was no substantial evidence from which a trier of fact could not have inferred the existence of a conspiracy, and that the defendant Flintkote knowingly participated therein. Permitting this issue to go to the jury was not error.

SECOND: ALLEGED ERRORS IN ADMISSION OF EVIDENCE.

Throughout the foregoing consideration of the first problem here presented, we have assumed all evidence before the jury was properly admitted. It is for this reason that the next point appellant raises—that evidence was erroneously admitted—must be considered most carefully. In doing so, we now reach appellant's point 2, (introduction against Flintkote of evidence of the conspiracy between the contractors); point 3, (the Waldron testimony respecting Ragland's alleged statements of alleged pressure by the conspiring dealers on Flintkote); and point 4, (the Lysfjord testimony respecting Ragland's alleged same statements). At this same time, we also will consider Krause's alleged telephone conversation with Lysfjord.

[3] It is with reluctance that the writer of this opinion makes reference to published statements for which he was, to a greater or lesser degree, partially responsible. It is comparable, but not parallel, to a judge citing a Law Review Article he had previously written, whether while on or off the bench. Yet such action has most respectable precedent and authority. For a most recent illustration see dissenting opinion of Mr. Justice Frankfurter in *Rogers v. Missouri Pacific R. Co.,* 352 U. S. 447, 491, decided February 25, 1957. Upon occasion jurists may even revise their extra-judicial views. *McGrath v. Kristensen,* 340 U. S. 162, 176 (concurring opinion).

A. Introduction as Against the Sole Defendant, Flintkote, of the Facts Relating to the Alleged Conspiracy Between the Acoustical Contractors.

[*Order of Proof*]

We must first consider the unique factual situation in this case. The acoustical contractors originally sued had been paid, before trial, for a Covenant Not to Sue Further. This was accompanied by a dismissal. The gravamen of the amended complaint was that Flintkote had joined in an already existing conspiracy. It was therefore incumbent on plaintiffs (1) to establish the prior existence of the conspiracy; who were its supposed members; how they supposedly operated; what their conspiratorial purpose was; and how they brought about their alleged purposes; and (2) Flintkote's subsequent connection with it, before evidence of the acts or statements of alleged co-conspirators would be admissible against the defendant. Two different though not wholly unrelated problems were thus raised. One was the necessity of making a prima facie showing of Flintkote's knowing participation in the alleged conspiracy, and the other was the order of proof in which the evidence thereof would be introduced. We turn to the latter point first.

The rules relating to proof of a civil conspiracy take us into one of the most difficult areas of today's law. As Mr. Justice Jackson said, in his concurrence in the leading case of *Krulewitch v. United States,* 336 U. S. 440, at 452:

"When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of the execution are admissible against all. But the order of proof in so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodge-podge of acts and statements by others which he may never have authorized or intended, or even known about, but which help to persuade the jury of existence of the conspiracy itself. *In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed.*" (Italics added.)[4]

[*Discretion of Trial Court*]

We are in an area of evidentiary law where much is left to the discretion of the trial judge. The trial court has a wide discretion in the admission of evidence which even remotely tends to establish conspiracy. *Clune v. United States,* 159 U. S. 590, 592, 593; *Devoe v. United States,* 8 Cir., 103 F. 2d 584, cert. den. 308 U. S. 571; *Nee v. United States,* 3 Cir., 267 Fed. 84, 87; *United States v. Sebo,* 7 Cir., 101 F. 2d 889, 891.

The trial court has absolute judicial discretion as to the order of proof. *United States v. Manton,* 2 Cir., 107 F. 2d 834; *United States v. Newman,* 9 Cir., 156 F. 2d 8. If he believes it better to allow evidence to be introduced, subject to its being connected up at a later time, that is his prerogative and such rulings are not error.

That procedure is what counsel for plaintiff proposed to follow in this case, when he preliminarily offered proof of conspiracy between the acoustical contractors before he had introduced any proof of the defendant Flintkote's participation therein.[5]

The court specifically deferred and reserved a final ruling on the admissibility of this evidence until after the plaintiffs' case was fully in; and advised counsel for the

[4] Mr. Justice Jackson, because speaking in a criminal case, refers to the accused defendant. His conclusions are every bit as applicable to a defendant charged with an antitrust violation in a civil private treble damage action.

[5] "Mr. Ackerson: . . . but you can always introduce evidence as to purpose and design."

"The Court: Are you contending that the yielding to pressure makes the one who yields a party to the conspiracy?"

"Mr. Ackerson: If he knows the illegal design, and I can prove it."

"The Court: And is that going to be your evidence of connection of this defendant to the conspiracy?"

"Mr. Ackerson: Yes, that plus other knowledge, your Honor, that they knew the design."

"The Court: What other knowledge are you going to bring home to this particular defendant? And is that going to be your evidence of connection of this defendant to the conspiracy?"

"Mr. Ackerson: Yes, that plus other knowledge, your Honor, that they knew the design."

"The Court: What other knowledge are you going to bring home to this particular defendant?"

"Mr. Ackerson: Well, this defendant, the knowledge that I have already stated, that this defendant knew the setup, he knew the effect of the setup, and when he was asked to help and obeyed and, I say, joined the setup by eliminating the only competition in the field, unless he can show that he didn't know anything about it, that he wasn't helping these contractors at all, it is my theory that he joined the conspiracy.

"The Court: The court finds that the complexities of the case now on trial are such, the involvement of the alleged parties to the alleged

defendant his rights to move to exclude the entire line of testimony were protected.

It was not error for the court initially to invoke this "rule of convenience," as it was denominated in the courtroom. The court had very carefully and properly brought home to counsel for the plaintiffs the necessity of proving by competent evidence that Flintkote "yielded to the combine, and became a member of it." [Tr. 294]

Was competent independent evidence ever introduced?

B. The Plaintiff's Testimony as to Statements of Others.

This brings us to a consideration of the alleged errors in admitting the testimony of Waldron and Lysfjord, as to the alleged statements of Ragland and others.

The only evidence that plaintiffs offered to prove defendant's "yielding," and the joining by Flintkote of the conspiracy, other than the act itself of refusing to sell, was the respective testimony of Waldron and Lysfjord relating to (a) alleged admissions of Baymiller; and (b) alleged admissions of Ragland; and (c) the testimony of Lysfjord with respect to a telephone conversation directly with Krause. These alleged statements or admissions can be divided into three conversations:

Conversation Number 1 was a hearsay statement largely made up by conclusions, by Ragland to Waldron and Lysfjord on or about February 1, 1952, at the Atlantic Avenue office of Aabeta Company covering (a) what Krause allegedly told Ragland on a previous date at the Flintkote office;[6]

conspiracy is such, that it is necessary to invoke the rule of convenience, as you have referred to it, Mr. Black, and to allow the evidence of acts and declarations of other alleged conspirators to be admitted into evidence, subject to a motion to strike.

"I do not know just what the outcome will be when a motion is made to dismiss at the conclusion of the plaintiffs' case, which I assume will be, on the question of joining a conspiracy because of compulsion, if the compulsion is shown to be in the form of pressure from the Association, pressure from other vendors. That would be evidence, I take it, circumstantial evidence, or offered as circumstantial evidence, of the joining of a conspiracy, but you are going to have to have enough, Mr. Ackerson, that the reasonable inference to be drawn from all the facts is that it was a yielding to the combine and becoming a member of it, otherwise we will have to, in the language of the street, throw your case out."

"Mr. Ackerson: I realize that."

"The Court: But for the present we will follow the rule of convenience and admit the testimony."

[Tr. 293, et seq.]

"The Court: As a general principle of conspiracy law, every person who is a co-conspirator of course is presumed—that is, every person who is alleged to be a co-conspirator with the person on trial as conspirators, is deemed to be their agent once he is shown to be a member of the conspiracy, and statements which are made in furtherance of the conspiracy may be admitted.

"I think the courts here have generally been admitting statements and doing so subject to a motion to strike if it does not appear that there develops a jury question as to whether there was a conspiracy, as to whether the person who is on trial and the persons whose statements have been received, have been connected to it."

"Mr. Ackerson: I think that is right."

"The Court: Unless you have some other way you would like to handle it, I am disposed to adopt that as a policy of this case, as the other judges have done in the cases tried before them, and entertain a motion to strike if the connection is not provided by sufficient evidence to create a jury question."

"Mr. Ackerson: I don't know of any other way you can try a case like this, your Honor."

"Mr. Black: Your Honor please, it may be we are at that point where we should address ourselves to your Honor in the absence of the jury, because I think that we would like to be heard some what extensively on that proposition."

[Tr. 259, 260]

"The Court: Objection overruled. I will not have so many of these but what I can strike them, if it turns out to be illegal after hearing your argument, and I will hear you fully at the time the jury takes its morning recess."

"Mr. Black: Thank you."

"Mr. Ackerson: I am about through with this particular conversation. I think this is the last such conversation."

"Q. (By Mr. Ackerson): Will you relate that conversation with Mr. Ragland?

* * * [Conversation related] * * *

"Mr. Black: Just a moment. I wish the record to show we move to strike this answer in pursuance of our objection."

"The Court: Ruling will be reserved until after I hear your argument." [Tr. 262, 263]

[6] Mr. Waldron: "Mr. Ragland said that he (Krause) came to their office—or his office and his desk, and got so abusive that he had to tell him that he would have to leave him and when he could be more rational he would return.

"Now, he was telling him that they couldn't stand for us the Aabeta Co., selling accoustical tile." [Tr. 262, 263.]

"Q. [Asked of Mr. Lysfjord]: What about any statement to Mr. Ragland by Mr. Gustave Krause?"

"A. I don't recall that he said any more at that time. However, there was another meeting where Mr. Gustave Krause did state very violently what he thought of us going into business."

"Q. Who told you that?"

"Mr. Black: That is objected to."

"Mr. Ackerson: Yes, you may strike that."

* * *

(b) what Howard had "complained" to someone about, at or about that date, perhaps in the hearing of Ragland, at the Flintkote office;[7] (c) about conversations occurring at an alleged meeting of certain of the conspirators, (Krause, Howard, Newport and Lewis) wherein "boycott" was threatened by Mr. Newport, and objections were voiced by others.[8]

"Q. (By Mr. Ackerson): Did Mr. Ragland relate this conversation to you by Mr. Krause?"

"A. Yes, sir."

"Q. Will you state what Mr. Ragland told you, what he said as nearly as you can in substance?"

"Mr. Black: It will be understood of course that our objection runs to all of this?"

"The Court: Are you speaking to the objection you urged last week?"

"Mr. Black: Yes, the objection that it is pure hearsay, that there is no authority in the agent to narrate past events."

* * *

"Mr. Ackerson: Will you read the question, Mr. Reporter?"

(The question referred to was read by the reporter as follows: "Q. Will you state what Mr. Ragland told you, what he said as nearly as you can in substance?")

"Mr. Ackerson: That is concerning Ragland's conversation with Mr. Krause."

"The Witness: Mr. Ragland told me that Mr. Krause came into the office and talked—"

"Q. (By Mr. Ackerson): Into the Flintkote office?"

"A. Into the Flintkote office, and talked so loudly to Mr. Ragland and pounded on the desk a little bit that Mr. Ragland got up and left and told Mr. Krause that if he couldn't talk as a gentleman he didn't want to talk to him any more, and until such time as he could behave as a gentleman, that he, Ragland, would come back and talk with him."

"Q. Did Mr. Ragland say what Mr. Krause was talking about?"

"A. He was objecting very strenuously to the aabeta company being in business."

"The Court: You cannot say he was objecting. That is a conclusion. You have to tell us what was said and then the jury can decide whether he objected to something or applauded, or something in between."

"The Witness: Well, I don't know how else to say it because that was what he was doing."

"Mr. Black: You weren't there."

"The Court: That is what he was doing? You tell us what he said. Of course you cannot remember it word for word, but you can say in substance he said A, B, C, D, and so forth, and go ahead and relate the substance of the conversations. Then it will be up to the jury to determine whether that was an objection or not."

"The Witness: I don't know quite how to answer that."

"Q. (By Mr. Ackerson): Did Mr. Ragland—are you relating Mr. Ragland's words to you as far as the word 'objection' goes, or did Mr. Ragland say Mr. Krause used other words?"

"A. He used the word 'objected.' He said, 'I object very much to the aabeta company being in business, in competition with us, using the same type of tile.' That is why I keep saying 'objected.' That is the word he used."

"The Court: If that it the word he used, that is all right. I thought you were using a word which you thought his words added up to."

"The Witness: Oh, no. Mr. Krause very definitely said those words, as I recall what Mr. Ragland told me, that he objected very strenuously to the aabeta company. He used the words 'I object to the aabeta company being in business here in the Los Angeles area, using the same type of acoustical tile that we are a dealer for.'

"And that is the time when Mr. Ragland decided to leave, not wanting to listen to the loud conversation, and he told me it was loud. That is not my assumption. He said he didn't like it, so he left. He left for about 10 minutes as I understand it—or I was told rather—and then went back and talked further with Mr. Krause. What they talked further about, I do not know." [Tr. 475 to 480, incl.]

[7] Mr. Waldon: "Yes, he (Mr. Ragland) said a Mr. R. E. Howard was down there complaining also."

"Q. (By Mr. Ackerson): And what did he say that Mr. Howard said, if anything?"

"A. I don't know any exact words, except he mentioned that they were trying their best to force an issue to stop our operations." [Tr. 269, 270.]

[8] Mr. Lysfjord: "Well, Mr. Ragland came into the office, met me at the office, and mentioned that in his words, things were getting a little bit hot. He said that pressure that you were talking about is starting to show up. The competitors of yours in the field are beginning to pick up your figures and the fact that you are bidding against them around in this general area.

"The manager of Howard Company, Mr. Howard, and Mr. Gustave Krause from Coast Insulating, a Sidney Lewis of Flintkote Company—I believe one of the principals there—and Mr. Newport, all had a meeting."

"Q. Who is Mr. Newport?"

"A. He is a principal of Coast Insulating. All of these are Flintkote dealers, incidentally."

"The Court: Are you telling this as a conversation?"

"The Witness: I am saying what Mr. Ragland told me."

"The Court: Very well."

"The Witness: That they had this meeting objecting very strenuously to the fact that we were in business, the aabeta company was in business.

"One of the very strongest statements was from Mr. Newport, saying that he would boycott, I believe the word was, all of Flintkote's materials and see that it wasn't used in the area, and he was willing to spend $40,000 or $50,000 to do it." [Tr. 474, 475.]

"Q. (By Mr. Ackerson): Did Mr. Ragland state the conversation of Mr. R. E. Howard on this occasion?"

"A. Only that he objected very violently. I don't recall the exact words." [Tr. 476.]

Conversation Number 2 was a portion of the conversation allegedly occurring on February 19, 1952, between Ragland, Baymiller, Thompson, Lysfjord and Waldron, when the plaintiffs were advised of Flintkote's refusal to sell further.[9]

Conversation Number 3 was an alleged telephone call between Krause and Lysfjord occurring "after the severance" [Tr. 267], of relations between Flintkote and the plaintiffs, and after the date the conspiracy was found by the court to have ended.[10] Upon motion of defendant, this conversation was struck out [Tr. 268], but after argument, the ruling was "recalled," apparently to be re-considered at the end of plaintiffs' case, when all defendants' motions to strike were denied.[11]

It is difficult to understand from the record precisely the theory upon which these various conversations were held admissible. At times both court and counsel talk of "res gestae," and at other times of "admissions," sometimes referring to "overt acts in furtherance of a conspiracy," at other times to the theory of "agency."

These three conversations had by plaintiffs involve individuals in two distinguishable categories—Ragland, and Baymiller, employees of the defendant Flintkote; and Krause, an alleged "officer, director and managing director of Coast Insulating Products,[12] a California corporation,"[13] one of the dismissed defendants at time of the trial.

The status of the various declarants poses distinct issues as to the admissibility of each of their statements. Requisite to the admission of incriminating statements attributed to Krause, Newport, and Ragland (in an alleged capacity other than as an agent of defendant) is a prima facie showing of Flintkote's participation in the conspiracy by competent evidence apart from the alleged statements. On the other hand, no such foundation need be laid for the alleged admissions of Baymiller and Ragland, if they were acting as agents within the scope of their employment for the defendant company.

[*Hearsay Rule*]

We start with the major premise that all such statements were hearsay. In fact, when Waldron or Lysfjord told the jury what Ragland said Krause had told him, we have hearsay placed upon hearsay; and when the plaintiffs testified that Ragland told them what Krause or Newport or Howard had said at a meeting, concerning which there had been no proper foundation laid as to whether Ragland was present, we have hearsay placed upon hearsay placed upon hearsay.

It is true that there are so many exceptions to the hearsay rule that much of the evidence which decides law suits is made up of hearsay evidence. But this does not eliminate the hearsay rule as a vital and important rule of evidence, nor permit us, or the lower court, to open wide the floodgates to any evidence, in total disregard of the rule.

One of the very best reasons for the hearsay objection is to prevent the presentation of self-serving statements.[14] The instant case is a perfect example of the reason and of the necessity for the rule. Without in any way passing upon or inferring as to the credibility of witnesses who testified, we here have two of the

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[9] "Mr. Waldron: . . . I asked Mr. Baymiller if they wouldn't hold up, or why they didn't hold up, to our agreement, and that I said the pressure must have been terrific. And he said, 'Yes, we had the pressure all right.' " [Tr. 257.]

Mr. Waldron, cross-examination. (Testimony from Deposition of Mr. Waldron):

". . . I said the pressure must have been terrific from our competition to cause this to happen. He said there was pressure, and that is all he said." [Tr. 362.]

Mr. Lysfjord: "And then I believe Mr. Waldron mentioned, 'I guess the pressure started to work a little bit more than you anticipated, and that you are becoming worried about it.' . . Mr. Baymiller stated that there was considerable pressure brought to bear." [Tr. 489, 490.]

[10] Mr. Lysfjord: He [Krause] told me he didn't want me to feel that there was anything personal about his being chosen to front for the organization, association, which is the Contractor's Association, and their own interests; to force this termination of selling us acoustical tile." [Tr. 267.]

[11] "The Court: Considering all evidence before the court, the motions to strike are denied and the motion to dismiss is denied. Bring in the jury." [Tr. 766.]

[12] Amended Complaint, ¶ 10.

[13] Amended Complaint, ¶ 15.

[14] "In many instances, the danger of fabrication as to whether the statement was or was not made may be as great as the danger that a statement by a declarant was a false representation of the fact stated. This, however, does not preclude admissibility as long as the statement is not used for assertive purposes."

Mason Ladd, "The Hearsay We Admit." 5 Okla. L. Rev. 271, 280.

three most interested parties to the law suit ascribing vital culpatory statements to Krause;[15] to Newport; to Howard; to Baymiller; to Thompson; to Lewis and to Ragland, each one of whom (except Newport who did not testify) denies both any recollection of the specific alleged statements, and of the fact sought to be proved by the hearsay statement.

But the hearsay rule serves another more important purpose. It requires the person asserting a fact to be present in the courtroom, and to subject himself to the best method yet devised for a determination of the truth of a fact; cross-examination.[16]

There are many exceptions taking hearsay evidence out of the general rule of inadmissibility. We will discuss the general exceptions as they relate to each conversation individually.

Conversation Number 1:

Ragland's alleged statements were in part a narrative of past events and in part double hearsay. In either case it was necessary in view of the fact that Ragland did not himself testify about the declarations of the alleged co-conspirators that his alleged statements came within some exception to the hearsay rule.

A number of theories exist under which the alleged statements of Ragland might have been offered against the defendant Flintkote, as exceptions to the hearsay rule: (1) As an admission of a party's authorized agent; (2) as a statement of a co-conspirator; (3) as a statement made as part of the *res gestae.*

Here it should be kept in mind that the evidence was never offered against the declarant Ragland individually, for he was not a party to the action.

Evidence of a hearsay statement is admissible against a party to the action if the judge finds: (a) the declarant was authorized by the party to make a statement for him concerning the subject matter of the statement; or (b) the party, with knowledge of the content of the statement by words or conduct manifested his adoption or approval of the statement or his belief in its truth.[17]

Here there was no attempt to prove that Flintkote adopted or approved of Ragland's statement as to what Krause, Howard and Newport had said, as to alleged threats. Hence plaintiff was left with the possibility of showing that Ragland had authority to make alleged statements purporting to establish the threats.

No evidence was offered to establish direct written or oral authority. Plainly, counsel relied on an implied or inferred authority from Flintkote to Ragland, to make the statements described by Waldron and Lysfjord. Technically, we believe such a reliance takes the hearsay declaration out

[15] Krause took the stand and denied that he had made any threats, although he readily admitted he had expressed displeasure. He claimed no right to influence or attempt to influence Flintkote; he denied he had used the word "boycott." [Tr. 1129.] The defendant's employees also denied any such statements.

[16] As one writer has said:

"The protection of the jury from being misled surely is a factor to be considered if a statement made out of court is to be regarded as intrinsically weak, subject to a cover for fraud, or containing the possibilities of error or mistake caused by bias, failure to understand, or the imperfection of memory. However, the hearsay rule applies in equity as well as in jury trials. Therefore these reasons alone, formidable as they appear, are not always sufficient to justify the exclusion of hearsay evidence. Professor Wigmore, in his thorough analysis of the hearsay rule of exclusion, concludes that the rule exists because of the lack of opportunity to cross-examine the declarant of a perceived fact as a testing process in the attempt to discover the truth. If the witness is a person who has personal knowledge, he may be examined as to the accuracy of his perception, memory, words of communication, and his sincerity or truthfulness. This is in line with the distinction between a deposition and an affidavit; for under the former the truth-testing device of cross-examination has been made available. Professor Morgan includes all of the reasons expressed above when he states:

" 'Hearsay is excluded because of potential in infirmities with respect to the observation, memory, narration and veracity of him who utters the offered words when not under oath and subject to cross-examination.'

"He also regards the hearsay rule of exclusion as now being directed more towards protecting the adversary than towards safeguarding the triers of fact, although both are so interrelated that it is hard to consider the effects separately. The rule at least rests in the hands of the adversary because, unless objection is urged, hearsay evidence will be admitted for consideration by the triers of fact." "The Hearsay We Admit." Professor Mason Ladd, Okla. L. Rev., 271, 272.

[17] American Law Institute, Model Code of Evidence, Rule 507; *Pekelis v. Transcontinental & Western Air, Inc.*, 2 Cir., 187 F. 2d 122, 128; *United States v. United Shoe Machinery Corp.* [1950-1951 TRADE CASES ¶ 62,589], 189 [89] Fed. Supp. 349, 351.

of the "authorized declaration" class of exception to the hearsay rule, into the *"vicarious admission"* rule. That rule has been expressed as follows:

> "Evidence of a hearsay declaration is admissible against a party to the action if the judge finds (a) the declaration concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of the agency or employment, or (b) the party and the declarant were participants in a plan to commit . . . a civil wrong, and the hearsay declaration was material to the plan or its subject matter and was made while the plan was in existence and before its execution was complete . . ." [18]

Subdivision (b) presents no very difficult problem. The alleged conspiracy did not, either as pleaded, or as the case was tried, attempt to charge or make Flintkote's employee, Ragland, a member of the alleged conspiracy,[19] or a "participant" who "planned"to commit a civil wrong. Subdivision (b) is really an extension of the usual rules applicable to conspiracies, and the admissibility of admissions made by a co-conspirator.[20]

We think Wigmore hits the nail on the head when he observes that our problem is one of the law of agency, not of the law of evidence.

> "He who sets another person to do an act in his stead as *agent* is chargeable in substantive law by such acts as are done under that authority; so too, properly enough, admissions made by an agent *in the course of exercising that authority* have the same testimonial value to discredit the party's present claim as if stated by the party himself.
>
> *"The question therefore turns upon the scope of the authority. This question, frequently enough a difficult one depends upon the doctrine of Agency applied to the circumstances of the case, and not upon any rule of evidence.* (Italics added.) IV Wigmore, 3rd Ed., § 1078.

Let us examine the record to see what was Ragland's capacity with Flintkote. Ragland left the employ of the Flintkote Company on April 1, 1955.[21] He had started that employment February 1, 1951. He had started as a field service engineer, "to promote the general line of insulation board products, which had no connection with acoustical tile." On June 1st, 1951, he "was given the job of sales promotion for acoustical tile, in which position he remained." Ragland had worked with the two plaintiffs previously, and was friendly with them. They met socially on frequent occasions, and Ragland wanted to help them become representatives of Flintkote, if he could.

Ragland, as "promotional salesman," worked under an assistant sales-manager, of the Southwest Division, of the Pioneer Division, of The Flintkote Company, a Mr. Browning Baymiller. Baymiller's immediate superior was a Mr. E. F. Thompson, Sales Manager. Thompson's immediate superior was Mr. Frank S. Harkins, who "had charge of all activities of the building material division."

The determination of whether or not Flintkote was to contract with the plaintiffs was passed "upwards" seriatim by Ragland to Baymiller to Thompson to Harkins. Ragland had no executive duties for the corporate defendant, but was a representative at the lower echelon.

There was an utter lack of proof of or any questioning seeking to establish Ragland's authority to speak on behalf of Flintkote, concerning the alleged incriminating

[18] Model Code of Evidence, Rule 508. In connection with subdivision (a), see *Peoples Gas Co. of Kentucky, Inc. v. Fitzgerald*, 6 Cir., 188 F. 2d 198; *State Farm Mut. Auto Insur. Co. v. Porter*, 9 Cir., 186 F. 2d 834; *American Ins. Union v. Lowry*, 5 Cir., 62 F. 2d 209; *Sharpless Separator Co. v. Skinner*, 9 Cir., 251 Fed. 25. The decisions propounding the rule set forth in subdivision (b) are legion. See e. g. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 249.

[19] While there were statements in colloquy between counsel and the court indicating that plaintiffs relied on the proposition that all employees of defendant Flintkote were agents and co-conspirators [Tr. 259], it cannot be seriously urged that naming a corporate defendant a co-conspirator makes every employee of said corporation a co-conspirator; subject to the rules of evidence which relate to a conspiracy.

[20] In commenting on it, for example, American Law Institute's Model Code of Evidence points out that subdivision (b) does not accept the rule as generally stated with reference to declarations of co-conspirators, which require the alleged statement to *further* the conspiracy, not merely be *material* to it. "The tendency in the authorities is to receive evidence of all declarations of a conspirator concerning the conspiracy when made during its pendency." We do not here pass on the question of whether a declaration which does not tend to further the objects of the conspiracy is admissible.

[21] Hence, the witness Ragland was not employed by defendant Flintkote during the trial of this action.

statements of Krause, Howard, and Newport, threatening Flintkote with a boycott.

We must yet consider the admissibility of such hearsay statements under the *res gestae* exception. Wigmore has this to say:

> "In two departments of substantive law this use of 'res gestae' has been very common, namely in the law determining liability for the acts of an agent and for the acts of a co-conspirator. The acts and admissions of an agent are available to charge the principal when they occurred in the course of his employment; and of a co-conspirator, when they occurred in the duration of the conspiracy. It is often attempted to designate this course of action, which thus limits the range of chargeable acts as 'res gestae.' But the scope of it is to be ascertained wholly from the substantive law on those topics, not from any rule of evidence." VI *Wigmore, Evidence, supra,* § 1769.

> "The phrase 'res gestae' has long been not only entirely useless, but even positively harmful. It is useless, because every rule of Evidence to which it has ever been applied exists as a part of some other well established principle and can be explained in terms of that principle. It is harmful . . . (and) ought therefore wholly to be repudiated, as a vicious element in our legal phraseology." VI *Wigmore,* 3rd Ed., p. 182.

We conclude that if the alleged admission in Conversation Number 1 is not admissible as a statement of a co-conspirator or of a party's authorized agent, it is not admissible under any theory; i. e., it does not fall within the legitimate and accepted *res gestae* exceptions of Spontaneous Exclamations, Verbal Acts, or Statements of a Mental Condition. VI *Wigmore on Evidence,* 3rd Ed., § 1768.

We cannot pass on whom the jury could, or should believe, but we have the duty of seeing that any evidence ordinarily inadmissible as hearsay, is admitted into evidence for the jury to consider only when a proper foundation for its admission has been laid.

The discussion of both counsel throughout the trial recognized the responsibility resting in the trial court. The trial court recognized it. But when this complicated case went to trial, (without the usual pretrial conferences), the court was pressed for immediate answers on involved procedural and evidentiary points. We conclude the court erred (a) in permitting the introduction of this hearsay evidence (Conversation Number 1, *supra*) without any foundation showing the extent and scope of the authority resting in the employee Ragland, if any, to act for and bind the corporate defendant; and (b) in refusing to grant the defendant's motion to strike, made at the conclusion of the plaintiffs' case, relating to the same "vicarious admissions" allegedly made by the witness Ragland.

What was the effect of the erroneous admission of this evidence?

Here we have testimony introduced which goes to the very heart of plaintiffs' cause of action and to defendant's defense. Why did Flintkote terminate the contract? No reason was placed in writing. The only evidence (other than the bare refusal to sell, which was equivocal) were [was] the conversations. Of these a reading of the record persuasively demonstrates that Ragland's alleged statements were by far the most significant and the most damaging to defendant's cause. They spelled out in clear perspective the nature of the conspiracy and brought the events home to the jury with the dramatic and incisive impact that only admissions can produce. This was defendant's own former employee outlining the unlawful scheme. The full effect of this evidence on the jurors' minds cannot be measured with precision. To deny that it influenced the jury's verdict in a material manner is to ignore reality. What the verdict would have been had this evidence not been introduced is not certain. Moreover, it is not our function to decide a hypothetical case. We must rule only on the basis of what actually transpired in the court below and under the circumstances here presented we hold that the admission of Ragland's statement constituted prejudicial error.

Conversation Number 2:

The statement attributed to Baymiller (Conversation Number 2, *supra*) again tenders the question of agency. Baymiller may or may not have been an executive officer of defendant company, authorized to bind that company by his statements. He was Ragland's immediate superior. His position, and his activity in connection with the subject matter of this action justified the admission of his alleged statement for whatever probative value it may have had,

provided that a proper foundation had been laid. We need not pass upon that issue here; nor upon the question of what the jury might have decided if this testimony was properly admitted, and the inadmissible Conversation Number 1 excluded.

Conversation Number 3:

Conversation Number 3 involves no question of agency, for Krause was neither agent, servant nor employee of the defendant Flintkote. Krause was named as a co-conspirator in the amended complaint. [¶ 10, T. 20.] Thus if plaintiff had made a prima facie showing that there was a conspiracy and that Flintkote had joined the conspiracy, then the statements made by a co-conspirator, if made *during the existence of the conspiracy,* and *in execution of the common design,* were admissible against all conspirators. *Schine Theatres v. United States* [1948-1949 TRADE CASES ¶ 62,245], 334 U. S. 110, 117, 68 S. Ct. 947, 92 L. Ed. 1245; *United States v. Gypsum Co.* [1948-1949 TRADE CASES ¶ 62,226], 333 U. S. 364, 393, 68 S. Ct. 525, 92 L. Ed. 746.

This conversation was introduced for the purpose of establishing that the act of termination was not equivocal, that it was an act in furtherance of the conspiracy, and that Flintkote had joined in that conspiracy. Excluding the evidence improperly introduced, no sufficient basis for the introduction of Conversation Number 3 was proved. Thus the foundation required to make the evidence admissible could only be established by the evidence itself. While much latitude is allowed in the order of proof establishing a conspiracy (as we have hereinabove discussed) the proponent of the evidence must still lay a proper foundation.

It may seem anomalous that the proponent must establish the existence of the conspiracy by independent evidence before statements of alleged co-conspirators showing the existence and operations of the conspiracy is [are] admissible. A cynic might observe that the law requires that the body be buried before the coffin is nailed. But the law has its reasons. The only conceivable basis upon which the admission of such unsworn and damaging evidence can be justified—the parties acted in concert and each authorized or approved the other's actions—intrinsically necessitates an independent showing of the conspiracy. If the rule were otherwise, persons would go to jail or be held liable in damages solely on hearsay evidence which they had no opportunity to impeach or refute.

There is a further reason why, under the record as it existed before the trial court, and the manner and theory under which the case was tried, this Conversation Number 3 was inadmissible. The court had previously ruled (and we do not here pass upon the merits of that ruling) that the refusal of Flintkote to deal further with plaintiffs on February 19, 1952, marked the termination of the conspiracy.[22] If that be true, the statements of Krause were inadmissible against Flintkote, the alleged co-conspirator.[23]

THIRD: ALLEGED ERRORS IN INSTRUCTIONS, OTHER THAN DAMAGES.

We next consider the defendant's third ground of alleged error, relating to instructions. Specification 12, alleged error in instructions respecting damages, will be considered later. There remains specification of alleged errors (Appellant's Points 5 to 10 inclusive) in instructions with re-

[22] "The Court: . . . Now I haven't heard anything yet which would indicate a court's duty to depart from the rule that admissions of a conspirator, one conspirator made in the course of a conspiracy and in furtherance of it, are admissible against and binding upon the fellow-conspirators. The rule I refer to is the one that holds that in order to be in furtherance of a conspiracy, the act or declaration must be one which was made in the course of the conspiracy and not afterwards. I think that the date of the conspiracy ended as the closing date for the making of admissible admissions binding on other conspirators—it is certainly binding upon the person who makes them—but as to their being in furtherance of a conspiracy they can't very well further it after it is ended. And I think if your February 19, 1952 date of ending is the date which forecloses the admissions of persons other than the firm on trial and its own direct agents acting for it rather than acting for it as a conspirator—"

"Mr. Ackerson: Very well, your Honor."

"The Court: —so if you have some holding of a court on that express question, I will reopen the ruling, but unless you do have, I will not admit testimony of the type just alluded to."

"Mr. Ackerson: Statements or acts subsequent to the termination date of the conspiracy, February 19th?"

"The Court: Yes. That statements or acts of persons other than the defendant on trial, and its agents, that is, the agents of Flintkote, Flintkote a corporation rather than Flintkote a conspiracy."

"Mr. Ackerson: Yes." [Tr. 293, 294, 295.]

[23] *Krulewitch v. United States, supra; Fiswick v. United States,* 329 U. S. 211, 67 S. Ct. 224, 91 L. Ed. 196.

gard to: Flintkote's participation in the conspiracy; reasonableness of restraint of trade; conflicting instructions on injury to public; refusal to give defendant's instructions 24, 25, and 33; error in refusal of defendant's instructions on burden of proof (Defendant's, 14 and 42).

[*Single Defendant*]

We have heretofore pointed out that the plaintiff's instructions in this case were prepared for a trial against all named defendants, including those dismissed out prior to trial, and that counsel for both parties and the court had agreed that they should be re-cast. Unfortunately, such recasting did not take place in every instruction. The court did carefully and properly instruct the jury:

> ". . . but there is only one defendant here. This complaint . . . was filed against many defendants. What has happened in this case with respect to the others is not of any concern to you. We are trying the case here today as to this one defendant." [Tr. 1239]

[*Refusal to Sell*]

The court further charged that:

> "The Flintkote Company can be liable for refusing to sell acoustical tile to plaintiffs only if such refusal to sell was in furtherance of and as a consequence of a knowing participation in an unlawful combination or conspiracy.
>
> "In other words, we come back to the old principle that if the Flintkote Company was acting entirely on its own, without conspiracy with the other defendants, then there is no cause of action." [Tr. 1247] [See also, Tr. 1252]

This charge was essentially correct.

But the jury was also instructed as follows:

> ". . . However, the case here is one in which the Flintkote Company is accused of being a member of a conspiracy. The Flintkote Company or anyone else engaged in private enterprise may select its own customers, and in the absence of an illegal contract, combination or conspiracy may sell or refuse to sell to any person, including these plaintiffs, for any cause or for no cause whatever. *But under the antitrust laws it cannot do so if there has been a conspiracy.*" [Tr. 1236] [Italics added]

Without interpretation this is an inaccurate expression of the law. It permits a recovery against a defendant who refuses to deal "if there has been a conspiracy;" *irrespective of whether or not the defendant then sought to be held participated therein.* Plaintiffs can only urge that it might be *inferred* that because of the first sentence (de-emphasized in Appellant's Brief), there was impliedly added to the last sentence the words: "in which Flintkote participated."

The confusion thus created was compounded by another instruction:

> "If you are satisfied from all the evidence that any two or more of the defendants acted together for the purpose and with the effect of eliminating the competition in the purchase, sale or installation of acoustical tile, then you may return a verdict against the defendants and in favor of the plaintiffs, provided the evidence actually shows preponderantly that plaintiffs were damaged by such acts and conduct." [Tr. 1245, 1246.]

Here the jury was authorized to return a verdict against the defendant *irrespective of whether or not the defendant ever participated in the conspiracy!* This goes to the heart of the defendant's theory of defense.

Finally, the jury was instructed that if they found certain essential facts existed, then

> ". . . your verdict should be in favor of plaintiffs as to each defendant whom you find to have knowingly participated therein." [Tr. 1245.]

And again, if they were satisfied that certain acts took place,

> ". . . then you may return a verdict against the defendants." [Tr. 1245.]

[*Failure To Object*]

The given instructions were misleading and contradictory. They did not help the jury return a careful and thoughtful verdict. The instructions were not correct, and should not have been submitted nor read. However, defendant admits that no objection was made to these instructions at the time they were given, [Tr. 1257-1261] or before the jury retired. There thus exists the question as to whether defendant can take advantage, on this appeal, of the alleged error. *Rules of Civil Procedure,* (Rule 51.).

We recognize the fact that trial lawyers in some respects act at their peril, in requesting a revision of an instruction once it has been given to a jury. It may be unduly emphasized in the jury's mind. Nevertheless, if the instruction is erroneous, objection must be made, and as the rule says, "stating distinctly the matter to which he objects and the grounds of his objection."

When a party fails to do this, he runs the risk that despite the error, he may be held to have waived it.

Because of other prejudicial error, to which exception was properly taken, we need not here pause to re-consider the question of whether "plain error" in the giving of misleading instructions may be reviewed where no proper objection or exception was made at the trial.[24]

Neither was any specific objection made to the court's failure to give certain instructions requested by the defendant, (No. 24, 25, 26, 27, 28, 29, 30, 32 and 33). The court admittedly gave the substance of some of these. The trial court has a broad discretion in the emphasis it may direct to any legal position, or whether, after having spoken on the subject, it need or need not repeat the proposition in varying ways, as proposed by respective counsel. We believe the court clearly tried to fairly present both plaintiffs' and defendant's legal theories to the jury; and we hold that on this aspect of the case, he did so.

As to burden of proof, we agree with the trial court that many instructions were offered, that he selected one, and "did not wish," nor was he required, to repeat. No error was committed thereby.

FOURTH: ALLEGED ERROR IN REFUSING TO GRANT A NEW TRIAL; IN INSTRUCTIONS RELATIVE TO DAMAGES; IN FIXING ATTORNEY'S FEES; AND IN CREDITING THE $20,000 PAYMENT.

We now turn to defendant's fourth contention, concerning damages. Here there is no question but that the defendant objected, and took exception, to the theory of damages which went to the jury, and which governed the court's action thereafter.

Appellant contends that numerous errors were committed in respect to the ultimate amount of the judgment. Specifically, appellant asserts (A) the jury verdict was grossly excessive; (B) damages were awarded for a period of time beyond the permissible period; (C) the District Judge erred in determining the legal effect of The Covenant Not to Sue executed between appellees and others; and (D) the attorney's fees granted below and those sought on appeal are excessive. We will consider these points in order.

A. Excessive Damages.

At the outset appellees question this Court's power to review the denial of a new trial on the grounds of excessive damages. Regardless of what the rule may be in other circuits, this Court has repeatedly affirmed its authority to review such a denial. *Cobb v. Lepisto,* 6 F. 2d 128; *Dept. of Water & Power v. Anderson,* 95 F. 2d 577, cert. den. 305 U. S. 607; *Southern Pacific Co. v. Guthrie,* 180 F. 2d 295, 186 F. 2d 926, cert. den. 341 U. S. 904. And it may reverse the lower court's decision if it finds the verdict grossly excessive or monstrous. *Southern Pacific Co. v. Guthrie,* 186 F. 2d 295. Stated differently, however, appellant's contentions in the instant case actually challenge the sufficiency of the evidence to support the jury verdict, a question of law, and one which this Court or any appellate court of ordinary jurisdiction has undoubted power to decide.

[*Items of Damage*]

Appellees here sought damages for three separate and distinct kinds of injury to their business:

(1) Out-of-pocket expenses incurred in establishing a business in San Bernardino. These exepnses consisted of sums expended for building rental, promotion and advertising, and trucking and utilities. Without dispute, they totaled $1,920.00. If we assume liability proven, the evidence supports without question an award as to this amount.

(2) Out-of-pocket expenses resulting from the increased cost of acoustical tile caused by appellees' inability to purchase their supplies from Flintkote. Appellees introduced evidence tending to show that during the period from January 1, 1952 to May 3, 1955, they paid $87,808.97 for acoustical tile obtained from persons other than Flintkote

[24] *Persons v. Gerlinger,* 9 Cir., 227 F. 2d 337; *Woodworker's Tool Works v. Byrne,* 9 Cir., 191 F. 2d 662; *Lynch v. Oregon Lumber Co.,* 9 Cir., 108 F. 2d 283.

and that this represented an excess of $12,758.57 over that sum which Flintkote would have charged them for the equivalent quantity. The evidence on this point was conflicting and although it appears possible that some of the items included in the computation of the aggregate amount actually paid were not properly allocable to acoustical tile, that was a question for the jury's determination. Excepting the question as to the validity of the time period for which damages were here allowed, which we will later come to, no error appears in the record as to this theory of damages.

(3) Loss-of-profits which appellees would have realized had they been able to acquire acoustical tile from Flintkote on a direct basis. The total possible damages sustained under items (1) and (2) is $14,678.57. Thus it is obvious that most of the award was based on loss-of-profits, and it is here that the evidence is frailest.

Initially, it should be noted that damages for all three kinds of injury alleged in the instant case are recoverable in the same action, if supported by competent evidence, and not all nor any two are necessarily mutually exclusive. *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U. S. 555, 51 S. Ct. 248.

[*Lost Profits*]

Turning to the issue of lost profits, the sole evidence adduced relative thereto was the oral testimony of the plaintiffs and their accountant, as supplemented by written computations. [Plaintiffs' Exhibits 38 and 39.] An analysis of the qualifications of the witnesses as well as the testimony is essential to an understanding of the problem which confronts us.

Mr. Lysfjord testified that prior to the formation of the Aabeta Company, he had worked twelve years in the acoustical tile industry, which were evenly divided between installing and selling, the last five of which were spent as a salesman for the R. W. Downer Co. He stated that he "never concerned" himself with the financial position of that company and "had nothing whatever to do with the purchasing of materials" for it. In short, his activities were restricted to the sales facet of this business. He evidently was thoroughly acquainted with this part of the business, but it is apparent from his own testimony that he knew little, if anything, about the myriad problems entailed in the proprietary and managerial operations of an acoustical tile business. That Mr. Lysfjord was an able and experienced salesman is not disputed. That is one thing. That this record qualifies him as an expert on business prognosis is quite another matter. His testimony bespeaks of great optimism, predicated not so much on economic reality as on his personal philosophy and enthusiasm.

> "I can't see any reason in my mind that I shouldn't be able to do as well for myself as working for somebody else. I surely would work as hard or probably twice as hard for myself as for anybody else." [Tr. 628.]

His partner, Mr. Waldron, demonstrated the same fervent hopes. His experience, too, had been confined to work as an applicator and then as a salesman before he embarked on this venture. Further, he admitted that he had had no previous experience in operating or owning any business; that in regard to his work at the R. W. Downer Co., he had never acquired any knowlledge of its working capital or financial structure and, indeed, had never even examined its books. Despite this patent lack of business background, he testified that he fully anticipated annual profit increases, justifying his assumption on

> "Just normal expected increase in good will and sales, promotional work, . . ." [Tr. 711.]

The accountant, Mr. Frank Hamiel, merely performed the mechanical function of computing the figures given him by plaintiffs.

What, then, were plaintiffs' estimates and upon what factual basis were they grounded? In essence, the computation of lost profits was based on the assumption that the plaintiffs would make as much working for themselves in their first year of operation as they and their employer, R. W. Downer Co., made together from their sales in their best year working for that going concern; that thereafer, profits would increase as much as 50% annually. In other words, they thought that they could have sold a carload of acoustical tile per month in 1952; one and one-half carloads per month in 1953; and two carloads per month in 1954. The gross sales price of a carload was estimated at $18,000, with a 20% net profit or $3600 per carload. The 20% profit factor was derived from adding plaintiffs' 10% commissions to the 10% profit made by the

Downer Co. on their sales. Thus, the total net profit for each partner was approximated at $21,600 in 1952; $32,400 in 1953; and $43,200 in 1954, for a cumulative total of $97,200 each, from which actual earnings were deducted to leave a net loss of anticipated profits of $75,788.50. It was also shown that plaintiffs actually made a net profit of 5% of gross sales in 1952; 11% in 1953; and 5% in 1954. (This variance alone is of peculiar significance to the soundness of plaintiffs' theory of damages.)

The foregoing represents the sum and substance of plaintiffs' evidence on this issue. The omissions are manifold and significant. Nowhere in the record is there any substantial evidence of the state of the industry during this three year period. There is no evidence that plaintiffs would probably have obtained more business if they could have purchased Flintkote tile on a direct basis in that no showing is made of the existence or availability of such business or plaintiffs' ability to undertake additional work. We know only that business was "very competitive" and that plaintiffs encountered difficulty in disposing of the one and one-half carloads of Flintkote tile which had been supplied them. Financially, plaintiffs went into business with a relatively small capital investment ($6,000), with hopes of increasing their capital account by plowing profits back into the enterprise.

[*General Rules*]

A study of the adjudicated cases in this area readily dispels any impression that this question of damages is governed by an application of the common law rule of reasonable certainty. The cases have long since departed from this rule in antitrust litigation. (*Story Parchment Co. v. Paterson, supra,* at 565.) Just how far they have gone in imposing the risk of uncertainty on defendants we must now consider.

Preliminarily, it should be observed that the reasons underlying the evolutionary trend toward liberality in proving damages are grounded in logic and sound policy. Two principal factors have influenced the courts. First, the self-evident intangible nature of the subject matter. To ascertain what would have been is as difficult as trying to determine what should be. In the cryptic words of Judge Wyzanski, in a private antitrust action, "You can't go to a book and look for the answer." *Cape Cod Food Products v. National Cranberry Ass'n.,* 119 Fed. Supp. 900, 910. Second, the legal maxim that a wrongdoer should not profit by his wrong. In light of the intrinsic uncertainty surrounding this problem, the responsibility for which lies in large measure with the defendant found liable, it has long been felt that this presents an ideal situation for application of that doctrine.

As stated by the Supreme Court,

> ". . . a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible." *Eastman Kodak Co. v. Southern Photo Co.,* 273 U. S. 359, 379. *Cf. Story Parchment Co. v. Paterson Co., supra,* at 563; *Bigelow v. RKO Pictures Inc.* [1946-1947 TRADE CASES ¶ 57,445], 327 U. S. 251, 264-5.

It is in this setting that the modern rule has developed.

We take it that the controlling rule today in seeking damages for loss of profits in antitrust cases is that the plaintiffs is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue. Once that has been accomplished, the jury will be permitted to "make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly." *Bigelow v. RKO Pictures Inc., supra,* at p. 264. The cases have drawn a distinction between the quantum of proof necessary to show the *fact* as distinguished from the *amount* of damage; the burden as to the former is the more stringent one. In other words, the *fact* of injury must first be shown before the jury is allowed to estimate the *amount* of damage.

The Supreme Court articulated this dichotomy of damage proof in the *Story Parchment Co.* case.

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to

such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect to their amount." 282 U. S. 555, 562. *Cf. Bigelow v. RKO Pictures Inc., supra.*

Although there may be instances where this distinction does not advance the resolution of a particular controversy, it here serves a useful purpose in accentuating the paucity of evidence of lost profits.

There are three chief types of evidence which the decisions have approved as the basis for the award of damages. (1) Business records of the plaintiff or his predecessor before the conspiracy arose.[25] (2) Business records of comparative but unrestrained enterprises during the particular period in question.[26] (3) Expert opinion based on items (1) or (2).[27]

In all three important Supreme Court decisions in this field, the jury verdict was sustained on the basis of evidence of prior business success by either the plaintiff or his predecessor.[28] There is, of course, no previous business history of a comparable nature in the case at bar. The absence of such history is not fatal, for even total exclusion from business is actionable, if substantial evidence of damages be adduced.[29] Here, though, plaintiffs did endeavor to introduce a type of prior business history. That is, they sought to show by their past performance with the Downer Co. what their expected profits would likely be in a new business. However, all they showed was evidence of their highest commissions during an unspecified period and what the company's profits on their sales had been. They selected only their segment of the business. There is no evidence of the over-all records of Downer Co.; nor evidence whether the company prospered as a whole; or whether it took more or less profit on plaintiffs' sales to compensate for gains or losses in other parts of the business. Further, there is no evidence of size of the Downer Company, or its financial resources as compared to that of the Aabeta Company. Indeed, plaintiffs conceded that they knew little about the affairs of the Downer Company.

Though the Supreme Court expressly withheld ruling on the validity of comparative figures in the *Bigelow* case,[30] subsequent lower court decisions in the motion picture cases have accepted them where similarities were shown.[31] Where no basis for comparison was shown such evidence has been rejected.[32]

Here no attempt whatsoever was made to introduce comparative figures of other acoustical tile businesses during the period in issue. The record is devoid of any evidence of what any other similar business did during any period. The references to the Downer Company business are fragmentary. There is no evidence of what established firms made during the period in question or what newly-formed companies made in their formative years during any period.

We have only the plaintiffs' own estimate. Yet their own testimony discloses their total lack of managerial experience and their lack of knowledge of the financial operations of an acoustical tile business.

The decision in *William H. Rankin Co. v. Associated Bill Posters, supra,* relied upon by appellees, does not support their position, for as explained by Judge Chase in *Baush Mach. Tool Co. v. Aluminum Co. of America,* 2 Cir. [1932-1939 TRADE CASES ¶ 55,084], 79 F. 2d 217, 227, the *Rankin* decision (which he also authored),

> ". . . upheld the admission of an estimate of lost profits, but there was a

[25] *Frey & Son v. Welch Grape Juice Co.*, 4 Cir., 240 Fed. 114; *William R. Rankin Co. v. Associated Bill Posters, etc.*, 2 Cir., 42 F. 2d 152.

[26] *William Goldman Theatres v. Loew's* [1946-1947 TRADE CASES ¶ 57,496], 69 Fed. Supp. 103, affirmed 3 Cir. [1948-1949 TRADE CASES ¶ 62,209], 164 F. 2d 1021, cert. den. 334 U. S. 811, 68 S. Ct. 1061, 92 L. Ed. 1742; *Bordonaro Bros. Theatres v. Paramount Pictures*, 2 Cir. [1953 TRADE CASES ¶ 67,464], 203 F. 2d 676; *Milwaukee Towne Corp. v. Loew's*, 7 Cir. [1950-1951 TRADE CASES ¶ 62,891], 190 F. 2d 561; *Twentieth Century-Fox Film Corp. et al. v. Brookside Theatre Corp.*, 8 Cir. [1952 TRADE CASES ¶ 67,218], 194 F. 2d 846, cert. den. 343 U. S. 942, 72 S. Ct. 1035; *Theatre Investment Co. v. RKO Pictures Inc.* [1946-1947 TRADE CASES ¶ 57,630], 72 Fed. Supp. 650.

[27] *Frey & Son v. Welch Grape Juice Co., supra; William R. Rankin Co. v. Associated Bill Posters, supra; Bordonaro Bros. Theatres v. Paramount Pictures, supra.*

[28] *Eastman Kodak Co. v. Southern Photo Co., supra; Story Parchment Co. v. Paterson Co., supra; Bigelow v. RKO Pictures Inc., supra.*

[29] *William Goldman Theatres v. Loew's, supra.*

[30] *Twentieth Century-Fox Film Corp. et al. v. Brookside Theatre Corp., supra,* 327 U. S. at p. 266.

[31] See note 30, *supra.*

[32] *Wolfe v. National Lead Co.*, 9 Cir. [1955 TRADE CASES ¶ 68,094], 225 F. 2d 427.

proper basis for estimate in that case afforded by a period of profitable operation prior to the defendants' unlawful interference which prevented a continuance of the former success."

In the *Baush* case itself, the court held inadmissible the testimony of plaintiff's president estimating future profits.[33]

We have reviewed the cases most favorable to appellees, but we have been unable to discover any case so fraught with uncertainty as the one at bar, which upholds a jury verdict. This Court only recently cautioned against giving "judicial blessing to a decision based upon speculation, surmise, and conjecture." *Wolfe v. National Lead Co.* [1955 TRADE CASES ¶ 68,094], 225 F. 2d 427, 434. There the District Court's dismissal of an action because of failure of proof of injury was affirmed.

We recognize the fact that as we examine this feature of the case, injured plaintiffs and a wrongdoing defendant face the court. In such a context the record will not ordinarily be searched with a microscopic eye. Yet something better is required to sustain a jury verdict than a mere interested guess.

As stated by the *Supreme Court in Bigelow v. RKO Pictures Inc., supra,*

"In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork."

[*Verdict Not Supported*]

Where, as here, the sole evidence as to loss of profits is the testimony of the plaintiffs, both inexperienced in business operations, stating what they had expected to make during the infancy of a newly-created enterprise based on inaccurate computations[34] of the most money they had made working as salesmen for an established firm in years preceding those in question, with no attempt having been made to establish a comparison as to either the businesses or the years, the jury verdict predicated on such evidence cannot stand.

We do not hold nor imply that a jury verdict could not be upheld under any circumstances solely on the testimony of the plaintiffs. We hold only that if they are qualified to make these estimates, the record must show their competency and the factual basis upon which they rest their conclusions.

B. The Period of Time for Which Damages Were Recoverable.

[*Cut-off Date*]

The court below, over strenuous objection, admitted evidence and instructed the jury that it could award damages for injuries incurred up to the date the trial began. Appellant urges that the proper cut-off date is the day the action was filed. The original complaint was filed on July 21, 1952. The amended complaint was filed on March 23, 1953. The trial commenced on May 4, 1955. No special verdict was rendered apportioning the damages to any particular segment of time. Thus, it is apparent that this question permeates the entire damage award in a substantial manner and if error be found, it is perforce prejudicial.

[*General Rules*]

Two well-settled propositions of law govern the determination of this issue. Succinctly stated, they are, that a plaintiff is entitled to recover all damages for injuries proximately caused by wrongful acts committed *prior* to the filing of the action;[35] and conversely, a plaintiff is not entitled to recover damages for injuries resulting from wrongful acts committed *subsequent* to the filing

[33] *Cf. Chiplets, Inc. v. June Dairy Products Co.* [1953 TRADE CASES ¶ 67,625], 114 Fed. Supp. 129, holding conclusionary estimates of claimant's officers insufficient evidence upon which to ground judgment for alleged loss of profits.

[34] The computations of plaintiffs' average monthly 1951 earnings with the Downer Co.—the base figure in all their tabulations—are patently incorrect and distorted. They reflect not only commissions earned during the base year, 1951, but also include undisclosed sums earned in 1950, but not paid until 1951. For example, Lysfjord's purported average monthly earnings were $1,580.00. This figure was arrived at by adding the *total* amount he received during 1951, $12,739.85 to that received in 1952 for sales made in 1951, $6,221.00. That sum was then divided by twelve. It would appear basic that if there was some time lag between sales and compensation therefor, if the 1950 sales were to be included in the aggregate figure for 1951, then the 1952 sales should be excluded. But this was not done. Both were included on the rationalization that an accurate allocation among the particular years could not be made. This made for a basic inaccuracy of at least 50%.

[35] *Lawlor v. Loewe*, 235 U. S. 522, 35 S. Ct. 170, 59 L. Ed. 341.

of the action.[36] The time of the wrongful act controls the measure of damages. Thus, it becomes necessary to ascertain whether plaintiffs' injuries were caused by a prior act or whether they are attributable to protracted conduct and repetitive acts which continued beyond the date this action was filed.

[*Nature of Wrongful Act*]

It is appellees' position that there was only one wrongful act in the instant case, i.e., "the act of terminating permanently appellees' source of supply" on February 19, 1952. It is true that Mr. Thompson's declaration made that day that Flintkote would no longer sell to plaintiffs was the only overt act of the alleged conspiracy charged against the defendant now sought to be held. Thereafter, say appellees, a continued refusal to sell in execution of the conspiracy could be implied from the already manifested refusal. Appellees' argument contains an inherent dilemma. If their position be that the February, 1952, announcement marked the termination of the alleged conspiracy, then any subsequent refusal to sell, express or implied, would be a lawful act and not actionable. If, on the other hand, we were to assume that the conspiracy did not end on that day, we would have to infer a continued refusal to sell; otherwise, plaintiffs could not succeed, for the record fails to show any attempt made by plaintiffs after February 19, 1952, to purchase acoustical tile from Flintkote.

Appellees' characterization of the refusal on February 19, 1952, as a *"permanent"* and fixed act is a mere conclusion, and more important, incorrect. In the very nature of things, the announcement lacked finality. It could mean no more than that Flintkote, on that day, was absolutely and unalterably opposed to future dealings with the plaintiffs. Appellees confuse unequivocality with permanency. Flintkote's position was neither irrevocable nor immutable. It was under no legal duty to adhere to that position. On the contrary, it was at all times completely free to reconsider and modify its views.

This cause of action is founded on an act of a continuing nature. The express refusal to deal constituted no more than a refusal to deal at that time. Plaintiffs' injuries were not caused just by the announced refusal but rather resulted from the explicit refusal coupled with the implied persistence in the announced course of conduct. Indeed, appellees themselves recognized the continuing nature of the conspiracy for in their brief they assert that:

> "At the time of trial it is clear that appellees . . . were still under the competitive limitations resulting from the conspiracy." [Appellees' Brief, p. 108]

[*Relevant Decisions*]

"[A] conspiracy . . . is in effect renewed during each day of its continuance." *United States v. Borden Co.* [1932-1939 TRADE CASES ¶ 55,250], 308 U. S. 188, 202. Accordingly,

> "Each time the plaintiff's interest is invaded by an act of the defendants, he has a new cause of action. For that particular invasion he is at once entitled to recover as damages, not only for the injuries he suffers at once, but also for those he will suffer in the future from that particular invasion, including what he has suffered during and will suffer after the trial. *Lawlor v. Loewe,* 235 U. S. 522, 35 S. Ct. 170, 59 L. Ed. 341. But he cannot at once recover for anticipated invasions, even though they are of the same general character as those he has already sustained." *Momand v. Universal Film Exchange,* 43 Fed. Supp. 996, 1006.

A case almost on all fours with the instant case is *Connecticut Importing Co. v. Frankfort Distilleries,* 2 Cir. [1932-1939 TRADE CASES ¶ 55,200], 101 F. 2d 79, which also involved a private antitrust action under the Sherman Act. There the plaintiff, a distributor, alleged a conspiracy between defendants, other distributors and the manufacturer, Frankfort, to maintain fixed prices; its refusal to join the conspiracy; and the consequent refusal by Frankfort to supply plaintiff with Frankfort products. The trial judge restricted damages to those sustained before the action was brought and on appeal the Second Circuit, addressing itself to the precise question before this Court, held,

> "Neither do we find any error on the plaintiff's appeal. The recoverable damages were only those sustained by the plaintiff from the time the cause of action accrued up to the time the suit was brought. *Frey & Son, Inc. v. Cudahy Packing Co.,* D. C. 243 F. 205. Damages which accrue after the suit is brought cannot be recovered in the action unless

[36] 25 C. J. S., Damages, Section 193, p. 908.

they are the result of actions done before the suit was commenced. *Lawlor v. Loewe,* 235 U. S. 522-536, 35 S. Ct. 170, 59 L. Ed. 341. Here the plaintiff's damages, if any, after the commencement of the suit were due to continued refusal or refusals, in furtherance of the consiracy, to supply it with the Frankfort products after that time. The unlawful acts which would give rise to such damages had from their nature to be committed in carrying out the conspiracy after the suit was brought. It would be impossible to predict how long such a conspiracy would remain in existence or how long the refusal to sell to the plaintiff would continue and even if such damages could, in a sense, be treated as the result of refusing to supply before suit was brought, they would be purely speculative." 101 F. 2d at p. 81.

In *Frey & Son v. Cudahy Packing Co., supra,* where the identical question was again in issue, the Court stated:

"In this case the only damage proved by the plaintiff was the loss of profits it would have made on resales of Old Dutch Cleanser, if it had been able to buy Old Dutch Cleanser at the price at which other jobbers could obtain it. Such damage is a damage which occurs from day to day, and the damage on one day is not the necessary result of an act done by the defendant at an earlier date."

Cf. Savannah Theatre Co. v. Lucas & Jenkins, 8 F. R. Serv. 34.12, Case 2 (S. D. Ga. 1944).

The decision cited by appellees, *Twentieth Century-Fox Film Corp. et al. v. Brookside Theatre Corp., supra,* is not contrary. In that case defendants' unlawful practices compelled plaintiff to sell its theatre business to a corporation controlled by the defendants. Among its assets was a fifteen year leasehold interest in the theatre. The court held that the jury could properly consider evidence of the threatre's profits during that period, although they accrued after commencement of the action, as one factor in determining the extent of injuries suffered by plaintiff as the result of the wrongful deprivation of its right to continue business.

The *Brookside* case is illustrative of the very distinction between the past and recurring act situations; that action for the destruction of plaintiff's business is analogous to an ordinary tort claim for a broken arm. In such instances, the causes of the plaintiff's injury have ceased to exist; only the effects remain. Here, though, the plaintiffs' injuries resulted from repetitive causes, the day-to-day implied refusal to sell to them. Both the cause and the effect continued. Yet there always existed the possibility that Flintkote would change its position. Thus, there was no assurance of the continuation of causal acts beyond any particular day.

Appellees assail the limitation of damage rule on its merits, but we find no compelling reasons for discarding so late in the day such a well-established rule. Not only the need for preserving some semblance of certainty in the law, but also the relatively simple procedural method of averting the time limitation pitfall dictates this result.

[*Correct Procedure*]

The proper procedure to be followed in seeking recovery for injuries caused by acts occurring after the filing of the action is to file a separate suit, as was done in *Bordonaro Bros. Theatres v. Paramount Pictures, supra,* or a supplemental action, *Bigelow v. RKO Pictures Inc., supra,* or as the administration of justice dictates upon the remand of the instant case, by a supplemental complaint.

The absence of any acceptable basis for segregating the damage award makes it unnecessary to consider whether the amended complaint, a superseding pleading, could be employed to sustain an award through March 23, 1953. Whether it did or did not would not affect our disposition of this issue.

C. The Covenant Not to Sue, *Vis a Vis* Damages.

On July 31, 1953, after the action was filed but before trial, the plaintiffs executed an agreement denominated "Covenant Not to Sue" with certain named co-conspirators other than Flintkote. By the terms of the agreement the plaintiffs agreed to withdraw their action against the covenantees in exchange for the sum of $20,000.00, expressly reserving therein all rights against defendant Flintkote.

The question presented is whether the $20,000 should be subtracted from the actual damages fixed by the jury verdict ($50,000) before said damages are trebled, or whether the award should first be trebled and then the $20,000 deducted from the trebled amount of $150,000. The former method produces a $90,000 judgment while the

latter method results in a $130,000 judgment, or a difference in dollars and cents of $40,000.00.

The parties stipulated that all facts concerning the amount and effect of said covenant should be withheld from the jury and the question left to the determination of the District judge. He decided that the jury verdict should be trebled and then the aggregate sum diminished by $20,000.

So far as our research reveals, this is a question of first impression for an appellate court.[37] Nevertheless, the resolution of it clearly lies in the application of firmly rooted principles of joint liability and the manifest objectives of the antitrust laws in general and the treble damage provision in particular.

The germane portion of the covenant provides,

> "That the sum of Twenty Thousand Dollars ($20,000) paid herein to the covenantors as consideration for the execution of this covenant not to sue does not represent to covenantors and shall not be construed as full compensation for the alleged damages claimed to have been suffered by the covenantors in their original complaint and in their first amended complaint, but is only *partial compensation* therefore, . . ."

The meaning of the italicized words is at best inconclusive. However, two conclusions can by inference be drawn from the document. First, it was not intended to be a release or to constitute full compensation. Second, the precise import of the treble damage statutory provision on the final settlement cannot be ascertained with scientific accuracy, but it can hardly be doubted that the spectre of potential three-fold liability influenced the negotiations.

The treble damage section reads as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of the United States—and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." 15 U. S. C. A. § 15.

Thus, pursuant to congressional fiat, the jury award is trebled. Here the jury verdict placed the actual damages at $50,000. Superimposing the statutory sanction, the total collective liability for the alleged violation is $150,000.

Flintkote, if a co-conspirator, would be jointly and severally liable under well-settled principles of law for the entire amount if (1) the plaintiffs had successfully prosecuted any or all of the other co-conspirators, or (2) no jurisdiction could be acquired over the other alleged offenders and consequently only Flintkote was sued. Accordingly, the settlement does not impose an additional burden on Flintkote, but rather serves only to militate against its liability. The question is to what extent should it do so?

Irrespective of the nature of the cause of action, a plaintiff is entitled to one full satisfaction of his claim in an action against joint defendants.[38] In the case at bar, as it was tried, partly by jury and partly by the court, and assuming there was no error in the introduction of evidence, such satisfaction would not be achieved by the award of any sum, which added to the settlement sum, did not total $150,000.

We are told that the treble damage provision is a unique statutory penalty, and therefore the pro tanto reduction should be made from the compensatory verdict itself. The non-compensatory share of the award is akin to the award of exemplary or punitive damages. In the case of punitive damages joint tortfeasors are liable for the entire amount, not merely the compensatory part.[39] Further, a niggardly construction of the treble damage provisions would do violence to the clear intent of Congress. The private antitrust action is an important and effective method of combatting unlawful and destructive business practices. The private suitor complements the Government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free

[37] However, another District judge in an unreported case, *Winekler & Smith Citrus Products Co. et al. v. California Fruit Growers Exchange*, decided March 5, 1956, reached the same conclusion as did the court below.

[38] *Davis v. Lawhon*, 186 Ark. 51, 52 S. W. 2d 887.

[39] *Reizenstein v. Clark*, 104 Iowa 287, 73 N. W. 588; *Waggoner v. Wyatt*, 43 Tex. Civ. App. 75, 94 S. W. 1076. See also, *Washington Gas-Light Co. v. Lansden*, 172 U. S. 534, 553, 19 S. Ct. 296, 43 L. Ed. 543.

and competitive economy.[40] Its efficacy should not be weakened by judicial construction.

Moreover, a contrary result would put a premium on litigation and discourage settlements. It is not the policy of the law to encourage litigation at the expense of compromise.

The collective liability for the alleged conspiracy as found at this trial, was $150,000. If no error had been committed, this is the amount which plaintiffs should have received. The plaintiffs having already received $20,000, it was proper to deduct that sum from the trebled amount. Any other method would have resulted in plaintiffs receiving less than the whole to which they were entitled.

D. Attorney's Fees; Below and On Appeal.

The holding that there was prejudicial error in this case, requiring reversal, renders unnecessary a consideration of the arguments advanced concerning the propriety of the amount awarded as attorney's fees, and of the sum requested for legal services performed in connection with this appeal. *Baush Mach. Tool Co. v. Aluminum Co. of America, supra; Paramount Film Distributing Corp. v. Village Theatre,* 10 Cir. [1955 TRADE CASES ¶ 68,239], 228 F. 2d 721.

[*Reversed*]

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views expressed in this opinion.

[Concurring Opinion]

STEPHENS, Circuit Judge, Concurring.

I concur with the opinion insofar as it treats of the subject of damages. I express no opinion as to the rulings upon the objections to the evidence.

[¶ 68,675] The American Hospital and Life Insurance Company v. Federal Trade Commission.

In the United States Court of Appeals for the Fifth Circuit. No. 16132. Dated April 9, 1957.

Petition for Review of an Order of the Federal Trade Commission, sitting at Washington, D. C.

Federal Trade Commission and McCarran-Ferguson Acts

Unfair Practices—False Advertising of Insurance—Jurisdiction of Federal Trade Commission to Regulate Insurance Advertising—McCarran-Ferguson Act.—The Federal Trade Commission did not have jurisdiction to issue a cease and desist order prohibiting a Texas insurance company, which was licensed to do business in several states, from falsely advertising its insurance policies. Each of the states in which the insurance company did business had laws regulating false and deceptive advertising of insurance; therefore, under the McCarran-Ferguson Act, the Federal Trade Commission did not have the power to regulate the advertising of the insurance company. The provisions of the McCarran-Ferguson Act evidence a design on the part of Congress to yield to the states which had undertaken, or which would undertake, to regulate the insurance business in those fields in which the Federal Trade Commission Act and other laws might otherwise have been applicable, with the exception of boycotts, coercion, and intimidation. The Commission's contention that a state does not have and never did have the power adequately to control the advertising practices of out-of-state insurance companies doing business within its boundaries was rejected. If there is an "irreducible area of Commission jurisdiction over the interstate activites of insurance companies which cannot be reached by state law," the matter presented in the instant case is not within it.

See Unfair Practices, Vol. 2, ¶ 5081.362, 5201, 5301.

[40] *Lawlor v. National Screen Service* [1955 TRADE CASES ¶ 68,061], 349 U. S. 322, 329, 75 S. Ct. 865, 99 L. Ed. 1122; *United States v. Borden Co.* [1954 TRADE CASES ¶ 67,754], 347 U. S. 514, 74 S. Ct. 703, 98 L. Ed. 903; *United States v. National City Lines* [1948-1949 TRADE CASES ¶ 62,259], 334 U. S. 573, 68 S. Ct. 1169, 92 L. Ed. 1584; *Karseal Corp. v. Richfield Oil Corp.,* 9 Cir. [1955 TRADE CASES ¶ 68,020], 221 F. 2d 358; *Maltz v. Sax,* 2 Cir. [1940-1943 TRADE CASES ¶ 56,259], 134 F. 2d 2; *Weinberg v. Sinclair Refining Co.,* 48 Fed. Supp. 203.

For the petitioner: J. D. Wheeler, San Antonio, Tex.

For the respondent: Robert B. Dawkins, Assistant General Counsel, Federal Trade Commission, and James B. Truly, Attorney, Federal Trade Commission, Washington, D. C.

Attorneys for *Amicus curiae*: George R. Cross, Associate Counsel, New York, N. Y., for the National Association of Insurance Agents; John S. Hamilton, Jr., Chicago, Ill., for The American Mutual Alliance; Lawrence Pomeroy, New York, N. Y., for the National Association of Insurance Brokers, Inc.; Whitney North Seymour, New York, N. Y., for the Health Insurance Association of America; Hugh B. Cox, Washington, D. C., for the Life Insurance Association of America and the American Life Convention; Edmund G. Brown, Attorney General, and Harold B. Haas, Deputy Attorney General, San Francisco, Cal., for the State of California; John Ben Shepperd, Attorney General, and Will B. Davis, Appellate Assistant, Austin, Texas, for the State of Texas.

A joinder to the Brief of *Amicus Curiae* of The State of Texas was filed by the Attorney General of the following States: New York, Louisiana, Maryland, North Dakota, New Hampshire, New Mexico, Florida, Idaho, Kentucky, Maine, Mississippi, Missouri, Nebraska, Wisconsin, Wyoming, Utah, and Connecticut.

Reversing and setting aside an order of the Federal Trade Commission in Dkt. 6237.

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges.

[*Petitioner's Business—FTC Ruling*]

JONES, Circuit Judge [*In full text*]: The petitioner, the American Hospital and Life Insurance Company, is a corporation of Texas. Its principal or home office is in San Antonio, Texas. It is engaged in the business of writing health and accident insurance. It has been licensed to do business and is doing business in Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma and Tennessee, as well as in the State of Texas. In each of these states the petitioner has agents through whom its business is conducted. Each of the states has statutes forbidding deceptive and misleading advertising. The petitioner employed printed brochures which it sent from its home office to its agents for use in advertising and soliciting business. It did no advertising by newspapers or other periodicals or by radio or television. The Federal Trade Commission issued its complaint against the petitioner charging it with engaging in unfair and deceptive advertising practices in commerce in violation of the Federal Trade Commission Act, 15 U. S. C. A. § 41, *et seq.* The petitioner asserted that its advertising was not false, misleading or deceptive. It also contended that the Commission was without jurisdiction because of the McCarran Act. After a hearing the Examiner of the Commission, in an initial decision, held that the charges concerning the petitioner's advertising had not been sustained. The Examiner also held that the Commission was without jurisdiction, except as to petitioner's transactions in Mississippi where, at the time of the hearing, there was no adequate law regulating false and deceptive acts and practices. The Commission, on appeal, set aside the initial decision of the Examiner by a three to two decision. It determined that in passing the McCarran Act the Congress did not, and did not intend to, deprive the Commission of the power to regulate and control the interstate activities of insurance companies. It found the advertising brochures which had been sent from Texas to the other states were false and deceptive. It entered a Cease and Desist Order which is before us for review. In the opinion of the majority of the Commission, it was said that "there must remain an irreducible area of Commission jurisdiction over the interstate activities of insurance companies which cannot be reached by state law."

[*South-Eastern Underwriters Case*]

In the *South-Eastern Underwriters* case,[1] of which more will be hereafter said, Mr. Justice Black, in the majority opinion, observed that "Perhaps no modern commercial enterprise directly affects so many people as does the insurance business". Although it has not been classed as a public utility charged with the duty of serving all who

[1] *United States v. South-Eastern Underwriters Association* [1944-1945 TRADE CASES ¶ 57,253], 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440.

may apply,[2] the business of insurance has been more generally regulated than any other sphere of business activities not a public utility.[3] It was determined in 1868 that the insurance business did not constitute transactions in commerce,[4] and this doctrine was adhered to in many subsequent decisions.[5] In 1944 came the *South-Eastern* case, *supra,* where, in a four to three decision, with two justices of the court not participating, it was held generally that insurance businesses are engaged in "commerce among the several states", and specifically that the Sherman Anti-Trust Act[6] applied to insurance activities. Mr. Chief Justice Stone, in his dissenting opinion, said that the action of the majority in overturning the precedents of the seventy-five years "cannot fail to be the occasion for loosing a flood of litigation and of legislation, state and national, in order to establish a new boundary between state and national power raising questions which cannot be answered for years to come * * *".[7] The litigation has not yet reached the flood stage and the McCarran-Ferguson Act,[8] sometimes referred to as Public Law 15, and more often merely as the McCarran Act, has been the only national legislation of consequence resulting from the decision. This act was proposed by Senators McCarran and Ferguson and on March 9, 1945, it was signed by the President and became a law. The enactment is brief and many of its provisions are here pertinent.[9]

[*McCarran Act*]

The purpose and effect of the McCarran Act has been stated by the Supreme Court, it saying:

> "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other

[2] *National Union Fire Insurance Co. v. Dickinson,* 128 Ark. 367, 194 S. W. 254.

[3] For a statement of the reasons for and history of the regulation of insurance see 1 Richards on Insurance, 5th Ed. 136, *et seq.*

[4] *Paul v. Virginia,* 8 Wall. (U. S.) 168, 19 L. Ed. 357.

[5] These were reviewed by the Supreme Court in 1913, where it was said of the prior decisions "they constitute a formidable body of authority and strongly invoke the sanction of the rule of *stare decisis.*" *New York Life Insurance Co. v. Deer Lodge County,* 231 U. S. 495, 34 S. Ct. 167, 58 L. Ed. 332.

[6] 15 U. S. C. A. § 1 *et seq.*

[7] 322 U. S. 583.

[8] 59 Stat. 33, 15 U. S. C. A. §§ 1011-1015.

[9] An act to express the intent of the Congress with reference to the regulation of the business of insurance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That: The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1941, as amended, known as the Clayton Act, and the act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

Sec. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects.

"Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations." *Prudential Insurance Co. v. Benjamin,* 328 U. S. 408, 66 S. Ct. 1142, 90 L. Ed. 1342. See *North Little Rock Transp. Co. v. Casualty Reciprocal Exchange,* 8th Cir. 1950, 181 F. 2d 174; *American Universal Ins. Co. v. Sterling,* 3rd Cir. 1952, 203 F. 2d 159.

By the Act it was provided not only that the business of insurance should be subjected to regulation by the States, but that until June 30, 1948,[10] the Sherman Act, the Clayton Act and the Robinson-Patman Act should not apply to the business of insurance, and after that date the Sherman and Clayton Acts and the Federal Trade Commission Act should apply to such business to the extent it is not regulated by State law. It is also provided that nothing contained in the Act shall render the Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation. Then too it was provided that the Act should not affect the application of the National Labor Relations Act, the Fair Labor Standards Act or the Merchant Marine Act to the business of insurance. These provisions evidence a design on the part of Congress to yield to the States which had undertaken, or which would undertake, to regulate the insurance business in those fields in which the Sherman Act might otherwise have been applicable, with the exception of boycotts, coercion and intimidation. Such was the intent of the Congress. Senator McCarran, in response to the query of a colleague, said:

"The Senator will recall the *Southeastern Underwriters* case. The decision was startling. It created consternation in the insurance business because by previous decisions rendered during the past 50 years or more we were entitled to believe that the business of insurance was not to be classified as interstate commerce. The Supreme Court of the United States specifically, directly, and emphatically put it into the category of interstate commerce. It put it squarely under the Sherman Act, the Clayton Act, and other Acts. The pending bill is for the purpose of creating a moratorium for 3 years in order that the business of insurance shall not be interfered with by any Federal power under either the Clayton Act or the Sherman Act. So during the period of moratorium the various states themselves may take steps to regulate the business of insurance."

Senator McCarran again said:

"The moratorium would not be continued; but if in the meantime the states themselves had regulated the business of insurance, the Sherman and Clayton Acts and the other Acts would not be effective."

[*FTC Lacks Jurisdiction*]

The Commission urges that a state does not have and never did have the power adequately to control the advertising practices of out-of-state insurance companies doing business within its boundaries. The Congress, seemingly, had no doubt that a state might exercise such power and we have none. The Supreme Court, we think, has expressed the same view in holding, with respect to another phase of state insurance regulation,

"These regulations can not be attacked merely because they affect business activities which are carried on outside the state. Of necessity, any regulations affecting the solvency of those doing an insurance business in a state must have some effect on business practices of the same company outside the state. Nothing in the Constitution requires a state to nullify its own protective standards because an enterprise regulated has its headquarters elsewhere. The power New York may exercise to regulate domestic insurance associations may be applied to foreign associations which New York permits to conduct the same kind of business." *Hoopeston Canning Co. v. Cullen,* 318 U. S. 313, 63 S. Ct. 602, 87 L. Ed. 777.

[10] The moratorium, intended to permit the States to enact regulatory measures if the laws were inadequate for the purpose, was extended from January 1, 1948, to June 30, 1948, by Act July 25, 1947, c. 326, 61 Stat. 448.

If there is an "irreducible area" of Commission jurisdiction, we are of the firm conviction that the matter presented by the record before us is not within it.

The Commission relied heavily upon *United States v. Sylvanus* [11] in support of its jurisdiction. An indictment was returned, in the *Sylvanus* case, for use of the mails to defraud in the sale of insurance by mail. The McCarran Act was held to be no bar to prosecution. A fraudulent scheme carried on by use of the mails would violate the mail fraud acts even though the mails never crossed a state boundary.[12] The doctrine of the case, with the decision of which we have no disagreement, is of no bearing on the problem before us here. A violation of the postal laws does not of itself confer jurisdiction on the Federal Trade Commission.

The Commission's Examiner found that each of the States in which the petitioner did business, except Mississippi, had enacted laws for the regulation of false and deceptive advertising. Mississippi enacted such a law while the matter was pending before the Commission. This is not controverted. The Examiner found that the petitioner's advertising matter was not false, misleading or deceptive. Holding, as we do, that the Commission was without jurisdiction, we do not reach the merits.

[*Order Set Aside*]

The order of the Commission is set aside and reversed.

[¶ 68,676] Federal Trade Commission v. William T. Reed, President, Reed Candy Company.

In the United States Court of Appeals for the Seventh Circuit. September Term 1956, April Session 1957. No. 11839. Dated April 11, 1957.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. HOFFMAN, District Judge.

Clayton and Federal Trade Commission Acts

Federal Trade Commission Enforcement and Procedure—Access to Documentary Evidence—Subpoena *Duces Tecum*—Power To Issue Subpoena in Clayton Act Proceedings.—The Federal Trade Commission may properly use the subpoena power granted to it by Section 9 of the Federal Trade Commission Act in proceedings before the Commission based upon alleged violations of the Clayton Act, as amended by the Robinson-Patman Act. The court agreed with the decision in *Menzies v. Federal Trade Commission,* 1957 TRADE CASES ¶ 68,648, in which the Court of Appeals for the Fourth Circuit held that the history, purpose, and decisional law concerning the Clayton and Federal Trade Commission acts demonstrate that they are in *pari materia*—to be read and construed as one in such manner as to best effectuate the purpose of Congress in enacting them.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8741, 8801.870.

For the appellant: David A. Canel, Chicago, Ill.

For the appellee: Robert B. Dawkins and John T. Loughlin, Washington, D. C.

Affirming an order of the U. S. District Court, Northern District of Illinois, Eastern Division, 1956 Trade Cases ¶ 68,551, enforcing a Federal Trade Commission subpoena in Dkt. 6461.

Before DUFFY, Chief Judge, LINDLEY and SWAIM, Circuit Judges.

[*FTC Subpoena Power*]

SWAIM, Circuit Judge [*In full text*]*:* This appeal questions the power of the Federal Trade Commission to issue subpoenas *duces tecum* in proceedings before the Commission on a complaint charging violation of the Clayton Act, as amended.

[11] 7th Cir. 1951, 192 F. 2d 96.

[12] See *New York Life Insurance Co. v. Deer Lodge County, supra.*

[*Clayton Act Proceeding*]

On November 21, 1955, the Federal Trade Commission ("F. T. C.") issued a complaint charging the Reed Candy Company with violation of Section 2(d) of the Clayton Act, as amended. 49 Stat. 1526, 15 U. S. C. A. § 13(d). The proceeding was duly assigned to an examiner of the F. T. C. for hearing and initial decision. The examiner, on February 20, 1956, caused a subpoena *duces tecum* to be served on William T. Reed, as President of the Reed Candy Company, directing him to appear and testify before the F. T. C. and to produce certain documentary evidence described in the subpoena. Reed's motion to quash the subpoena was denied by the examiner and on appeal to the F. T. C. the examiner's ruling was affirmed. On April 4, 1956, another subpoena was issued which was identical in all respects with the first except that the date for the hearing was set for April 11, 1956. Reed did not appear at the April 11 hearing, but his counsel was present and he explained that Reed's refusal to obey the subpoena was upon the advice of counsel that the F. T. C. lacked subpoena power in proceedings under the Clayton Act.

[*Order of Compliance*]

On May 7, 1956, the F. T. C. filed an application in the United States District Court for the Northern District of Illinois, Eastern Division, for an order requiring Reed to comply with the subpoena. The District Court ordered Reed to appear and show cause why the application should not be granted. After answer to the application of the F. T. C. and a hearing on the matter the District Court, on June 12, 1956, entered an order directing compliance by Reed with the subpoena. From that order Reed has taken this appeal.

[*Contentions*]

The arguments of the parties may be briefly summarized as follows: Reed contends that the Clayton Act, 38 Stat. 730, as amended, 15 U. S. C. A. §§ 12-27, prescribes a self-contained procedure for the enforcement of its provisions and does not contain a substantive grant of subpoena power. The F. T. C. contends that the subpoena and investigational powers granted it by the Federal Trade Commission Act, 38 Stat. 717, as amended, 15 U. S. C. A. §§ 41-46 and 47-58, may properly be used in the discharge of the F. T. C.'s duties under the Clayton Act, as amended. This question has recently been the subject of decision in the district courts. *Federal Trade Commission v. Menzies,* D. C. Md. [1956 TRADE CASES ¶ 68,478], 145 F. Supp. 164 (holding for the F. T. C.); and *Federal Trade Commission v. Rubin,* S. D. N. Y. [1956 TRADE CASES ¶ 68,505], 145 F. Supp. 171 (holding against the F. T. C.).

[*Menzies Decision*]

During the pendency of this appeal the *Menzies* decision has been reviewed and affirmed by the Court of Appeals for the Fourth Circuit, per Judge John J. Parker, *Menzies v. Federal Trade Commission* (No. 7352, decided March 7, 1957) [1957 TRADE CASES ¶ 68,648], — F. 2d —. We agree with the Fourth Circuit that the history, purpose and decisional law concerning the Clayton and Federal Trade Commission Acts demonstrates that they are in *pari materia*—to be read and construed as one in such manner as to best effectuate the purpose of Congress in enacting them. We hold that the F. T. C. may properly use the subpoena power granted it by Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. A. § 49, in proceedings before the F. T. C. on a complaint charging violation of the Clayton Act, as amended.[1] Even if the question were more doubtful than we think, we should be hesitant to reject the conclusion of the F. T. C. fortified as it is by years of administrative practice, consistent and generally unchallenged.

[*Affirmed*]

The order of the District Court is affirmed.

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[1] On April 2, 1957, the Court of Appeals for the Second Circuit sustained the power of the F. T. C. to subpoena documents pursuant to Section 9 of the Federal Trade Commission Act in a proceeding before the F. T. C. on a complaint charging violation of Section 7 of the Clayton Act. *Federal Trade Commission v. W. W. Tuttle, Resident Manager, Ernst & Ernst* (No. 24325) [1957 TRADE CASES ¶ 68,669], — F. 2d —.

[¶ 68,677] **United States v. J. Myer Schine, et al.**

In the United States District Court for the Western District of New York. Criminal No. 6279-C. Dated February 28, 1957. Filed March 4, 1957.

Case No. 1186 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

O. Henderson, United States Attorney.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Consent Decree—Violation of Decree—Criminal Contempt.—Supplemental findings of fact are entered in an action in which individuals and corporations were found to be guilty of criminal contempt by reason of their wilful disobedience of a consent decree, *U. S. v. Schine, et al.*, 1956 TRADE CASES ¶ 68,580.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.575, 8401.31, 8421.

For the petitioner: Joseph E. McDowell, Attorney, Department of Justice, and John

For the respondents: Raichle, Tucker and Moore (Frank G. Raichle and David C. Diefendorf, of counsel), Buffalo, N. Y.

Supplementing findings of fact of the U. S. District Court, Western District of New York, 1956 Trade Cases ¶ 68,580. For related judgments and opinions, see 1954 Trade Cases ¶ 67,902, 67,844-67,850; 1952-1953 Trade Cases ¶ 67,237; 1948-1949 Trade Cases ¶ 62,447, 62,245; 1946-1947 Trade Cases ¶ 57,518, 57,478; and 1944-1945 Trade Cases ¶ 57,413, 57,310, 57,309.

Supplemental Findings of Fact

HAROLD P. BURKE, District Judge [*In full text*]: In addition to the Findings of Fact heretofore made herein, I make the following Supplemental Findings of Fact:

41. In September, 1949 the respondents sent out a form letter to, among others, the firm of Berk and Krumgold, theatre brokers in New York City, which letter listed theatre properties offered for sale. Berk and Krumgold was a real estate brokerage firm specializing in the sale of motion picture theatres throughout the states of New York, New Jersey, Pennsylvania, Delaware, Maryland, Illinois, Ohio, the District of Columbia and New England.

42. After the receipt of that letter, David Berk, of the firm of Berk and Krumgold, had a conversation with J. Myer Schine at the Waldorf-Astoria Hotel in New York, particularly about the Palace Theatre in Watertown, New York. Berk had a prospect who was interested in buying the building in which the Palace Theatre was located and in leasing the theatre. In that conversation they talked in a general way about the other theatres which had been listed for sale in the form letter.

43. In November, 1949 Berk and Krumgold succeeded in selling the building in which the Palace Theatre was located and the leasehold interest of the Palace Theatre, and was paid a commission.

44. There were several conversations between November 1949 and March 10, 1954 between J. Myer Schine and David Berk on the subject of whether Berk and Krumgold had any prospects for the sale or lease of other theatres listed. Meanwhile Berk and Krumgold were also trying to interest J. Myer Schine in the purchase of theatres. Berk and Krumgold did not sell or lease any of the other theatres which had been listed for sale.

[¶ 68,678] **Sunbeam Corporation v. John W. Richardson, Joe B. Richardson, John W. Richardson, III, Charles Robert Richardson, partners, d/b/a Richardson Hardware Company and Barren County Hardware Company.**

In the United States Court of Appeals for the Sixth Circuit. No. 12980. Filed April 11, 1957.

Appeal from the United States District Court, Western District of Kentucky, Bowling Green Division. SWINFORD, District Judge.

Kentucky Fair Trade Act and McGuire Act

Fair Trade—Constitutionality of Kentucky Fair Trade Act and McGuire Act—Nonsigner Provisions—United States and Kentucky Constitutions.—The Kentucky Fair Trade Act and the McGuire Act, as applied to a nonsigner of a fair trade contract, are valid under the United States Constitution. Therefore, a Federal District Court ruling that the acts are unconstitutional as applied to nonsigners was reversed. Also, the District Court's ruling that the Kentucky Fair Trade Act, as applied to nonsigners, is invalid under the Kentucky Constitution was reversed since the issue as to the constitutionality of the act under the Kentucky Constitution was pending in the Kentucky Court of Appeals. Comity and a regard for the consideration of the court of last resort in Kentucky require that the determination of the constitutionality of the Kentucky Fair Trade Act under the State Constitution be held in abeyance until the issue has been determined by the Kentucky Court of Appeals.

See Fair Trade, Vol. 1, ¶ 3040.20, 3085, 3258.19, 3410.

For the appellant: Thomas M. Scanlon, Indianapolis, Ind.; and Carroll M. Redford, Glasgow, Ky.; Barnes, Hickam, Pantzer & Boyd, Indianapolis, Ind., by Thomas M. Scanlon and Raymond W. Gray, Jr.; and Finn & Van Mell, Chicago, Ill., on brief.

For the appellees: Robert M. Coleman, Bowling Green, Ky., and Richard L. Garnett, Glasgow, Ky.

Reversing a decision of the U. S. District Court, Western District of Kentucky, Bowling Green Division, 1956 Trade Cases ¶ 68,407.

Before MARTIN, MCALLISTER and STEWART, Circuit Judges.

[*Fair Trade Action*]

PER CURIAM [*In full text*]*:* Sunbeam Corporation, an Illinois corporation, filed a complaint in the district court in Kentucky to enjoin appellees from selling trademarked electrical appliances manufactured by Sunbeam, at less than certain prices. Sunbeam sold such products in interstate commerce and maintained so-called fair trade contracts with its dealers in Kentucky. Fair trade contracts are methods by which wholesale and retail resale prices are maintained by the manufacturer of a trademarked product in free and open competition with other brands. Appellees had no dealers' contract, fair trade contract, or any contractual relations with Sunbeam; but they had knowledge of the fair trade contracts between Sunbeam and its dealers, and sold the trademarked appliances at less than fair trade prices.

[*Kentucky Fair Trade and McGuire Act*]

The Kentucky Fair Trade Act provides that resale prices of trademarked commodities may be regulated by contract, and that violation of a contract by one who offers the commodity at less than the agreed resale prices, is unfair competition and actionable, whether the party so selling the commodity is a party to the agreement or not, if such sale is wilfully and knowingly made. Kentucky Revised Statutes 365.080, 365.090. The McGuire Act of 1952, Title 15 U. S. C. A. Section 45(a) provides that contracts prescribing minimum or stipulated prices for the resale of a trademarked commodity shall be exempted from the operation of the Federal Anti-Trust Laws, and that nothing in the Anti-Trust Laws shall render unlawful the exercise of enforcement of any right or right of action created by any State, which provides that wilfully and knowingly selling any commodity at less than the price prescribed in such contracts, is unfair competition and actionable at the suit of any party damaged or injured thereby.

[*Trial Court Ruling*]

The district court dismissed appellant's complaint on the ground that appellee had signed no agreements with Sunbeam to maintain fair trade prices; that the Kentucky Fair Trade Act was unconstitutional under the Constitution of the State of Kentucky; and that the McGuire Act was unconstitutional under the Constitution of the United States.

[*Constitutionality of McGuire Act*]

In *Old Dearborn Distributing Co. v. Seagram Distillers Corp.* [1932-1939 TRADE CASES ¶ 55,141], 299 U. S. 183, an Illinois fair trade statute was attacked on the ground

that it violated the due process and equal protection clauses of the Fourteenth Amendment and was an unconstitutional delegation of legislative power to private persons. The state statute provided that noncontracting parties, who had knowledge of a fair trade contract to sell at no less than the minimum resale price stipulated in the contract, were bound in the same manner as though they had executed such a contract, and that their resale at less than such a price was actionable. The Court held that the Illinois Statute did not violate the Federal Constitution.

As to the applicability of state fair trade laws to interstate commerce, Congress, in 1937, enacted the Miller-Tydings Amendment to the Sherman Act, which provided that fair trade contracts, which had been lawful within the state, would, in the future, be lawful in interstate commerce. However, in 1951 the Supreme Court construed the Miller-Tydings Act, and held that the terms thereof did not exempt nonsigners of such contracts from the operation of the Sherman Act. *Schwegmann Bros. v. Calvert Distillers Corp.* [1950-1951 Trade Cases ¶ 62,823], 341 U. S. 384. Almost immediately thereafter, Congress passed the McGuire Act providing that nothing in the anti-trust laws would render the nonsigners provisions of state fair trade acts unlawful when applied in interstate commerce. Since then, the constitutionality of the McGuire Act has been upheld in *Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co.* [1953 Trade Cases ¶ 67,516], 205 F. 2d 788 (C. A. 5), cert. denied, 346 U. S. 856. See also *S. Klein on the Square, Inc. v. Lionel Corp.* [1954 Trade Cases ¶ 67,878], 348 U. S. 860 and *Masters v. General Electric Co.* [1954 Trade Cases ¶ 67,907], 348 U. S. 892, dismissing appeals for want of a substantial federal question in cases from state courts holding constitutional fair trade acts, similar to that in the instant case.

In *United States v. McKesson & Robbins* [1956 Trade Cases ¶ 68,368], 351 U. S. 305, 316, in a case involving the McGuire Act, the court stated that it was not only bound by the limitations marked by Congress, beyond which price fixing may not go, but was also bound to construe such limitations strictly, since resale price maintenance is a privilege restrictive of a free market. The foregoing is certainly persuasive that the Supreme Court views the McGuire Act as not invalid on constitutional grounds. Because of this strong implication, and because of the cases above cited, we are of the view that the district court erred in holding the McGuire Act unconstitutional.

[*Constitutionality of Kentucky Act*]

We come then to the determination of the district court that the Kentucky Fair Trade Act violated the Constitution of Kentucky. This question has not yet been passed upon by the Kentucky Court of Appeals, but a case is there pending on that issue, on appeal from the Circuit Court of Jefferson County. In *Walker et al. v. Felmont Oil et al.,* — F. 2d — (C. A. 6), (decided February 12, 1957), this court noted that

> "Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of lower federal courts. . . . The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. . . . There is no direct ruling by the Kentucky Court of Appeals on this question. No matter how seasoned the judgment of the District Judge may be, it cannot escape being a forecast rather than a determination. . . . Uniformity throughout the state with respect to this important question of property rights is not promoted by the exercise of federal jurisdiction in this case."

Under the circumstances of the instant case, we are of the view that comity and a regard for the consideration of the court of last resort in Kentucky require that the determination of the constitutionality of the State Fair Trade Act under the State Constitution be held in abeyance until the issue has been determined by the Kentucky Court of Appeals. The Circuit Court of Jefferson County, in the case above mentioned, although holding that the Kentucky Fair Trade Act violated the Constitution of Kentucky, nevertheless, upon the petition of the appellant in that case, continued the status of the case pending the determination of the appeal, upon the execution of a bond by the appellant therein to secure the rights of the party prevailing in the Circuit Court. Consonant with this determination, the judgment of the district court is reversed upon the Federal constitutional issue, and the case remanded to the district court, with instructions to stay further pro-

ceedings in the instant case, pending a determination of the validity of the State Fair Trade Act under the State Constitution by the Kentucky Court of Appeals, on such terms as the court may deem proper.

[¶ 68,679] United States v. Socony Mobil Oil Company, Inc.

In the United States District Court for the District of Massachusetts. Criminal Action Nos. 56-152-S through 56-156-S. Dated March 20, 1957.

Case Nos. 1289-1293 in the Antitrust Division of the Department of Justice.

Massachusetts Fair Trade Act, McGuire Act, and Sherman Antitrust Act

Resale Price Fixing and Fair Trade—Resale Price Fixing Practices—Absence of Formal Fair Trade Contracts—Validity Under McGuire Act and Massachusetts Fair Trade Act.—An oil company did not violate the Sherman Antitrust Act by agreeing to give service station dealers a rebate if they would sell its gasoline at specified prices, or by entering into agreements under which service station dealers were charged with the duty of meeting competition of a competing dealer. The purpose of the oil company was to have its gasoline sold at a price that would meet competition of dealers in other brands of gasoline. The Government's contention that the McGuire Act did not exempt the company's agreements from the prohibitions of the Sherman Act because the company did not enter into fair trade agreements with its dealers was rejected. There is nothing in the McGuire Act which limits its exemptions to fair trade agreements. Furthermore, the oil company's agreements were lawful under Massachusetts common law. The Massachusetts Fair Trade Act is, in effect, a statutory recognition of a long established public policy and common law principle that a producer of a trade-marked article may establish resale prices. The company's agreements were within the scope of the McGuire Act because the contracts provided for the sale of a commodity at a stipulated price, the container of the commodity bore the company's trade-mark, and the company's gasoline was in fair and open competition.

See Fair Trade, Vol. 1, ¶ 3015.20, 3040, 3055, 3130, 3130.80.

Resale Price Fixing and Fair Trade—Commodities Which May Be Fair Traded Under McGuire Act—Gasoline Sold Through Trade-Marked Pumps.—The contention that gasoline stored in a tank, which is buried underground at a service station and from which a pipe conveys the stored gasoline to a pump which has a label designating the brand or name of the producer, is not a container bearing a trade-mark within the meaning of the McGuire Act was rejected. A tank which provides a continuous flow of gasoline to a pump, which bears the label of the producer, is a container within the meaning of the McGuire Act.

See Fair Trade, Vol. 1, ¶ 3150.80.

For the plaintiff: Stanley N. Barnes, Assistant Attorney General; Anthony Julian, United States Attorney; and Worth Rowley, Richard B. O'Donnell, John J. Galgay, Ralph S. Goodman, and Philip Bloom.

For the defendant: John L. Hall and Conrad W. Oberdorfer, Boston, Mass.

Opinion

[*Indictments*]

SWEENEY, Chief Judge [*In full text*]: There are before me five indictments which charge the defendant with violation of the Sherman Act, 15 U. S. C. § 1, which is entitled "An act to protect trade and commerce against unlawful restraints and monopolies." In the various indictments it is alleged that the defendant through devious devices such as discounts, rebates, and abatement of rents to the dealers who traded in its product fixed the price of retail gasoline that was to be sold by the dealers to the public and still allowed the dealer a fair margin of profit. As a typical example, the defendant agreed with one Cail who was referred to in the 6th count of indictment 56-154 to allow him a rebate of 3.7¢ per

gallon provided that he would sell his regular gasoline at 22.9¢ a gallon and his special gasoline for 25.9¢ per gallon. Whether the inducement was in the form of a rebate or a reduction in the purchasing price or an abatement of rent on property owned by the defendant and leased by the dealer is inconsequential for they were all inducements to persuade the dealer to sell his gasoline at a price that would meet the competition of dealers in other brands of gasoline. Right here it is important to note the government's argument that the arrangement was made possible and flowed from the maintenance of a tank wagon price by the defendant which was high, arbitrary, and non-competitive. The maintenance of a high tank wagon price may have been the result of the action on the part of the defendant and its dealers, but it could hardly be called a basis for the arrangements referred to. It was the apparent and real purpose of the defendant who was the wholesaler of the gasoline to allow its gasoline to be sold in a market where it could meet the competition of dealers in other brands of gasoline. Indictment 56-156 alleges an agreement between the defendant and two dealers, Frederick Abaid and Anthony Inglese, under which the dealers were charged with the duty, not of maintaining their retail price at a particular mathematical level, but rather to meet the competition of a competing retailer, known as Bell's Service Station.

[*McGuire Act*]

The defendant insists that the operations of the defendant are taken out of the Sherman Act, *supra,* by reason of the McGuire Act, 15 U. S. C. § 45, which provides in substance that "any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others" shall not be unlawful under the Antitrust Acts "when contracts or agreements of that description are lawful as applied to intra-state transactions under any statute, law, or public policy" in effect in the state involved. The government contends that gasoline stored in a tank, which is buried underground at the filling station and from which a pipe conveys the stored gasoline to a pump which has a label designating the brand or name of the producer or distributor, is not a container bearing a trademark within the meaning of the McGuire Act. In short it alleges that the tank which contains the gasoline prior to being pumped is not a container. I cannot follow this reasoning and find as a matter of fact and law that such a tank which provides a continuous flow of gasoline to the pump when needed where the pump bears the label of the producer or distributor is a container within the meaning of the McGuire Act.

[*Necessity of Fair Trade Contract*]

The next argument advanced by the government is that the McGuire Act refers only to "fair trade" contracts and that as the defendant, during the major portion of the time charged in the indictment, was not subject to fair trade agreements, it was outside the terms of the McGuire Act. This defendant had fair trade agreements with its dealers early in 1940 for a period of about 16 weeks after the passage of the Massachusetts statute of May 19, 1939, Mass. General Laws (Ter. Ed.), Chapter 93, § 14A, which included the vending equipment clause specifically, in what was felt to be a necessary amendment to cover gasoline pumps. At the end of 16 weeks of fair trading in 1940, the defendant ceased fair trading and did not resume it until August 8, 1956, which was some five or six weeks after these indictments were returned. I can find nothing in the McGuire Act which limits its exemptions to fair trade agreements. Had Congress intended to so limit this Act, it certainly could have used simple and appropriate words to indicate its intent. The language of the Act is clear of ambiguities, and I see no reason for referring to Congressional debates or expressions of intents or understandings on the part of individuals, prior to the adoption of the Act.

Conforming the facts in this case to the McGuire Act, I find that the indictments allege contracts for the sale of commodities at a stipulated price and that the container of the commodity bore the trademark of the producer and that the defendant's gasoline was in fair and open competition

with commodities of the same general class. The court takes judicial notice of this latter fact.

[*Massachusetts Law*]

The only question remaining to be determined is the effect of Massachusetts law upon such agreements. The Supreme Judicial Court of Massachusetts has consistently held that a wholesaler or distributor had an absolute right to dictate the terms of resale. In *Garst v. Harris,* 177 Mass. 72, decided in 1900, the court allowed a recovery for breach of the retailer's agreement not to sell below the price stipulated by the distributor. This doctrine was reaffirmed, *Garst v. Hall and Lyon Co.,* 179 Mass. 588, in 1901, although relief in that case was denied because it was against a third party and "fair trade" legislation which was needed for such recovery was not available. The most recent case which has reaffirmed a long series of cases involving the point is *General Electric Co. v. Kimball Jewelers, Inc.* [1956 TRADE CASES ¶ 68,291], 1956 Mass. A. S. 305. The court in upholding the Massachusetts Fair Trade Law held that "The producer of a trade marked article which is of a class in open competition may fix the price at which the retailer may sell," citing *Garst v. Harris, supra, Garst v. Charles,* 187 Mass. 144, *Associated Perfumers, Inc. v. Andelman* [1944-1945 TRADE CASES ¶ 57,248], 316 Mass. 176.

Mass. General Laws (Ter. Ed.) chapter 93, § 14A, states as follows:

> "No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, or the vending equipment from which said commodity is sold to consumers bears, the trademark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the commonwealth by reason of any of the following provisions which may be contained in such contract:
>
> ". . . That the buyer will not resell such commodity except at the price stipulated by the vendor. . ."

This enactment is, in effect, a statutory recognition of a long established public policy and common law principle on the part of the Commonwealth.

[*Indictments Dismissed*]

On the basis of the above findings, I rule as a matter of law that the indictments herein do not charge an offense under the Sherman Act, and the indictments, therefore, are to be dismissed.

[¶ 68,680] Massey-Harris-Ferguson, Limited v. Hon. Marion Speed Boyd, United States District Judge for the Western District of Tennessee.

In the United States Court of Appeals for the Sixth Circuit. No. 13121. Filed April 12, 1957.

Petition for Writ of Mandamus or Prohibition or Other Appropriate Writ.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Where Suit May Be Brought—Proper Judicial District—Denial of Motion To Quash Service of Process—Review—Petition for Writ of Mandamus.—A petition requesting a United States Court of Appeals to issue a writ of mandamus or other appropriate writ directing a United States District Judge to vacate his order overruling the petitioner's motion to quash the purported service of process on it was denied. The ruling was not a final order, but interlocutory in nature, and, therefore, it was not appealable. The rule against piecemeal appeals is not to be circumvented by resort to mandamus or prohibition, and the instant case does not involve such unusual circumstances as to warrant the use of such a writ. The question of whether or not the District Court had jurisdiction over the petitioner was difficult and the ruling doubtful, both as a matter of fact and in point of law.

See Private Enforcement and Procedure, Vol. 2, ¶ 9015.12.

For the petitioner: Cahill, Gordon, Reindel & Ohl, by John F. Sonnett and Kenneth D. Wallace, New York, N. Y.; and Canada, Russell, Turner & Alexander, by Cooper Turner, Jr., and Thomas R. Price, Memphis, Tenn.

For the movants: Lowell W. Taylor and William A. Percy, Memphis, Tenn., for Southland Tractors, Inc. and Farm Tractors, Inc.

Before: ALLEN, MILLER, and STEWART, Circuit Judges.

[*Parties*]

MILLER, Circuit Judge [*In full text*]: Petitioner, Massey-Harris-Ferguson, Limited, a Canadian corporation with its principal office in Toronto, Ontario, Canada, has filed in this court its Petition for Writ of Mandamus or Prohibition or Other Appropriate Writ against Hon. Marion Speed Boyd, United States District Judge for the Western District of Tennessee, pursuant to Section 1651(a), Title 28, U. S. Code. The petition prays that this court issue an appropriate writ directing Respondent to vacate and set aside the order entered by him on January 4, 1957 in Action No. 2969, U. S. District Court for the Western District of Tennessee, in which Southland Tractors, Inc., and Farm Tractors, Inc., are plaintiffs, and the Petitioner, herein referred to as the Canadian Corporation, together with Massey-Harris-Ferguson, Inc., a corporation organized under the laws of Maryland, and a wholly-owned subsidiary of the Petitioner, herein referred to as the American Company, are named defendants.

[*Cause of Action—Service of Process*]

In the District Court action, the plaintiffs claim to have been damaged in amounts exceeding $2,500,000 and $3,150,000, respectively, by reason of violations by the defendants of the provisions of the Sherman Anti-Trust Act, Sections 1-33, Title 15, U. S. Code, for which alleged wrongs they claim triple damages. No question is raised about jurisdiction over the American Company. Process against the Canadian Corporation was served in Memphis upon an Assistant Branch Manager of the Memphis Branch of the American Company, and in Detroit, Michigan, upon Herman Klem, who was an officer of both the American Company and the Canadian Corporation. The Canadian Corporation appeared specially and moved to quash the purported service upon it upon the grounds that it was not an inhabitant of or transacting business in the Western District of Tennessee and was not either actually or legally present or found in the Western District of Tennessee, and accordingly was not subject to suit in said District. The motion was supported by affidavits of officers and agents of the two companies stating the separate corporate existence of the two companies, that the Canadian Corporation was not qualified to do business in Tennessee and had never maintained any office or place of business in the Western District of Tennessee, that it had never done any advertising, solicited any business, made any sales, or appointed anyone as its agent in the Western District of Tennessee, that it had never made any sales to the plaintiffs, and that the American Company had never acted as the agent for the Canadian Corporation but had in all its dealings with the plaintiffs acted solely in its own name and for its own account. The plaintiffs filed a verified response to the motion to quash which denied the allegation of the Canadian Corporation that it was not transacting business in the Western District of Tennessee, and stated that the Canadian Corporation had, since long prior to August 1953, carried on a tremendous business in the Western District of Tennessee through its own instrumentalities and agencies, and that the American Company was organized as an outlet for the sale in the United States of products manufactured by the Canadian Corporation and has at all times since its organization been an instrumentality and agency for the Canadian Corporation. Several hundred pages of depositions, which included numerous exhibits, were taken on the issue involved, which evidence has been forwarded to this Court for its consideration.

[*Trial Court Ruling*]

The District Judge made the following findings of fact:

"The American company maintains a district office at Memphis with a manager, and assistant manager, and certain other personnel. This office is the distributor for farm machinery manufactured by both the American company and the Canadian company. It appears that merchandise of the approximate value of three million dollars yearly was shipped into Memphis from the Canadian concern, and that this accounts for between sixty and seventy-five percent of the business done by the local office. The Canadian company, incidentally, claims that all of these sales are the result of contracts between it and the American company. However,

the correspondence in the record reveals that the American company was mainly the sales outlet in the United States for the Canadian concern. There are (interlocking) officers and directors as between the two. Annual statements of the Canadian company shows the American company as a division or branch of the Canadian company, which would mean that the Memphis office is probably a sub-branch. Engineers are sent to Memphis from Canada to run field tests for the purpose of developing farm equipment for use by farmers in this trade territory or section of the country. These engineers paid expense money by the local office.

"The whole structure of the Canadian company is, in the Court's opinion, that of a very large enterprise with full control of all of its many operations, including the Memphis office in this judicial district. The American company operates wholly under the control and dominion of the Canadian company, even to the extent of procuring approval for the expenditure of moneys of any substantial amount."

The District Judge ruled that for all intents and purposes there was only one corporation, the parent Canadian Corporation, with the American Company and affiliates being merely adjuncts or instrumentalities of the Canadian Corporation; that the activities and operations of the Canadian Corporation were a continuous course of business of a substantial character within the Western District of Tennessee; and that the Canadian Corporation was found in the District, was transacting business in the District, and was subject to the jurisdiction of the court and its processes. The motion to quash was overruled by order of January 4, 1957, which is the order the present application for Mandamus by the Canadian Corporation seeks to have vacated.

[*Contentions*]

Petitioner contends that the ruling of the District Judge that the Court has jurisdiction over it is clearly erroneous, that it encroaches upon the sovereignty of Canada and will expose Petitioner or its officers to fines and penal provisions under Canadian or Ontario laws or to contempt of the lower court, that the Petitioner has no adequate remedy through any ordinary appellate procedure which might eventually be available to it, and that it will suffer irreparable injury from the action of the District Judge if it is required to proceed with the defense of the case, and that Mandamus or Prohibition under the All Writs Act, Sec. 1651, Title 28, U. S. Code, is the appropriate remedy where a District Court erroneously asserts jurisdiction over an alien corporation clearly not subject to jurisdiction. On the question of jurisdiction it relies chiefly upon *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U. S. 333. See also: *People's Tobacco Co., Ltd. v. American Tobacco Co.*, 246 U. S. 79, and *Eastman Kodak Co. v. Southern Photo Co.*, 273 U. S. 359. The District Judge relied chiefly upon *United States v. Scophony Corp.* [1948-1949 TRADE CASES ¶ 62,238], 333 U. S. 795. See also: *International Shoe Co. v. Washington*, 326 U. S. 310; *Travelers Health Assn. v. Commonwealth of Virginia;* 339 U. S. 643; *Scholnik v. National Airlines*, 219 F. (2d) 115, C. A. 6th, cert. denied, 349 U. S. 956, rehearing denied, 350 U. S. 868.

[*Relief Denied*]

In the present state of the litigation we consider it inadvisable to rule on the issue involved. The record in its present shape indicates that the question is a difficult one, and the ruling doubtful, both as a matter of fact and in point of law. As was said by the Supreme Court in *Ex parte Muir*, 254 U. S. 522, 533, "The suit is still in the interlocutory stage. The Court may take up again the question of its jurisdiction. If it does, the inquiry may proceed on other lines and the facts may be brought out more fully than before. In addition, the question may be re-examined in regular course on an appeal from the final decree." The Court in that case held that where the existence or absence of jurisdiction is in doubt, the granting or refusal of the writ is discretionary, and deemed it a proper exercise of discretion to refuse the writ. See also: *Ex parte Chicago, R. I. & Pac. Ry.*, 255 U. S. 273.

Assuming that it should be found to be erroneous, it is subject to review by us if and when a final judgment should be entered against the Petitioner. *Eastman Kodak Co. v. Southern Photo Co., supra.* The present ruling is not a final order, but interlocutory in nature, from which an appeal does not lie. Sec. 1291, 1292, Title 28, U. S. Code. In the usual case the rule against piece-meal appeals is not to be circumvented by resort to Mandamus or Prohibition. *Ex parte Harding*, 219 U. S. 363; *Roche v. Evaporated Milk*

Association [1940-1943 TRADE CASES ¶ 56,276], 319 U. S. 21, 27-31; *Bankers Life & Casualty Co. v. Holland* [1953 TRADE CASES ¶ 67,626], 346 U. S. 379.

We do not consider the recent decision of the Supreme Court in *La Buy v. Howes Leather Co.* [1957 TRADE CASES ¶ 68,585], 352 U. S. 249, as changing the rule. It recognized that Mandamus should be resorted to only in extreme cases, but held that the unusual circumstances existing in that case made the use of the writ appropriate. In our opinion, the present case does not involve such unusual circumstances. *Ex parte Fahey,* 332 U. S. 258; *Direct Transit Lines v. Starr,* 219 F. (2d) 699, C. A. 6th; *Sunbeam Corp. v. Picard,* 227 F. (2d) 596, C. A. 6th. See also: *Eastman Kodak Co. v. Southern Photo Co., supra,* 273 U. S. 359, 367-368, where the usual procedure was followed after an adverse ruling to the defendant on the question of jurisdiction.

The Petition for Writ of Mandamus or Prohibition or Other Appropriate Writ is denied.

[¶ 68,681] The Maryland Baking Company v. Federal Trade Commission.

In the United States Court of Appeals for the Fourth Circuit. No. 7292. Argued March 11, 1957; decided April 8, 1957.

On Petition for Review of an Order of the Federal Trade Commission.

Robinson-Patman Price Discrimination Act

Price Discrimination—Geographic Pricing Practices—Price Cutting in Limited Area—Legality.—A Federal Trade Commission finding that a baking company unlawfully discriminated in price when it cut the price (approximately 25 per cent) of a particular type of ice cream cone in the limited area in which a small competitor operated, while maintaining higher prices in other areas where the company operated but the small competitor did not, was sustained by evidence. There was evidence that the price cut was initiated for the purpose of driving the competitor out of business, and that it deprived the competitor of its normal channel of distribution through jobbers, with the loss to the competitor of about half of its volume of business in the product involved. The company's contentions that its actions did not affect competition, and that the matter involved was a private business dispute not affecting the public interest, were rejected.

See Price Discrimination, Vol. 1, ¶ 3505.390, 3508.345.

Federal Trade Commission Enforcement and Procedure—Price Discrimination Proceeding—Federal Trade Commission Cease and Desist Order—Scope of Order—Statutory Exceptions.—Where the Federal Trade Commission found that a baking company unlawfully discriminated in price when it cut the price of a particular type of ice cream cone in the limited area in which a small competitor operated for the purpose of driving the competitor out of business, the company's petition to set aside the Federal Trade Commission's cease and desist order on the ground that the order was not limited to the type of ice cream cone which was the subject of the price cut and to the area in which the price cut occurred was denied. The Commission was acting within its power in making the order sufficiently broad to prevent evasion and proscribe unfair trade practices of the same general kind as that in which the company had engaged. "As to territorial extent, the company, having been found guilty of a flagrant violation of the act, was properly required to cease and desist from such practices in all areas in which it was doing business." Also, the Commission's order did not have to include provisions excepting from its prohibition the matters excepted by the provisos contained in Sections 2(a) and 2(b) of the Clayton Act, as amended, since such statutory exceptions are implicit in the Commission's order. However, the order was modified so as to forbid discrimination in prices within any area in the United States in which the company is doing business, but not to require uniform prices throughout the country or to forbid the company from making prices in good faith to meet competition. The company had contended that the order, before modification, required uniform prices even though no discrimination was involved.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8801.

For the petitioner: William Simon (Robert L. Wald and David Gerber on brief).

For the respondent: Robert B. Dawkins, Assistant General Counsel, Federal Trade Commission (Earl W. Kintner, General Counsel; Alvin L. Berman and Gerald Harwood, Attorneys, Federal Trade Commission, on brief).

Affirming, as modified, a Federal Trade Commission cease and desist order in Dkt. 6327.

Before PARKER, Chief Judge, SOPER, Circuit Judge, and HOFFMAN, District Judge.

[*Price Discrimination*]

PER CURIAM [*In full text*]: This is a petition by the Maryland Baking Company, Inc., to set aside an order of the Federal Trade Commission, which found that the company had engaged in price discrimination in violation of section 2(a) of the Clayton Act as amended, 15 USC 13(a). The discrimination found was a price cut of about 25% on a particular type of ice cream cone in the limited area in which a small competitor operated, while maintaining higher prices in other areas where petitioner operated but the small competitor did not. While this finding is challenged by petitioner, it is amply sustained by the record. There is evidence that the price cut was initiated for the purpose of driving the competitor out of business and that it deprived the competitor of its normal channel of distribution through jobbers with the loss to the competitor of about half its volume of business in the product in question. The contention that petitioner's actions did not affect competition, and that the matter involved was a private business dispute not affecting the public interest, is so lacking in merit as not to warrant discussion. The Commission entered the following order:

> "It is ordered that respondent The Maryland Baking Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale or distribution of ice cream cones in commerce, as 'Commerce' is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling ice cream cones to any purchaser at higher prices than the prices charged any other purchaser engaged in the same line of commerce where, in the sale of said cones to such purchaser charged the lower price, respondent The Maryland Baking Company is in competition with another seller."

[*Scope of FTC Order*]

The baking company complains of the order because it was not limited to the particular type of ice cream cone which was the subject of the price cut and to the area in which the price cut occurred. It is clear, however, that the Commission was acting well within its power in making the order sufficiently broad to prevent evasion and proscribe unfair trade practices of the same general kind as that in which the company had been found guilty of engaging. *P. Lorillard Co. v. Federal Trade Com'n* 4 Cir. [1950-1951 TRADE CASES ¶ 62,747] 186 F. 2d 52, 58, 59; *Hershey Chocolate Co.* [*Corp.*] *v. Federal Trade Com'n* 3 Cir. [1940-1943 TRADE CASES ¶ 56,312] 121 F. 2d 968, 970; *Moog Industries v. Federal Trade Com'n* 8 Cir. [1956 TRADE CASES ¶ 68,527] 238 F. 2d 43, 52-53. As to territorial extent, the company, having been found guilty of a flagrant violation of the act, was properly required to cease and desist from such practices in all areas in which it was doing business. "When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." *International Salt Co. v. United States* [1946-1947 TRADE CASES ¶ 57,635] 332 U. S. 392, 400. See also *Federal Trade Com'n v. Ruberoid Co.* [1952 TRADE CASES ¶ 67,279] 343 U. S. 470; *Federal Trade Com'n v. National Lead Co.* [1957 TRADE CASES ¶ 68,629] — U. S. —, 77 S. Ct. 502, 509; and *Moog Industries v. Federal Trade Com'n, supra.*

[*Statutory Exceptions*]

The petitioner complains that the Commission did not include in the order provisos excepting from its prohibition the matters excepted by the provisos contained in subsections 2(a) and 2(b) of the Clayton Act 15 USC 13(a) and (b).* The Commis-

* These provisos are as follows:

"Sec. 13. Discrimination in price, services, or facilities—Price; selection of customers. (a) * * * Provided, that nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allow-

sion says, however, that these are implicit in its order; and this is unquestionably correct. *Moog Industries v. Federal Trade Commission, supra; Federal Trade Commission v. Ruberoid Co. supra.* As said by the Supreme Court in the case last cited:

"* * * we think the provisos are necessarily implicit in every order issued under the authority of the Act, just as if the order set them out in extenso. Although previous Commission orders have included these provisos, they gained no force by that inclusion. Their absence cannot preclude the seller from differentiating in price in a new competitive situation involving different circumstances where it can justify the discrimination in accordance with the statutory provisos."

[*FTC Modification*]

The company complains, also, that the effect of the order is to put its prices in a strait jacket throughout the country, so that it may not vary them in various localities even though no discrimination may be involved. To meet this objection, the Commission proposes to change its order so that it will read as follows:

"It is ordered that respondent The Maryland Baking Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale or distribution of ice cream cones in commerce, as 'commerce' is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling ice cream cones to any purchaser at a price which is lower than the price charged any other purchaser engaged in the same line of commerce, where such lower price undercuts the price at which the purchaser charged the lower price may purchase ice cream cones of like grade and quality from another seller."

We interpret the order as thus changed to forbid discrimination in prices within any area in the United States in which the company is doing business, but not to require uniform prices throughout the country nor to forbid the company's making prices in good faith to meet competition as permitted by the proviso to section 13(b), heretofore quoted in the note.

[*Affirmed*]

The order will accordingly be modified in accordance with the Commission's suggestion, the petition to set it aside will be denied and as modified it will be affirmed.

Affirmed.

[¶ 68,682] Packard Motor Car Company, et al. v. The Webster Motor Car Company. The Webster Motor Car Company v. Packard Motor Car Company, et al.

In the United States Court of Appeals for the District of Columbia Circuit. Nos. 13152 and 13153, respectively. Decided April 18, 1957.

Appeals from the United States District Court for the District of Columbia. HOLTZOFF, District Judge.

Sherman Antitrust Act

Monopolies—Monopolization—Attempt or Conspiracy To Monopolize—Refusal To Renew Automobile Dealer Franchises—Grant of Exclusive Franchise—Legality—Relevant Market.—An automobile manufacturer did not violate Section 2 of the Sherman Act when it, at the request of its largest dealer in the Baltimore area, refused to renew the franchises of its other dealers in the area and granted the largest dealer an exclusive franchise for the area. The manufacturer offered to renew the franchise of the plaintiff-dealer for one year, but only after the plaintiff had threatened suit. However, the plaintiff did not accept

ance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *. (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, that nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

the offer. There was no monopoly, or attempt or conspiracy to monopolize, within the meaning of the Sherman Act. The power which a manufacturer has over its trade-marked products is not the power that makes an illegal monopoly. Illegal power must be appraised in the terms of the competitive market for the product. Since there were other cars "reasonably interchangeable by consumers for the same purposes" as the manufacturer's make of car and therefore in competition with its car, an exclusive contract for marketing its car did not create a monopoly. There was no evidence of any attempt or conspiracy to create a monopoly, since there was no evidence of any attempt to get control of the relevant market.

Also, it was held that there was no contract or conspiracy in restraint of trade within the meaning of Section 1 of the Sherman Act, and that the fact that the manufacturer had agreed not to renew the plaintiff's franchise when the proffered renewal expired was immaterial because the agreement was legal and because it inflicted no damage.

See Monopolies, Vol. 1, ¶ 2530.10, 2540, 2610.300, 2610.720.

Combinations and Conspiracies—Refusal To Renew Automobile Dealer Franchises—Grant of Exclusive Franchise—Legality.—An automobile manufacturer did not violate Section 1 of the Sherman Act when it, at the request of its largest dealer in the Baltimore area, refused to renew the franchises of its other dealers in the area and granted the largest dealer an exclusive franchise for the area. The manufacturer offered to renew the franchise of the plaintiff-dealer for one year, but only after the plaintiff had threatened suit. However, the plaintiff did not accept the offer. There was no contract or conspiracy in restraint of trade within the meaning of the Sherman Act. When an exclusive dealership is not part of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has been upheld as a reasonable restraint of trade. Of the manufacturer's 1600 dealers, 1100 were the only dealers of its cars in their cities, some of which were nearly as large as Baltimore, and such a ratio was typical in the automobile industry. The fact that other dealers in the same product of the same manufacturer are eliminated, and the fact that the largest dealer requested an exclusive franchise, did not make the exclusive dealership illegal. A relatively small manufacturer, competing with large manufacturers, thought it advantageous to retain its largest dealer in the area and could not do so without agreeing to drop its other dealers in the area. The fact that the manufacturer agreed not to renew the plaintiff's franchise when the proffered renewal expired is immaterial because the agreement was legal and because it inflicted no damage. Also, it was held that there was no violation of Section 2 of the Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.670, 2005.785; Private Enforcement and Procedure, Vol. 2, ¶ 9011.400, 9012.500, 9014.

For the appellants (No. 13152) and appellees (No. 13153): Harold L. Smith, with whom Robert W. Barker, Louis M. Denit, Jerome G. Shapiro, and Richard P. McGrath were on the brief.

For the appellee (No. 13152) and appellant (No. 13153): William J. Hughes, Jr., and Donald D. Webster, with whom William E. Leahy was on the briefs.

Reversing a decision of the U. S. District Court, District of Columbia, 1955 Trade Cases ¶ 68,171.

Before EDGERTON, Chief Judge, and PRETTYMAN and BAZELON, Circuit Judges.

[*Appeal*]

EDGERTON, Chief Judge [*In full text*]: Packard Motor Car Company and two of its officers appeal from a judgment for $570,000 in favor of Webster Motor Car Company, a former Packard dealer in Baltimore, for alleged violation of the Sherman Antitrust Act. 15 U. S. C. §§ 1, 2, 15. The essential facts are not disputed.

[*Termination of Franchises*]

There were formerly four dealers in Packard cars in Baltimore. In 1953 there were three, of which Webster was one. The usual dealer contract in the automobile business, and the contract between Packard and Webster, were for one year, with no option of extension. It was the custom in the business to extend contracts, from

year to year, "barring some reason for cancellation." Webster and Packard had extended their contracts from year to year a considerable number of times.

In 1953 Zell Motor Car Company, the largest of the three Baltimore dealers in Packard cars, told Packard that Zell was losing money and would quit unless Packard gave it an exclusive contract. Packard told Zell it would do so, and told Webster and the other Baltimore dealer that their contracts would not be renewed. After Webster protested and threatened suit, Packard offered Webster the usual one-year renewal but refused to promise more. Packard told Zell, in effect, that this would be Webster's last renewal. Webster declined Packard's offer, quit the business, and brought this suit.

[*Trial Court*]

The District Court submitted to the jury the question whether there was an unreasonable restraint of trade, and also whether there was an agreement or attempt to monopolize. The jury found for the plaintiff and awarded $190,000 damages, which the court trebled in accordance with the statute. Motions for judgment notwithstanding the verdict, and for a new trial, were denied. The court held that the jury had "a right to reach the conclusion that an agreement on the part of the manufacturer with one of its own dealers to terminate the franchise of all competitors and to grant to him a monopoly within a certain area, is an agreement in unreasonable restraint of trade, or an agreement to monopolize." *Webster Motor Car Co. v. Packard Motor Car Co.* [1955 TRADE CASES ¶ 68,171], 135 F. Supp. 4, 9.

[*Defendants Entitled to Judgment*]

We think the defendants were entitled to judgment. We agree substantially with *Schwing Motor Co. v. Hudson Sales Co.* [1956 TRADE CASES ¶ 68,292], 138 F. Supp. 899 (D. Md. 1956), *aff'd* [1956 TRADE CASES ¶ 68,564], 239 F. 2d 176 (C. A. 4, 1956).

[*Monopoly*]

1. There was no monopoly, or attempt or conspiracy to monopolize, within the meaning of the Sherman Act. The cellophane case, which had not been decided when the present case was tried, makes this clear. The Supreme Court there said: "this power that, let us say, automobile or soft-drink manufacturers have over their trade-marked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product." And the Court held that "In considering what is the relevant market for determining the control of price and competition . . . commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." The Court accordingly held that, although du Pont produced about 75% of the cellophane sold in this country, there was no monopoly, because "the relevant market" was flexible packaging materials, including such things as glassine, waxed paper, and foil, as well as cellophane, and cellophane accounted for only 17.9% of this market. *United States v. du Pont & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 393, 395, 399-400. Since there are other cars "reasonably interchangeable by consumers for the same purposes" as Packard cars and therefore in competition with Packards, an exclusive contract for marketing Packards does not create a monopoly. And there is no evidence of any attempt or conspiracy to create a monopoly, since there is no evidence of any attempt to get control of the relevant market.

[*Restraint of Trade*]

2. There was no contract or conspiracy in restraint of trade within the meaning of the Sherman Act. As the court informed the jury, it has long been clear that only unreasonable restraints of trade are unlawful. *Standard Oil Co. of New Jersey v. United States,* 221 U. S. 1. When an exclusive dealership "is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of *per se* legality" until the District Court decided the present case.[1] Of Packard's 1600 dealers,

[1] Handler, "Annual Antitrust Review," 11 *Record of the Ass'n of the Bar of the City of New York* 367, 370 (1956). *Fargo Glass & Paint Co. v. Globe American Corp.* [1953 TRADE CASES ¶ 67,427], 201 F. 2d 534 (C. A. 7), *cert. denied,* 345 U. S. 942 (1953); *Bascom Launder Corp. v. Telecoin Corp.* [1953 TRADE CASES ¶ 67,472], 204 F. 2d 331 (C. A. 2), *cert. denied,* 345 U. S. 994 (1953); *United States v. Bausch & Lomb Optical Co.,* 45 F. Supp. 387, 398-399

1100 were the only Packard dealers in their cities, some of which were nearly as large as Baltimore, and such a ratio was typical in the automobile industry. The fact that any other dealers in the same product of the same manufacturer are eliminated does not make an exclusive dealership illegal; it is the essential nature of the arrangement. The fact that Zell asked for the arrangement does not make it illegal. Since the immediate object of an exclusive dealership is to protect the dealer from competition in the manufacturer's product, it is likely to be the dealer who asks for it.[2]

The short of it is that a relatively small manufacturer, competing with large manufacturers, thought it advantageous to retain its largest dealer in Baltimore, and could not do so without agreeing to drop its other Baltimore dealers. To penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it.

[*Refusal of Renewal*]

3. Though Packard had formerly expressed an intention not to renew its contract with Webster, Packard offered and Webster refused the usual renewal. That Packard had agreed with Zell not to renew Webster's contract again when the proffered renewal expired is immaterial, not only because the agreement was legal but also because it inflicted no damage.

[*Reversed*]

The judgment in favor of Webster is reversed. Webster's cross-appeal concerning the amount of Webster's attorneys' fee is dismissed as moot.

No. 13152 reversed; No. 13153 dismissed.

[Dissenting Opinion]

BAZELON, Circuit Judge, dissenting: Webster and Zell were competing Packard automobile dealers in Baltimore. In 1952 Packard served notice of termination of Webster's dealership, but then, after Webster's protest, offered to renew the dealership for only one year without further renewal.

I think the court properly instructed the jury upon the law applicable to conspiracies or combinations in restraint of trade in violation of § 1 of the Sherman Act and that the evidence supports the jury's finding in respect thereto. It is therefore unnecessary to decide whether the determination below of a conspiracy to monopolize in violation of § 2 may also be sustained.

There was evidence that Zell had asked Packard to eliminate Webster as a competing Packard dealer; that Packard had never before considered that one dealer could be adequate representation in Baltimore; that Packard had found Webster to be a satisfactory dealer with a good organization; that there was an "understanding" between Zell and Packard, and that Packard had "agreed" with Zell that Webster's franchise be ended; and that, when Webster balked at his demise and threatened to bring an action for damages, Packard had offered Webster a renewal of its franchise in the usual form for one year, which Packard had agreed with Zell would be a final renewal. As a Packard memorandum put it: "This . . . was reviewed in detail and agreed to by Mr. Zell."

From this evidence the jury could have found—as it apparently did—that Webster's elimination as a dealer resulted not from a unilateral decision by Packard in selecting its customers, but rather from an agreement between Packard and Zell to eliminate Zell's competitor and make Zell the sole distributor of Packard cars in Baltimore; in simple terms, that it was an agreement which amounted to a combination or conspiracy to get rid of Webster.[3]

The "common right" of an individual to engage in a lawful calling was protected against restraints at common law,[4] is en-

(S. D. N. Y.), *aff'd* [1944-1945 TRADE CASES ¶ 57,224], 321 U. S. 707, 719 (1944). *Cf. G. & P. Amusement Co. v. Regent Theater Co.* [1952 TRADE CASES ¶ 67,360], 107 F. Supp. 453, *aff'd* [1954 TRADE CASES ¶ 67,888] 216 F. 2d 749 (C. A. 6); *Boro Hall Corp. v. General Motors Corp.* [1940-1943 TRADE CASES ¶ 56,178], 124 F. 2d 822 (C. A. 2); *Hudson Sales Corp. v. Waldrip* [1954 TRADE CASES ¶ 67,694], 211 F. 2d 268 (C. A. 5).

[2] Handler, *supra* note 1, at p. 372.

[3] We are not called upon to decide whether § 1 of the Sherman Act applies to a manufacturer who, after a discussion with one dealer, decides to make the latter his exclusive distributor, cutting off all others, for the purpose of improving the manufacturer's competitive position vis-a-vis more powerful manufacturers. *Cf. Schwing Motor Co. v. Hudson Sales Co.* [1956 TRADE CASES ¶ 68,292], 138 F. Supp. 899, 906 (D. Md. 1956), *affirmed* [1956 TRADE CASES ¶ 68,564], — F. 2d — (4th Cir. 1956). That is not this case.

[4] *Darcy v. Allen*, 11 Coke 84b, 77 ENG. REP. 1260 (1576).

compassed within the protection of the Fourteenth Amendment[5] and forms the very basis of the Sherman Act.[6] The purpose of the Act is to protect the individual business man as well as to assure to the consumer the benefits flowing from free competition. Applied to a dealership situation, the Act does not interfere with the manufacturer's right to select his dealers but it does prevent him from combining and conspiring with one not to deal with another.[7]

Schwing Motor Co. v. Hudson Sales Co. [1956 TRADE CASES ¶ 68,292], 138 F. Supp. 899 (D. Md. 1956), *affirmed* [1956 TRADE CASES ¶ 68,564], — F. 2d — (4th Cir. 1956), disagrees with the decision here under review. The latter case would limit the manufacturer's right to select his own customers by the requirement that he make no agreement with one to exclude another. *Schwing* would recognize this limitation only "if the agreement is a horizontal one between competitors, or if the manufacturer dominates the market in the commodity." 138 F. Supp. at 906. In this I think *Schwing* is wrong. The Supreme Court has held that, even apart from monopolistic effect, a *vertical* agreement which excludes a competitor of one of the parties from a substantial market violates § 1 of the Sherman Act.[8]

To avoid the application of the Sherman Act Packard contends that, because Webster rejected the proffered one-year renewal, the jury could not find that Packard refused to deal with Webster. But this contention is not persuasive. The record contains ample evidence from which the jury could have found that the renewal offer was not made in good faith, was prompted by Webster's threat to sue, and resulted from an agreement between Packard and Zell that it would be the last renewal.

[¶ 68,683] United States v. Twentieth Century-Fox Film Corporation; Warner Bros. Pictures Inc.; Warner Bros. Pictures Distributing Corporation; RKO Radio Pictures, Inc.; Republic Pictures Corporation; Republic Productions, Inc.; Columbia Pictures Corporation; Screen Gems, Inc.; Universal Pictures Company, Inc.; United World Films, Inc.; Films, Inc.; and Pictorial Films, Inc.

In the United States District Court for the Southern District of California, Central Division. Civil Action No. 14354-Y. Filed April 11, 1956.

Case No. 1140 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Consent Decrees—Modification Pursuant to Terms of Decree—Decrees Vacated.—Consent decrees entered against three dependents in a Government antitrust action, 1955 TRADE CASES ¶ 68,137 and 68,160, were vacated and the action as to the defendants was dismissed on the motion of the Government. The decrees provided that if any final judgment is entered in the action against any defendant other than the consenting defendants and such judgment is more favorable to any such other defendant than the instant decrees are to the consenting defendants, the consenting defendants will be entitled to a modification of the decrees to substitute the more favorable provisions for corresponding provisions in the instant decrees. A final judgment dismissing the action as to other defendants had been entered.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.50, 8321.48, 8341.20, 8361.37, 8421.

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[5] *Butcher's Union v. Crescent City Co.*, 111 U. S. 746 (1884), concurring opinions of Mr. Justice Field and Mr. Justice Bradley.

[6] *Apex Hosiery Co. v. Leader* [1940-1943 TRADE CASES ¶ 56,039], 310 U. S. 469, 497-98 (1940).

[7] Even individually conceived refusals to deal may be an element in a violation of § 1 of the Sherman Act. *United States v. Bausch & Lomb* [1944-1945 TRADE CASES ¶ 57,224], 321 U. S. 707, 723 (1944); *Federal Trade Comm'n v. Beech-Nut Co.*, 257 U. S. 441 (1922); Report of The Attorney General's National Committee To Study The Antitrust Laws (1955), at 134; *cf. Dr. Miles Medical Co. v. Parks*, 220 U. S. 373 (1911).

[8] See *Standard Oil of Calif. v. United States* [1948-1949 TRADE CASES ¶ 62,432], 337 U. S. 293, 305 (1949), explaining *International Salt Co. v. United States* [1946-1947 TRADE CASES ¶ 57,635], 332 U. S. 392 (1947).

For the plaintiff: James M. McGrath.

For the defendants: Loeb and Loeb, by Laurence M. Weinberg, Los Angeles, Cal., for Republic Pictures Corporation and Republic Productions, Inc.; and Lillick, Geary & McHose, by Don I. Johnson, Hollywood, Cal., for Films, Inc.

Vacating consent judgments entered in the U. S. District Court, Southern District of California, Central Division, 1955 Trade Cases ¶ 68,137, 68,160; for a prior opinion and consent decree, see 1956 Trade Cases ¶ 68,205, 68,157.

LEON R. YANKWICH, Chief Judge [*In full text*]: The United States of America, plaintiff, having consented with defendants Republic Pictures Corporation and Republic Productions, Inc. to the entry of a final judgment in the above-entitled action, and said final judgment having been entered on September 12, 1955, and provision having been made in said final judgment for the substitution in place thereof of any more favorable judgment rendered with respect to any defendant other than Republic Pictures Corporation, Republic Productions, Inc., Films, Inc., Pictorial Films, Inc., or Warner Bros. Pictures Distributing Corporation, and the Court having rendered judgment against the Government with respect to defendants other than those named above, and having dismissed said action as to them, and said judgment having become final;

Now, Therefore, on motion of the Government, It Is Ordered, Adjudged, and Decreed as follows:

1. The judgment as to defendants Republic Pictures Corporation and Republic Productions, Inc., entered September 12, 1955, is hereby vacated and set aside, *nunc pro tunc* as of September 12, 1955.

2. At the request of the Government, the action is dismissed as to Republic Pictures Corporation and Republic Productions, Inc.

LEON R. YANKWICH, Chief Judge [*In full text*]: The United States of America, plaintiff, having consented with defendant Films, Inc., to the entry of a final judgment in the above entitled action, and said final judgment having been entered on September 21, 1955, and provision having been made in said final judgment for the substitution in place thereof of any more favorable judgment rendered with respect to any defendant other than Republic Pictures Corporation, Republic Productions, Inc., Films, Inc., Pictorial Films, Inc., and with respect to Warner Bros. Pictures Distributing Corporation, other than a judgment containing no injunctive relief, and the Court having rendered a judgment against the Government with respect to defendants other than those named above, and having dismissed said action as to them and said judgment having become final;

Now, Therefore, upon motion of the Government, It Is Ordered, Adjudged and Decreed as follows:

1. The judgment as to defendant Films, Inc. entered September 21, 1955, is hereby vacated and set aside, *nunc pro tunc* as of September 21, 1955.

2. At the request of the Government the action is dismissed as to the defendant Films, Inc.

[¶ 68,684] Eastern Wine Corp. v. United Vintners, Inc. and Peerless Importers, Inc.

In the United States District Court for the Southern District of New York. Civ. 118-140. Dated April 15, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Injunctive Relief—Pretrial Procedures —Motion for Preliminary Injunction—Irreparable Injury—Legal Issues.—A wine distributor's motion for a preliminary injunction restraining a wholesaler and another distributor of wines from engaging in price cutting activities in violation of Section 1 of the Sherman Act and Section 3 of the Robinson-Patman Act was denied on the ground that the distributor failed to show that it will suffer irreparable injury unless the injunction is granted. A showing of loss of future sales is not sufficient to meet the burden of showing irreparable injury. This is especially true in a case where there is a substantial legal

issue in dispute, that is, whether or not a private action may be maintained for an underselling violation of Section 3 of the Robinson-Patman Act.

See Private Enforcement and Procedure, Vol. 2, ¶ 9024.95, 9026.15.

For the plaintiff: Lester Lewis Jay, New York, N. Y.

For the defendants: Edward J. Carr, Jr., of Cravath, Swaine & Moore, argued and prepared the brief for United Vintners, Inc. J. Logan O'Donnell, of Olwine, Connelly, Chase, O'Donnell & Weyher, argued and prepared the brief for Peerless Importers, Inc. Mr. O'Donnell prepared the brief with W. N. Mairs, Jr. All of New York, N. Y.

Memorandum

[*Injunction Sought*]

DIMOCK, District Judge [*In full text*]: Plaintiff, Eastern Wine Corp., moves for a preliminary injunction restraining defendants from engaging in price cutting activities in the sale of wine in violation of section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1, and section 3 of the Robinson Patman Act, 49 Stat. 1526, 15 U. S. C. § 13a. Plaintiff brings this action pursuant to section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. § 26.

Defendants contend that the motion should be denied on the grounds that (1) plaintiff has failed to state a claim upon which relief may be granted, (2) there is a substantial issue of fact in dispute, (3) there is a substantial issue of law in dispute, (4) money damages will adequately compensate plaintiff, and (5) granting of the injunction would do irreparable harm to defendant Peerless Importers, Inc.

[*Price Cutting*]

Plaintiff is a distributor of wines to retailers in the New York City area in competition with defendant Peerless Importers, Inc. (hereafter Peerless). Plaintiff alleges that it sells to wholesalers in competition with defendant United Vintners, Inc., (hereafter United) in Nassau, Suffolk and Westchester Counties. Defendant denies this. United markets, under various brand names including "Petri," about 20% of all California wines sold in the United States. Peerless is the sole wholesale dealer in the New York area of wines bearing the "Petri" brand name. The New York State market absorbs approximately 20,000,000 gallons of wine annually, a large percentage of which consists of dessert wines of California origin. The State of New York requires that the owner of the brand name fix the sale price to the jobber or wholesaler and the ultimate consumer each calendar month for the next succeeding calendar month. The jobber or wholesaler must likewise specify its sales price to retailers.

The particular circumstances that plaintiff complains of are the following: United is now selling to Peerless a case of 14 quarts of Petri Wine for $5.50, a price which plaintiff alleges is below cost; Peerless is reselling this case to retailers for $8.20 which provides a gross profit of $2.70 per case; Peerless had been making a gross profit of $3.00 per case of 12 quarts.

Plaintiff further alleges that defendants' price schedule is unreasonably low and has been adopted for the purpose of destroying plaintiff's business.

[*Irreparable Injury*]

Plaintiff, to obtain a preliminary injunction, must sustain the burden of showing that it will suffer irreparable injury unless the injunction is granted. Plaintiff attempts to meet this burden with proof of reduced sales, and expectations of continued reduced sales. A showing of loss of future sales is not sufficient to meet the burden of showing irreparable harm. *Foundry Services v. Beneflux Corporation,* 2 Cir. [1953 TRADE CASES ¶ 67,554], 206 F. 2d 214. This is especially true in a case such as this where there is a substantial legal issue in dispute. See *Nashville Milk Company v. Carnation Company,* 7 Cir. [1956 TRADE CASES ¶ 68,520], 238 F. 2d 86, cert. granted 25 U. S. L. Week 3254, March 4, 1957, which holds that a private treble damage action may not be maintained for an underselling violation of section 3 of the Robinson-Patman Act, and *Vance v. Safeway Stores,* 10 Cir. [1956 TRADE CASES ¶ 68,538], 239 F. 2d 144, cert. granted 25 U. S. L. Week 3254, March 4, 1957, *contra.*

Motion denied.

[¶ 68,685] Switzer Brothers, Inc. v. James P. Byrne, d.b.a. Byrne Wallpaper & Paint Store.

In the United States Court of Appeals for the Sixth Circuit. No. 12902. Filed April 8, 1957.

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division. JONES, District Judge.

Sherman Antitrust Act

Private Enforcement and Procedure—Antitrust Law Violations as Defenses—Patent Infringement Suit—Government Antitrust Consent Decree as Bar.—A Federal District Court exercised sound discretion in dismissing a complaint, with prejudice, charging the infringement of patents for fluorescent devices where a consent decree entered in a Government antitrust suit during the pendency of the patent infringement action directed the instant plaintiffs to dismiss any of their pending actions for the infringement of certain of their patents. The consent decree related to the patents involved in the instant action.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8401; Private Enforcement and Procedure, Vol. 2, ¶ 9040.

For the appellant: Albert Ely, Jr. (Albert L. Ely, Jr., and Ely, Pearne & Gordon, on brief), Cleveland, Ohio.

For the appellee: Carl Hoppe (Carl Hoppe, and Townsend and Townsend, on brief), San Francisco, Cal.

Before SIMONS, Chief Judge, ALLEN and MCALLISTER, Circuit Judges.

[*Issues*]

ALLEN, Circuit Judge [*In full text except for omissions indicated by asterisks*]: The District Court dismissed with prejudice a complaint alleging infringement of Patents Nos. 2,417,384 and 2,475,529 for fluorescent devices and materials and praying for the usual equitable relief. Two principal questions are presented in this appeal: (1) Are tenants in common of the patents in question indispensable parties to the suit? (2) If the tenants in common are indispensable parties and were not joined in the suit at its inception, does a subsequent assignment purporting to convey all right, title, and interest of the tenants in common to the licensee of the patents cure the defect in parties existing at the time the suit was instituted?

[*Consent Decree*]

The chronology of the case has importance and will be given somewhat in detail. On February 9, 1953, appellant, licensee of the patents above named, with authority to conduct and control all litigation relating to such patents, instituted the infringement suit herein. Robert C. Switzer and Joseph L. Switzer, hereinafter called the Switzer brothers, original patentees of such patents and holders of the record title, joined as plaintiffs. On January 10, 1951, the patents involved had been held valid and infringed, *Switzer Brothers, Inc., v. Centennial Liquor Stores, Inc.,* 186 Fed. (2d) 414, 416 (C. A. 5). On February 13, 1953, Patent No. 2,417,384 was held invalid in view of the prior art. *Texas-Miller Hat Corporation v. Switzer Brothers, Inc.,* 201 Fed. (2d) 824 (C. A. 5), certiorari denied, *Switzer Brothers, Inc. v. Texas-Miller Hat Corporation,* 346 U. S. 821. On October 22, 1953, appellant and the Switzer brothers, co-plaintiffs entered into a consent decree in a pending antitrust action, *United States of America v. Switzer Brothers, Inc.,* brought in the District Court for the Northern District of California, 1952-53, CCH TRADE CASES, paragraph 67,598. This consent decree, which related to the two patents involved here, 1952-53 CCH TRADE CASES, paragraphs [pages] 68,878-9, provided:

"(A) Defendants are jointly and severally ordered and directed to grant to each applicant making written request therefor a non-exclusive, unrestricted, royalty-free license to manufacture, sell and use under United States Letters Patent Nos. 2,417,384; 2,475,529 or 2,450,085.

* * *

"(B) Defendants are jointly and severally enjoined and restrained from instituting or threatening to institute any suit or proceeding against any person to

restrain or enjoin, or collect damages for, infringement occurring prior or subsequent to the date of entry of this Final Judgment, of said patents Nos. 2,417,384; 2,475,529 or 2,450,085; provided, however, that nothing herein shall prevent defendants (1) from defending the validity of said patents, or (2) by way of claim (counterclaim) or defense, from asserting claims for past unlicensed, contributory or induced infringement of said patents.

"(C) Except as to cases now on appeal or on certiorari defendants are ordered and directed to dismiss any of their pending actions for infringement of the patents listed in subsection (B) above in which a counterclaim has not been pled, or to dismiss any such pending action in which a counterclaim if pled, is dismissed. However, in case a counterclaim has been pled and is not dismissed, defendants may, but only to the extent of such counterclaim and only until the time of such dismissal, assert in such case the validity of said patents and plead by way of claim (counterclaim) or defense past unlicensed, contributory or induced infringement of said patents."

[*Dismissal*]

The instant case is not shown to have been on appeal or on certiorari on October 22, 1953, and no counterclaim had been filed therein. On November 5, 1953, presumably in compliance with paragraph (C) above quoted, appellant and the Switzer brothers moved for dismissal of the instant suit and appellee consented to such dismissal on condition that an award for attorneys' fees be granted defendant under 35 U. S. C. Section 285. Appellant and the Switzer brothers, after opposing dismissal upon such terms and conditions, withdrew their motion to dismiss the suit.

October 28, 1955, in *Switzer v. Commissioner of Internal Revenue*, 226 Fed. (2d) 329 (C. A. 6), this court affirmed a decision of the Tax Court of the United States to the effect that the license agreement executed in favor of appellant by Robert C. Switzer and Patricia Switzer, Joseph L. Switzer, and Elise DeGroot Switzer, dated July 30, 1946, and later transactions through 1949, did not constitute an effective assignment for tax purposes of the various patents and applications in which the wives of the Switzer brothers had acquired an interest on or before November 1, 1945. Later, December 16, 1955, the Switzer brothers and their wives quitclaimed to appellant all their right, title, and interest in the patents involved. Appellee then moved to dismiss the complaint for want of indispensable parties plaintiff, namely, Patricia Switzer and Elise DeGroot Switzer. Appellant opposed this motion and moved to drop Robert C. Switzer and Joseph L. Switzer as plaintiffs. The District Court granted the motion to dismiss for lack of indispensable parties plaintiff and from its order this appeal is prosecuted by Switzer Brothers, Inc.

We think the decision of the District Court was clearly correct. * * *

* * *

[*Suit Barred*]

During the pendency of the instant case, as heretofore set out, an antitrust suit filed against appellant and co-plaintiffs in the Southern District of California, *United States of America v. Switzer Brothers, Inc., supra,* was settled by the entry of a consent decree against appellant and coplaintiffs. The instant suit, filed February 9, 1953, set up infringement of the patents involved and asked for the usual equitable relief. Under (C) of the consent decree heretofore quoted appellant should have dismissed the case. Such a motion was filed November 5, 1953, but later withdrawn. In view of this record as to the consent decree, we conclude that the District Court exercised sound discretion in dismissing the complaint with prejudice.

The judgment of the District Court is affirmed.

[¶ 68,686] **Frederick Rossi, Joseph Rossi, Nicholas Cucinotti, and Dominick Lento v. McCloskey and Company, Thomas McDonald, Peter Schultz, Michael McCary, Harry Jericho, and Local 470, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, American Federation of Labor.**

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 19204. Filed March 29, 1957.

Clayton and Sherman Antitrust Acts

Combinations and Conspiracies—Monopolies—Identical Collective Bargaining Agreements—Employee Rights—Sufficiency of Complaint—Injury to Plaintiffs.—Truck drivers failed to charge a violation of the antitrust laws when they alleged that their employer (a contractor), their union, and union officers conspired to enter into a collective bargaining agreement which was identical to agreements then existing between other contractors and their employees and that the agreement was made to secure for their employer certain benefits then enjoyed by the other contractors and to enable their employer to join with the other contractors in monopolizing the excavation business. The allegations were not supported by statements of fact, and since the drivers were not competitors in the excavation business, any injury they may have suffered was wholly incidental and therefore not compensable under the antitrust laws. Allegations that the union, with the aid of the employer, discriminated against the drivers also were insufficient. The principle that when a union conspires with businessmen to control some substantial portion of a market it is vulnerable under the antitrust laws had no application in the instant suit.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.605, 2101.005; Monopolies, Vol. 1, ¶ 2610; Private Enforcement and Procedure, Vol. 2, ¶ 9009.275.

For the plaintiffs: Norman Shigon, Philadelphia, Pa.

For the defendants: Edward Davis, Philadelphia, Pa., for Thomas McDonald, Peter Schultz, Michael McCary, Harry Jericho, and Local 470, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers. J. Dress Pannell, Harrisburg, Pa., and Lawrence D. Beile, Philadelphia, Pa., for McCloskey and Co.

Opinion and Order

[*Motion to Dismiss*]

KRAFT, District Judge [*In full text*]: In this action, brought by plaintiffs under the Sherman and Clayton Antitrust Acts, the defendants have moved to dismiss the second amended complaint for failure to state a claim upon which relief can be granted and for failure of the plaintiffs to comply with the order of court requiring submission of the second amended complaint within twenty days.

[*Causes of Action*]

The plaintiffs are truck drivers, members of the defendant Local 470 (four officers of which are also defendants), and erstwhile employees of the defendant, McCloskey and Company, a Philadelphia contractor. Plaintiffs complain of manifold conspiracies: conspiracies among all of the defendants, between the Union and its officers, among McCloskey and other unnamed Philadelphia contractors, and among all the defendants and these contractors. They claim, *inter alia,* that their reputations have been injured, their "physical and mental conditions" damaged, and their seniority rights, rights to Union Welfare funds and to wages disregarded. For these alleged wrongs they seek treble damages, sundry injunctions and reinstatement.

Turning first to the sufficiency of plaintiffs allegations against McCloskey,[1] they aver substantially that McCloskey, the Union and its officers conspired to and did enter into a collective bargaining agreement which was identical to agreements then existing between other Philadelphia contractors and their employees; that this agreement was made to secure for McCloskey certain benefits then enjoyed by these other contractors, and to enable McCloskey to join with these other contractors in monopolizing the excavation business in Philadelphia. They aver that the agreement was openly opposed by McCloskey's truck drivers because it unfairly limited the "access to the labor market" which they had enjoyed under their prior collective agreement.

[*Sufficiency of Allegations*]

Few additional facts are stated and, for this reason alone, the complaint might be held fatally deficient. General allegations of conspiracy and of attempts to monoplize are no more than statements of legal conclusions. If they are not supported by statements of fact, no cause for relief is stated. *Black & Yates, Inc. et al v. Mahogany Ass'n., Inc. et al.,* 129 F. 2d 227 (Cir. 3 1942); *Feddersen Motors, Inc. v. Ward et al.* [1950-1951 TRADE CASES ¶ 62,579], 180 F. 2d 519 (Cir. 10 1950); *Nelson Radio & Supply Co.,*

[1] Complaint, ¶'s 6, 9, 10, 11, 13 and 16.

Inc. v. Motorola, Inc. [1952 TRADE CASES ¶ 67,386], 200 F. 2d 911 (Cir. 5 1952, cert. denied 345 U. S. 925).

[*Injury to Plaintiffs*]

A further and equally fundamental defect in the complaint against McCloskey deserves comment. The plaintiffs are not competitors in the excavation business which is allegedly being monopolized, and any injury they may have suffered from the asserted suppression of competition was wholly incidental thereto. Injury which is merely a collateral effect of illegal restraint upon competition is not compensible under the antitrust laws. Those who suffer such injury are not injured "by reason of" antitrust violations within the purport of the statute. 15 U. S. C. § 15; *Conference of Studio Unions et al v. Loew's, Inc. et al.* [1950-1951 TRADE CASES ¶ 62,953], 193 F. 2d 51 (Cir. 9 1951, cert. denied 342 U. S. 919); *Harrison v. Paramount Pictures, Inc. et al.* [1954 TRADE CASES ¶ 67,721], 211 F. 2d 405 (Cir. 3 1954, approving the opinion in [1953 TRADE CASES ¶ 67,568] 115 F. Supp. 312), *Karseal Corp. v. Richfield Oil Corp.* [1955 TRADE CASES ¶ 68,020], 221 F. 2d 358 (Cir. 9 1955); *Productive Inventions, Inc. v. Trico Products Corp.* [1955 TRADE CASES ¶ 68,104], 224 F. 2d 678 (Cir. 2 1955).

[*Claim Against Union*]

Examination of plaintiffs' allegations against the Union and its officers [2] discloses defects of equal moment. Some,[3] such as those which allege slander and infringements of plaintiffs' rights freely to circulate petitions, are so totally unrelated to the antitrust laws on which this suit is founded that they merit no discussion. Others aver that the Union and its officers, in effecting the collective bargaining agreement previously mentioned, have, alone and with McCloskey's aid, discriminated against the plaintiffs in relation to employment and discharge, curtailed their opportunities to work and violated their rights under past and present collective bargaining agreements.

When a Union conspires with businessmen to control some substantial portion of a market, it is vulnerable under the antitrust laws. *Allen Bradley Co. et al v. Local Union No. 3 et al.* [1944-1945 TRADE CASES ¶ 57,386], 325 U. S. 797 (1945). However, the factual allegations in the present complaint are insufficient to bring it within this principle. The meager facts which are alleged relate to discrimination by the Union, a wrong which can find no redress in the antitrust law. "Congress has indicated no purpose to make a union's breach of duty to employees in a collective bargaining group an infraction of the Sherman Act." *Hunt et al. v. Crumboch, et al.,* [1944-1945 TRADE CASES ¶ 57,385], 325 U. S. 821, 826 (1945). In *Labor And The Antitrust Laws—A Preliminary Analysis,*[4] Professor Cox, elaborating upon this point, stated:

> "Where a union controls job opportunities, it may abuse its power by limiting access to the trade, arbitrary discrimination, denials of individual liberty or unwarranted discipline; but these are problems primarily affecting labor-management relations or internal union affairs. They have little to do with the purpose of the antitrust laws . . . ."

He relied, in part, on the lengthy and authoritative treatment of antitrust policy in relation to labor unions in *Apex Hosiery Co. v. Leader et al.* [1940-1943 TRADE CASES ¶ 56,039], 310 U. S. 469 (1940) which makes it abundantly clear that ". . . restraints on the sale of employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations in restraint of trade or commerce under the Sherman Act." [5]

[*NLRB*]

Whether the Labor Management Relations Act affords a proper basis for plaintiffs' action against the Union and its officers, and the National Labor Relations Board, a proper forum, need not here be decided. See *Born v. Laube et al.,* 213 F. 2d 407 (Cir. 9 1954, cert. denied 348 U. S. 855).

[*Time of Filing*]

An additional and wholly procedural ground for dismissal of the second amended complaint must also be considered. The plaintiffs, pursuant to F. R. C. P. 15a, amended their initial complaint as a matter of course. Thereafter, on January 9, 1956, on plaintiffs' application following argument on defendants' motions to dismiss the first amended complaint, the court granted the plaintiffs leave to file, within twenty

[2] Complaint, ¶'s 6 through 16.
[3] Complaint, ¶'s 7, 8, 11 and 15.
[4] 104 U. of Pa. L. Rev. 252, 254 (1955).
[5] 310 U. S. 469, 503.

days, a second amended complaint.[6] The second amended complaint, however, was not submitted until March 15, 1956.

Leave of court, freely given when justice so requires, is a condition precedent to the filing of a second amended complaint, absent the written consent of the adverse parties.[7] To such leave, the court may attach reasonable conditions. *Parrisi v. Foley*, 203 F. 2d 454 (Cir. 2 1953); *Chicago Pneumatic Tool Co. v. Hughes Tool Co.*, 192 F. 2d 620 (Cir. 10 1951). The plaintiffs failed to comply with the reasonable condition here imposed, that the amended pleading be submitted within twenty days, and for such failure to comply with an order of court the defendants may move, under F. R. C. P. 41b, for dismissal of the action.

Order

Now, this 29 day of March, 1957, defendants' motions to dismiss the complaint are granted and plaintiffs' complaint is dismissed.

[¶ 68,687] The Crummer Company and One Other v. Jessie Ball duPont, et al., as Trustees, etc., et al.

In the United States District Court for the Northern District of Florida, Tallahassee Division. Civil Action No. 313. Filed February 13, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—When Recovery May Be Barred—Statute of Limitations—When Cause of Action Accrues—Fraudulent Concealment.—Where plaintiffs claimed that they had no knowledge of the existence of an alleged conspiracy to destroy their business because the defendants concealed their alleged conspiratorial activities behind the activities of Government employees, and that, therefore, the applicable state three-year statute of limitations was tolled by fraudulent concealment, the trial court, after the jury announced that it was in irreconcilable disagreement and unable to reach a verdict on this issue, directed a verdict for the defendants on the ground that the plaintiffs' evidence was totally insufficient to sustain their allegations of fraudulent concealment. The fact that an appellate court had directed the trial court to submit the issue to a jury did not deprive the trial court of its power to enter a directed verdict.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.200.

For the plaintiffs: Hall, Sweeney & Godbee, DeLane, Fla.; Francis P. Whitehair, DeLane, Fla.; and Chris Dixie, Houston, Tex.

For the defendants: McCarthy Crenshaw; Clarence G. Ashby and Davisson F. Dunlap, of Adair, Ulmer, Murchison, Kent & Ashby; Charles R. Scott; and William H. Rogers and Taylor Jones, of Rogers, Towers & Bailey; all of Jacksonville, Fla. Richard W. Ervin, Attorney General, State of Florida; and Atkinson & Atkinson, all of Tallahassee, Fla. Maguire, Voorhis & Wells, by W. H. Poe, Orlando, Fla. Donald Russell, Columbia, S. C. Leonard W. Cooperman, St. Petersburg, Fla. S. Wallace Shafer, Lakeland, Fla.

For a prior opinion of the U. S. Court of Appeals, Fifth Circuit, see 1955 Trade Cases ¶ 68,042, reversing U. S. District Court, Northern District of Florida, Tallahassee Division, 1955 Trade Cases ¶ 67,980.

Memorandum-Decision Stating Grounds Upon Which the Court Directed a Verdict in This Case

[*Conspiracy*]

DOZIER A. DEVANE, District Judge [*In full text*]: This action was instituted by plaintiffs under the Anti-Trust Laws of the United States. Plaintiffs charge that various persons named as defendants, together with other persons not named as defendants, conspired with each other in violation of the Anti-Trust Laws to injure, damage and destroy plaintiffs in their business.

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[6] Minutes of court, January 9, 1956: "Amended complaint to be submitted within 20 days."

[7] F. R. C. P. 15a; *Canister Co. et al. v. Leahy et al.*, 191 F. 2d 255 (Cir. 3 1951).

This suit was instituted on December 19, 1949. The complaint charges that the conspiracy between defendants to put the plaintiffs out of business was formed early in 1941. Plaintiffs charge the defendants with the commission of approximately forty overt acts of conspiracy between that date and June 30, 1946.

[*Prior Proceedings*]

The case came on for hearing before the Court on a motion to dismiss filed by all the defendants save three on the ground that the suit was barred by the Statute of Limitations. The Court, after full hearing on said Motions to Dismiss, dismissed this case on the ground that same was barred by the Statute of Limitations. The Court held the three year statute applicable.

The three exceptions referred to above were Post Office Inspector Edward J. Mansfield, Walter Gaul and Cummer Cypress Lumber Company. The Court granted the motions of these defendants to dismiss on the ground that they had been improperly joined as co-conspirators and party-defendants in the case. (*Crummer Company, et al., v. duPont, et al.* [1955 TRADE CASES ¶ 67,980], 117 F. Supp. 870).

Promptly upon the Court's opinion and order coming down dismissing this case on the ground it was barred by the Statute of Limitations, plaintiffs applied to the Court for authority to amend the complaint, charging more specifically acts of fraudulent concealment of their activities by the defendants, an the Court gave to plaintiffs the right to file such amendment. Upon further hearing upon the amended complaint, the Court adhered to its former ruling and dismissed the action on the ground it was barred by the Statute of Limitations.

On appeal the Court of Appeals affirmed this Court in respect of every order it had entered in the case, save and except on the question of the fraudulent concealment of the alleged overt acts charged by plaintiffs. The Court held that plaintiffs were entitled to a jury trial on this specific issue. (*The Crummer Company, et al., v. duPont, et al.* [1955 TRADE CASES ¶ 68,042], 223 F. 2d 238).

When the case came back to this Court, an order was entered setting this case for trial before a jury on the single issue of fraudulent concealment and the case finally came on for trial upon this issue.

[*Complaint*]

As heretofore stated, the complaint charges defendants with the commission of approximately forty overt acts in the execution of the alleged illegal conspiracy. The complaint named public authorities of the State and Federal Governments as the only visible activity behind which plaintiffs claim the alleged overt acts were committed. These activities of public authorities behind which the defendants are alleged to have operated were grouped and classified into five groups by this Court in its opinion in this case (117 F. Supp. 874) and need not be repeated here.

[*Fraudulent Concealment*]

When the Court began holding pre-trial conferences to define the issues that would be submitted to the jury and to require counsel for the respective parties to designate those parts of the voluminous discovery depositions and exhibits they desired to use in the trial of the single issue of fraudulent concealment, plaintiffs announced the abandonment of all alleged overt acts except the fifth classification made by this Court as follows:

> "The alleged investigation authorized by the Attorney General of the United States which led to the return of two indictments against R. E. Crummer and Company and others in the District Court of the United States, District of Kansas, Second Division, in August, 1944."

This case was thereupon readied for trial upon this limited issue of alleged fraudulent concealment and counsel for the respective parties cooperated admirably in designating such parts of the voluminous discovery depositions and exhibits each party desired to use at the trial; in fact, they cooperated in this respect so completely that no counsel found fault with the designations made by any opposing counsel.

In connection with the limited designation of the issues by plaintiffs, it should be kept in mind that plaintiffs named as co-conspirators Post Office Inspector Edward J. Mansfield, who was named as a party-defendant in the complaint, and Thomas B. Hart, Robert T. Wright, George Ruetell, F. Joseph Butler and Alexander J. Brown, Jr., employees of the Securities and Ex-

change Commission, were not made party-defendants because they resided beyond the jurisdiction of this Court. As stated above, this Court by appropriate order dismissed Post Office Inspector Mansfield as a party-defendant and the Court of Appeals affirmed this Court in that action. So this case went to trial before the jury on the single issue of fraudulent concealment of the alleged conspiratorial activities between the named defendants, or some of them, and those Federal Government employees conducting the investigations, which investigations resulted in the return of the two indictments against the plaintiffs and others in Kansas.

[*Governmental Activities*]

The evidence in this case discloses no conspiratorial overt act by any of the defendants (with one noted exception to be referred to later) with any Government employee. All it discloses is that some of the Government employees during their investigations contacted a few of the defendants and solicited certain specific information from them. There was nothing improper or unusual brought out in the evidence in connection with these interviews being carried on by the Government employees. Moreover, these contacts were generally known by plaintiffs long before June 30, 1946.

The one noted exception is that of Walter P. Fuller. The evidence in the case discloses that the House of Representatives of Florida in the 1941 Session passed a resolution authorizing the appointment of a Committee to investigate into the activities of bond houses dealing in municipal bonds in the State of Florida. This Committee was reactivated early in 1942 by the Honorable Spessard Holland, Governor, and Walter P. Fuller was appointed as Investigator for this Committee. The Committee was to complete its investigation in time to make a report to the 1943 Session of the Legislature and to the Governor. The evidence shows that Fuller was an extremely active Investigator for his Committee, apparently limiting his activities to the Crummer Companies and he prepared for his Committee and the Committee submitted to the Governor and to the Legislature a report touching upon his investigation of these companies. R. E. Crummer testified extensively as to his relationship with Fuller dating back many years and as to the animosity Fuller held against him and his companies. The activities of Fuller as an Investigator for the Governor and the House Committee became fully known to plaintiffs when the Committee filed its report with the Governor and the Legislature early in 1943.

The investigations of the Post Office Department and the Securities and Exchange Commission were just getting under way, according to the testimony in the case, when Fuller was actively engaged in his investigation for the Legislative Committee and for the Governor of Florida. Fuller learned of this investigation through contacts he made with others during the course of his investigation for the Legislative Committee and he sought an interview with Post Office Inspector Mansfield, advised Mansfield of his activities for the Legislative Committee and the Governor and offered to supply Mansfield with any information in his possession that Mansfield might desire. There is no evidence in the case that any of the other named defendants had anything whatever to do with Fuller's activities in behalf of the Governor and his own Committee, or in the supplying of information to the Federal employees.

Fuller was subpoenaed to appear before the Grand Jury in Kansas and gave damaging testimony against plaintiffs, but there is no testimony in the record in this case that supports the allegations of the complaint that Fuller was a part of the alleged duPont-Wheeler-Pierce conspiracy. And on this record they cannot be held responsible for any of Fuller's activities as an Investigator for the State of Florida or in the contacts he solicited from and had with the Federal Employees during the course of their investigations, which led to the return of the two indictments against plaintiffs in Kansas.

[*Plaintiffs' Knowledge*]

The great preponderance of the evidence discloses that plaintiffs were fully aware of the activities of Fuller and of the Federal Investigators, including their contacts with the named defendants, all the while the investigations were going on and this knowledge and information was most effectively used by the plaintiffs in their arguments to Assistant Attorney General T. Lamar Caudle and the panel of attorneys in his office that he created at plaintiffs' request to pass upon the question as to whether or not the indictments against plaintiffs should be dismissed. The record in this case is full of

information supplied Assistant Attorney General Caudle by plaintiffs on this question. The Statute of Limitations, therefore, was effectively in operation on all these matters save one from the date the moratorium act expired on June 30, 1946.

The one exception to the statement just made above relates to one act of defendants, Roger L. Main and Howard S. Wheeler. The evidence in this case shows that on May 21, 1941, these defendants filed with the Post Office Department in Washington, D. C., a memorandum with certain papers attached as exhibits, charging irregularities in connection with the handling of certain bonds of Lee County, Florida, for which R. E. Crummer and Company was fiscal agent at the time, and that thereafter on May 31, 1941, defendant, Roger L. Main, wrote a letter to the Post Office Department at the request of the Department formalizing these charges. Both Main and Wheeler testified that neither disclosed to anyone save probably Wheeler's business associate, Loomis C. Leedy, that this memorandum had been filed with the Post Office Department by them until after the Post Office Department itself made the disclosure.

It is alleged by plaintiffs and admitted by defendants, and the evidence shows, that plaintiffs had no knowledge of the above mentioned activities of the defendants, Main and Wheeler, until December 27, 1946. This date is within three years of the bringing of this suit. The Court held in this case, and so instructed the jury, that the filing of this memorandum by defendants, Main and Wheeler, with the Post Office Department constituted no act of conspiracy and that the failure of these defendants to disclose that they had filed said memorandum to anyone prior to December 27, 1946, did not constitute an act of fraudulent concealment. The Court held that it is the duty of every citizen to report to the appropriate department of the United States Government any violation of the Federal laws of which he has any knowledge, and that the activities of Main and Wheeler in filing the memorandum above mentioned were not wrongful or illegal in any respect. The Court further held and charged the jury that it was against Postal Regulations for the Post Office Department to make any disclosure with reference to this memorandum until the Post Office Department investigation had been terminated and the two indictments brought against plaintiffs had been dismissed. The evidence shows that the disclosure was in fact made to a United States Senate Subcommittee after the two indictments against plaintiffs had been dismissed. The Court, however, in this case went on to instruct the jury that the activities of Main and Wheeler in filing this memorandum with the Post Office Department may be considered by the jury in determining whether the defendants are guilty of other overt acts which they concealed from plaintiffs.

It appears from this record that plaintiffs rest their entire case of fraudulent concealment on the act of Main and Wheeler in filing the memorandum with the Post Office Department on May 21, 1941, and if the Court is in error as to the law on this issue, then fraudulent concealment as alleged has been fully established by the plaintiffs as to this one act.

[*Conspiratorial Acts*]

Near the conclusion of the trial of this case, counsel for plaintiffs attempted to again inject into the case the issue as to whether the activities of Walter Gaul and the Crummer Cypress Lumber Company in joining in the suit with the Board of Administration in a Pasco County case was barred by the Statute of Limitations. This Court and the Court of Appeals held in the two opinions referred to above that the alleged overt acts charged by plaintiffs against Gaul and the Crummer Cypress Lumber Company with reference to this litigation were not conspiratorial acts and the Court reaffirmed those holdings in this case.

[*Directed Verdict*]

At the conclusion of all the testimony of plaintiffs, counsel for defendants filed and pressed a motion for a directed verdict, which the Court promptly denied. Then again at the conclusion of all the evidence in the case and after all the parties had rested, counsel for defendants renewed their motion for a directed verdict. The Court held this motion under advisement until after the case had been submitted to the jury. After almost a full day of deliberation divided into two parts, the jury reported to the Court that it was in irreconcilable disagreement and unable to reach a verdict.

Upon the Court being so advised by the Foreman of the jury, the Court promptly directed a verdict for defendants and announced to the jury at the time its reasons for doing so. After the verdict had been returned by the jury at the Court's direction, counsel for plaintiffs excepted thereto and insisted that the Court was without authority to direct a verdict in the case inasmuch as it held a mandate from the Court of Appeals to submit the issue of fraudulent concealment to a jury and this mandate of the Court of Appeals deprived this Court of its authority to direct a verdict in the case. The Court held the point was not well taken and affirms that holding here. This Court certainly did not lose its power to enter a judgment notwithstanding the verdict in this case had a verdict been returned for plaintiffs by the jury and assuming such power to exist in the Court, the Court certainly possessed authority to proceed in the matter in the simple way of directing the jury to return a verdict in the case.

[*Dismissal*]

The evidence in the case is totally insufficient to sustain plaintiffs' allegations of fraudulent concealment and the verdict directed by the Court brings this long, protracted litigation to an appropriate end. A final judgment dismissing this case in conformity with this Memorandum-Decision will be entered herein.

[¶ 68,688] E. B. DeGolia v. Twentieth Century-Fox Film Corporation, et al.

In the United States District Court for the Northern District of California, Southern Division. No. 32514. Filed April 1, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Who May Bring Suit —Non-Operating Landlord of Motion Picture Theatre—Injury to Business or Property.— In a non-operating motion picture theatre owner's action alleging, among other things, that motion picture producers and exhibitors conspired to give the theatres which they own or operate a priority over his operating lessees in the exhibition of motion pictures, and that he has lost a substantial amount of percentage rentals which he otherwise would have received from his operating lessees, the court reserved its ruling on the defendants' motion for judgment on the pleadings until trial because, from the present record in the case, it could not be determined whether the alleged injury to the theatre owner lies within that remote area to which the private remedies afforded by the antitrust laws do not extend.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.55.

For the plaintiff: Morrison, Hohfeld, Foerster, Shuman & Clark, San Francisco, Cal.

For the defendants: Landsburg, Hoffman, Arnold & Schiller; Dunne, Dunne & Phelps; and Pillsbury, Madison & Sutro, all of San Francisco, Cal.

Order Reserving Ruling on Defendants' Motion for Judgment on the Pleadings

[*Complaint*]

LOUIS E. GOODMAN, District Judge [*In full text*]: This is a private anti-trust action brought by a non-operating motion picture theater owner against numerous defendants who produce motion pictures and exhibit them in theaters which they own or operate. The complaint alleges that, in violation of the anti-trust statutes, the defendants attempted, in combination, to monopolize the business of operating motion picture theatres in San Francisco; maintained, in combination, a monopoly of exhibition of first and second run pictures in the downtown areas of San Francisco, conspired to give the theaters which they owned or operated in San Francisco a priority over plaintiff's operating lessees in the exhibition of motion pictures; conspired to impose unreasonable clearances upon and exact discriminatory rental from plaintiff's operating lessees; and indulged in the same unlawful practices in respect to plaintiff's theater and his operating lessees that they were found to have indulged in by the United States District Court for the Southern District of New York in an equity anti-trust action brought

against them by the United States.[1] As a result of these acts by defendants, it is asserted, plaintiff lost a substantial amount of percentage rentals which he would have otherwise received from his operating lessees.

[*Motion for Judgment*]

Defendants have moved for judgment on the pleadings and for a summary judgment in their favor. By their motion, they ask the Court to decide this case upon the bare pleadings supplemented by a single affidavit which adds nothing of substance. Plaintiff has submitted in opposition to the motion an affidavit which only sets forth excerpts from the pleadings and the findings in the equity action referred to in the complaint herein. Thus, the Court will treat the motion merely as one for judgment on the pleadings.

[*Right To Maintain Action*]

The ground of defendants' motion is that plaintiff is not entitled to bring an action under the anti-trust statutes as a "person injured in his business or property,"[2] because any injury to him was indirect and merely incidental to that suffered by his operating lessees.

The recognized limitations on the right to maintain a private antitrust action, based on remoteness of injury, are not spelled out in the statutes. They have been formulated by judicial decisions appraising the facts of each case in the light of the Congressional purpose in creating a private cause of action for violations of the anti-trust laws.

The courts that have thus far considered the right of a non-operating theater owner to maintain an anti-trust action for damages resulting from conspiracies similar to the one charted in the complaint herein, have reached divergent conclusions upon varied facts.[3] This diversity of judicial opinion stands as a caution against attempting to decide the question tendered by defendants' motion without an adequate factual record. The present posture of the case in the pleading stage does not enable us to determine, with any degree of confidence, whether or not the alleged injury to plaintiff lies within that remote area to which the private remedies afforded by the anti-trust laws do not extend. The Court cannot fairly rule upon the motion without a fuller and more detailed picture of plaintiff's place in the motion picture industry, his relationship to his operating lessees, and the impact of defendants' allegedly unlawful activities upon his economic position.

Ruling on the motion will therefore be reserved until the trial. Rule 12(d) Federal Rules of Civil Procedure.

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[1] *United States of America v. Paramount Pictures, Inc. et al.*, Equity No. 87-273 (S. D. N. Y.)

[2] Section 4 of the Clayton Act, 38 Stat. 731, 15 USC 15 provides that:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[3] Cases sustaining the right of a non-operating motion picture theater to maintain a private anti-trust action are: *Steiner v. 20th Century-Fox Film Corporation* [1956 TRADE CASES ¶ 68,304], 232 F. 2d 190 (9 Cir. 1956); *Tower Building Corp. v. Loew's Inc.*, No. 50 C 1307 (N. D. Ill., 1956), CCH 1956 TRADE CASES par. 68,537; *Camrel Co. Inc. v. Paramount Film Dist. Corp., et al.*, CCH 1944-1945 TRADE CASES par. 57,233 (S. D. N. Y. 1944); *East Orange Amusement Co. v. Vitagraph, Inc.*, CCH TRADE REGULATION REPORTS, 9th Ed., Supp. 1941-43 Court Decisions, par. 52,965, (D. N. J. 1943). Those denying him a right of action are: *Melrose Realty Co., Inc. v. Loew's Inc. et al.* [1956 TRADE CASES ¶ 68,358], 234 F. 2d 518 (3 Cir. 1956), aff'g CCH 1955 TRADE CASES par. 68,150 (E. D. Pa. 1955); *Harrison v. Paramount Pictures, Inc., et al.* [1954 TRADE CASES ¶ 67,721], 211 F. 2d 405 (3 Cir. 1954), aff'g [1953 TRADE CASES ¶ 67,568] 115 F. Supp. 312 (E. D. Pa. 1953); *Walder v. Paramount Publix Corp.*, CCH 1956 TRADE CASES par. 68,275 (S. D. N. Y. Jan. 1956), CCH 1956 TRADE CASES par. 68,572 (S. D. N. Y. Dev. 1956); *Congress Bldg. Corp. v. Loew's Inc.*, CCH 1956 TRADE CASES par. 68,513 (N. D. Ill. 1956).

[¶ 68,689] Health-A-Teria, Inc. v. The Gillette Company.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 56 C 1961. Dated March 13, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Production of Documents—Relevancy—Service of Subpoena by Defendant Before Answer.—A plaintiff's motion to quash a subpoena, which was served by the defendant before the filing of an answer to the complaint and which demanded the production of documents concerning the issue of damages, was granted. While it is not improper to allow discovery before an answer is filed, the information sought must be relevant to the issues as they probably will be framed. The information sought was held irrelevant at this stage of the proceeding.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.825.

For the plaintiff: Abraham Shanes, Jack Arnold Welfeld, and Jerome F. Dixon, Chicago, Ill.

For the defendant: Crowell & Leibman, Chicago, Ill.

Memorandum

[*Production of Documents*]

PHILIP L. SULLIVAN, District Judge [*In full text*]: This is a complaint to recover damages for alleged violation by defendant of the Sherman Act (Title 15 U. S. C. § 1 and 2). No answer or other pleading has been filed by defendant; on the contrary, it has taken the initiative in the suit by serving upon plaintiff's President a subpoena asking that he produce certain named documents. Presently before the court is plaintiff's motion to quash this subpoena.

The documents requested by defendant need not be now listed in detail. Briefly, they include defendant's financial statements for five years, and its customer lists and income tax returns for the same period. Defendant in its brief agrees that these items are all relevant to the question of damages. That being true, they are irrelevant at this time. While it is not improper to allow discovery before an answer is filed *Avon Linen Service v. Gratenstein,* 16 F. R. D. 469 (D. C., D. Conn, 1953), the information sought must be relevant to the issues as they will probably be framed (*Avon Linen, supra; Wagner v. Kemper,* 13 F. R. D. 128 (D. C. W. D. Mo. 1952).

In the present instance, the subpoena is premature. Defendant, if it believe that allegations of damages are insufficient to state a cause of action, it is at liberty to test that question by a motion to dismiss. There is no doubt that the information requested is highly confidential; whether or not it is legally privileged, it should not be needlessly revealed. Certainly it is not necessary to enable defendant to frame an answer; and if a motion to dismiss should be filed and allowed, revelation would serve no purpose and would be only harmful.

The motion to quash the subpoena is allowed, without prejudice to defendant's right to renew it at some subsequent time in the course of the trial.

[¶ 68,690] Abel Allan Goodman, an individual trading as Weavers Guild v. Federal Trade Commission.

In the United States Court of Appeals for the Ninth Circuit. No. 15,124. Filed April 17, 1957.

On petition to review an order to cease and desist.

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Unfair Practice Proceeding—Misrepresentations by Salesmen Designated as Independent Contractors—Apparent Scope of Authority.—An individual engaged in the sale of a home study course in re-

weaving was responsible for misrepresentations made by his salesmen, even though the individual designated his salesmen as independent contractors. The criteria of direction and control, which govern in determining whether or not a principal-agent relationship exists, are well recognized in law. However, "in dealing with a regulatory statute aimed to achieve a greater societal control through specialized agencies, the courts should disregard common-law definitions." Regardless of the manner in which the salesmen may have been designated, so far as the public was concerned, they were the individual's authorized agents and acted not only within the apparent but also within the actual scope of their authority. In view of the relationship between the individual and the salesmen, the individual was responsible for their acts.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8611.

Federal Trade Commission Enforcement and Procedure—Unfair Practice Proceeding—Defenses—Cessation of Business.—A Federal Trade Commission order prohibiting misrepresentations concerning a home study reweaving course was not set aside where the respondent, an individual, claimed that he was no longer engaged in the business of selling his reweaving course. The respondent testified that, while he has suspended his operations, he might want to resume business under another set-up, and that he sold his assets to a corporation, which took over his salesmen and the materials used in making sales of his course. The incorporators of the company which took over the business were the respondent's daughter, her husband, and a former employee; the respondent stated that he continues to act in an advisory capacity; the respondent receives a royalty for the use of his course; and the respondent signed a letter in which he was designated as a director of the corporation. The Commission was within its authority in concluding that the change in the relationship was more apparent than real and that too much reliance should not be placed on a promise of discontinuance of activities or participation in them by the respondent.

See Unfair Practices, Vol. 2, ¶ 5201.171; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.

Federal Trade Commission Enforcement and Procedure—Unfair Practice Proceeding—Misrepresentations—Sufficiency of Evidence—Evidence Relating to Particular Locality.—A Federal Trade Commission order prohibiting an individual from misrepresenting his home study reweaving course was affirmed where a large portion of the misrepresentations found by the Commission to exist related to one region of the country. However, the misrepresentations were not confined to that area because advertisements were published in trade magazines of national circulation and various circulars to salesmen had wide, interstate distribution. The Commission may prevent the spread of unfair practices, and the courts, on review of a Commission order, may infer the existence of practices other than those proved.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8621.

Unfair Practices—Misrepresentations—Home Study Reweaving Course—Test of Legality—Capacity To Deceive.—A Federal Trade Commission order prohibiting an individual from misrepresenting his home study reweaving course was affirmed, although the individual contended that some of his representations were nothing more than "puffing" which is tolerated in modern commerce. In the instant case, there were statements made to salesmen with the intention that they be conveyed by them to prospective purchasers and which were aimed to induce the purchase of a course of study. The doctrine of "buyer beware" does not apply in the instant proceeding. The capacity to deceive and not actual deception is the criterion by which practices are tested under the Federal Trade Commission Act.

See Unfair Practices, Vol. 2, ¶ 5201.201, 5201.621.

Unfair Practices—Misrepresenting Trade Status—Use of Word "Guild"—Private Enterprise.—A Federal Trade Commission order prohibiting an individual selling a home study reweaving course from using the word "guild" in his trade name was affirmed. There was no "guild" in existence, purchasers of the course derived no benefit from the

individual's so-called "guild," and the individual's so-called "guild" was merely a fictitious name under which the individual was doing business. The word refers to a non-profit association of persons engaged in the same craft for mutual assistance. This was not the nature of the individual's business. Also, the order of the Commission prohibiting the individual from representing that his business is anything other than a private business enterprise was affirmed.

See Unfair Practices, Vol. 2, ¶ 5089.10, 5103.29.

Unfair Practices—Misrepresenting to Salesmen—Earnings and Materials To Be Furnished.—A Federal Trade Commission order prohibiting an individual selling a home study reweaving course from representing (1) that the typical earnings of persons selling his course of instruction are greater than they actually are, (2) that he will furnish sales leads or other selling assistance to those selling his course of instruction, or (3) that sales kits and other advertising material are furnished to sales agents was affirmed. Earnings represented by the individual as "typical" were "exceptional" rather than "typical." The individual did not furnish to sales agents the names of prospective purchasers or with everything necessary in selecting and closing sales. Also, salesmen were required to pay five dollars, as a returnable deposit, for sales kits, and if they needed additional sales material, they would have to pay for such material.

See Unfair Practices, Vol. 2, ¶ 5101.51, 5101.80, 5101.90.

Unfair Practices—Misrepresenting Home Study Reweaving Course—Completeness of Course, Ease of Learning, Personal Instructions, Potential Earnings, Value of Supplies, and Governmental Approval.—A Federal Trade Commission order prohibiting an individual selling a home study reweaving course from representing (1) that his course of instruction constitutes a complete course in reweaving, (2) that reweaving is easily learned, or quickly learned, by taking his course, (3) that he will arrange for personal instructions for those purchasing his course, (4) that the potential earnings of persons completing the course and engaging in the reweaving business are greater than they are in fact, (5) that the needles supplied with the course are worth any amount in excess of the amount ordinarily charged for such needles by him, (6) that he will refund payments made on contracts, or (7) that his courses of instruction have been approved for training by the Bureau of Education of the State of California or the United States Veterans Administration was affirmed. Evidence established that the individual's course was not a complete course in reweaving, that reweaving is difficult to learn, that no personal assistance in completing the course was given as a regular part of the course, that it was not possible for persons completing the course to earn the amounts represented by the individual, that the needles supplied with the course were not worth the amount represented by the individual, that refunds were refused, and that the individual's course was not approved for training by the above government agencies.

See Unfair Practices, Vol. 2, ¶ 5083, 5083.10, 5083.24, 5083.31, 5083.50, 5097.25.

For the petitioner: Wolver & Wolver, by Eugene L. Wolver, Los Angeles, Cal.

For the respondent: Earl W. Kintner, General Counsel, Federal Trade Commission; Robert B. Dawkins, Assistant General Counsel, FTC; and Emerson K. Elkins, Washington, D. C.

Affirming a Federal Trade Commission cease and desist order in Dkt. 6153.

Before: LEMMON and CHAMBERS, Circuit Judges, YANKWICH, District Judge.

YANKWICH, District Judge [*In full text*]: The Federal Trade Commission, the respondent herein, to be referred to as "the Commission," after an investigation of the practices of Abel Allan Goodman, an individual trading as "Weavers' Guild," to be referred to as "the petitioner," filed a complaint on December 22, 1953, charging him with violation of §§ 2[5](a)(1) and 2[5](a)(6) of the Federal Trade Commission Act.[1]

[1] 15 U. S. C., § 45(a)(1) and § 45(a)(6).

I

The Proceedings Under Review

[*Complaint*]

In substance, the complaint charged that by the use of the words "Weavers' Guild" the petitioner had represented himself that his business was an organization or guild of weavers organized to protect the interests of its members, and that, for the purpose of obtaining salesmen in connection with the sales and distribution of his home study course of instruction in a method of repairing damage to cloth, he had caused to be published in interstate commerce advertisements, and false, misleading and deceptive statements as to the prospective earnings of such salesmen and the assistance which would be given to them. And for the purpose of inducing the salesmen to sell the course of instruction he had made false, deceptive and misleading claims and representations concerning the course and the benefits which would accrue to those purchasing it.

These representations will be treated with specificity as we discuss the findings made by the Commission and the attack made on them by the petitioner.

[*Answer*]

The petitioner filed his answer on January 11, 1954, in which he admitted that he *formerly* sold and distributed in interstate commerce the course mentioned, but claimed that he no longer did so, but was, at the time,

> "only engaged in the liquidation and winding up of the business."

He also denied that certain of the representations were made either by him or in his behalf and claimed that others were true.

[*Order*]

A Hearing Examiner was designated and hearings were had in Los Angeles, San Francisco and New Orleans. Twenty-two witnesses were presented for the Commission, nine for the petitioner. The Examiner filed his Initial Decision on September 23, 1955. On appeal, the Commission, on March 14, 1956, denied petitioner's appeal and granted, in part, the appeal in support of the complaint. The order issued by the Commissioner differed in one respect, to be adverted to later, from that recommended by the Examiner. In substance, the Order required the petitioner, in conjunction with the sales and distribution of the course of instruction of reweaving in commerce to cease and desist from:

1. Representing, directly or by implication:

(a) That the typical earnings of persons selling petitioner's course of instruction are greater than they actually are;

(b) That the petitioner will furnish sales leads or other selling assistance to those selling his course of instruction unless he actually does furnish such leads and assistance;

(c) That sales kits and other advertising material are furnished to sales agents, unless it is clearly disclosed that such articles are furnished only after the agents have made deposits or payment therefor;

(d) That the petitioner's course of instruction constitutes a complete course in reweaving unless and until such is in fact true;

(e) That reweaving is easily learned, or quickly learned, by taking the petitioner's course, unless such representation be specifically restricted to the overweaving or patch type of reweaving;

(f) That the petitioner will arrange for personal instructions for those purchasing his course;

(g) That the potential earnings of persons completing the petitioner's course and engaging in the reweaving business are greater than they are in fact;

(h) That the needles supplied with the course are worth any amount in excess of the amount ordinarily charged for such needles by the petitioner;

(i) That the petitioner will refund payments made on contracts unless he in fact makes such refunds upon demand by the purchasers;

(j) That the petitioner's courses of instruction have been approved for training by the Bureau of Education of the State of California or the United States Veterans Administration.

2. Using the word "Guild" in his trade name or otherwise;

3. Representing, directly or by implication, that his business is anything other than a private business enterprise selling a

correspondence course of instruction in reweaving, unless such representation is true.

II

The Scope of Review

This is a petition to review the order. Under the Federal Trade Commission Act, the findings of the Commission as to facts, if supported by evidence, are conclusive.[2]

In an Opinion just filed,[3] we had occasion to treat fully the scope of review under this statutory mandate and the impact of the Administrative Procedures Act[4] on it. The conclusion there stated was that the function of this Court is merely to make a comprehensive review of the record before the Commission and to determine if the findings are supported by substantial evidence on *such record considered as a whole.*[5]

In exercising the right of review, we are aware that the growing complexity of our economy has induced the Congress to place upon specialized agencies the power to regulate certain phases of it and to control the abuses in them. For this reason, the Supreme Court has stated, *both as a policy and as a warning:*

> "Courts are slow to interfere with their conclusions when reconcilable with statutory directions".[6]

III

The Status of the Salesmen

[*Contention*]

The petitioner's primary contention is that the salesmen who sold the course were *independent contractors,* for whose actions he was not responsible. The brunt of the argument is based on the claim that because the petitioner carried the salesmen on his books as independent contractors, his agreements with them so stated, and he had no control over their work and the manner of performing it, the connection between him and his salesmen conformed to the classical characteristics which courts have attached to that relationship.

[*Common Law Definitions*]

The criteria of direction and control, which govern in determining whether or not such relationship exists, are well recognized in law. However, even the general criteria are not applied with rigid consistency. And in the authorities[7] there are references to cases in which salesmen have been held to be agents of the principal notwithstanding assertions of a different relationship. However, when interpreting a statute the aim of which is to regulate interstate commerce and to control and outroot some evil practices in it, the courts are not concerned with the refinements of common-law definitions, when they endeavor to ascertain the power of any agency to which the Congress has entrusted the regulation of a business activity or the enforcement of standards it has established.

Illustrative is a case which arose under the National Labor Relations Act[8] involving the definition of the word "employee" as used in that Act. There was before the Supreme Court the important question whether newsboys who, by ordinary criteria—because they purchase the newspapers at a definite price and resell them, and, in many other respects—would be considered independent contractors, were within the Act.[9] Ruling in the affirmative, the Court rejected the contention that common-law concepts should be read into statutes of this character, saying:

> "It will not do, for deciding this question as one of uniform national application, to import wholesale the traditional common-law conceptions or some distilled essence

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[2] 15 U. S. C., § 45(c).

[3] *Jacques and Suze C. De Gorter, trading as Pelta Furs, v. Federal Trade Commission,* No. 15184 [1957 TRADE CASES ¶ 68,691], — F. 2d —.

[4] 5 U. S. C., § 1009(e).

[5] See, *Jacques and Suze C. De Gorter, trading as Pelta Furs, v. Federal Trade Commission, supra,* Note 3; and see cases cited in Notes 6 to 13 inclusive. The present state of the law is well summed up by the Court of Appeals for the Fourth Circuit:

"Conflicts in testimony are to be resolved by the Commission and not by us whose function is limited to determining whether upon a review of the whole record it appears that the Commission's findings are supported by substantial evidence. The weight to be given to the facts proved and the inferences to be drawn from them are for the Commission to determine, not the courts." (*Bristol-Myers Co. v. Federal Trade Commission,* 4 Cir., 1950 [1950-1951 TRADE CASES ¶ 62,722], 185 F. 2d 58, 62)

[6] *United States v. Storer Broadcasting Co.,* 1956, 351 U. S. 192, 203.

[7] 2 Am. Jur., Agency, § 8; 2 C. J. S., Agency, § 2(d); 35 Am. Jur., Master & Servant, § 5; 56 C. J. S., Master and Servant, § 3; Restatement, Agency, § 2(c), 220c.

[8] 29 U. S. C., § 152 *et seq.*

[9] *National Labor Relations Board v. Hearst Publications,* 1944, 322 U. S. 111.

of their local variations as exclusively controlling limitations upon the scope of the statute's effectiveness. To do this would be merely to select some of the local, hairline variations for nation-wide application and thus to reject others for coverage under the Act."[10]

The courts adopted a similar attitude under the Fair Labor Standards Act[11] when it was urged that homeworkers working on a piece basis, not under the direct control of the employer, were not employees, but independent contractors.[12]

The gloss of these cases is that, in dealing with a regulatory statute aimed to achieve a greater societal control through specialized agencies, the courts should disregard common-law definitions. Rather, should they envisage the legislation as a whole, the evils it sought to eradicate or the control which it aimed to achieve and interpret the words used with these objections in view. As said by the Court of Appeals for the Sixth Circuit:

"We are dealing, however, with a specific statute which, * * * is of a class of regulatory statutes designed to implement a public social, or economic policy through remedies not only unknown to the common law but often in derogation of it. * * * If the Act presently considered, expressly or by necessary implication, brings within the scope of its remedial and regulatory provisions, workers in the status here involved, we are not concerned with the question whether a master-servant relationship exists under otherwise applicable rules of the common law".[13]

The statute under which the present proceeding was instituted declares unlawful,

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce".[14]

And the Commission is empowered to prevent persons

"from using unfair methods of competition in commerce and deceptive acts or practices in commerce".[15]

[*Apparent Scope of Authority*]

The courts in interpreting the particular statute have stressed the fact that one who

"places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act."[16]

So when they found that there were unfair or deceptive acts in conjunction with the sale or advertising of a product or service in commerce, they held the seller or manufacturer responsible whether the salespersons were what might have been considered at common law independent contractors or not. All they were interested in was to determine whether misrepresentations were made within the *apparent scope* of the authority of the salespersons.

Thus in one of the cases which arose in the Seventh Circuit the contention was made, *as it is made here,* that the concern involved had *no such* control over the persons participating in the sales plan as would make it liable for their acts. However, the Commission found that the testimony of customers, the representation made by the salespersons and the form of the credential cards, contracts and blanks on which the sales were made, were sufficient to hold the concern responsible as a principal. In sustaining this finding the court said:

"True, there was testimony by the so-called managers and representatives to the effect the business was being conducted by them independently and, that they received no orders or directions from the Art Company. There is evidence, however, including the physical facts, which demonstrate to the contrary. For instance, each salesman was issued a certificate designating him as the representative of the Art Company; the order was taken in its name; the picture was shipped in its name, and the customer was notified in its name of the time of delivery. All blanks used by the salesmen were furnished by the Art Company and bore its

[10] *National Labor Relations Board v. Hearst Publications, supra,* Note 9, p. 125. As stated in another case,

"It is the total situation that controls." *(Bartels v. Birmingham,* 1947, 332 U. S. 126, 130) And see, *United States v. Silk,* 1947, 331 U. S. 704, 716-718.

[11] 29 U. S. C., § 201 *et seq.*

[12] *Walling v. American Needlecrafts,* 6 Cir., 1943, 139 F. 2d 60, 64; *McComb v. Homeworkers' Handicraft Cooperative, et al.,* 4 Cir., 1949, 176 F. 2d 633.

[13] *Walling v. American Needlecrafts, supra,* Note 12, p. 63. See, *United States v. Silk, supra,* Note 10, *loc. cit.; Stewart-Jordan Distributing Co. v. Tobin,* 5 Cir., 1954, 210 F. 2d 427, 432.

[14] 15 U. S. C., § 45(a)(1).

[15] 15 U. S. C., § 45(a)(6).

[16] *C. Howard Hunt Pen Co. v. Federal Trade Commission,* 3 Cir., 1952 [1952 TRADE CASES ¶ 67,286], 197 F. 2d 273, 281; and see, *Federal Trade Commission v. Winsted Hosiery Co.,* 1922, 258 U. S. 483, 494.

name. The customer had a right to believe—in fact, could not have believed otherwise, than that the salesmen *were the agents of the Art Company, with full authority in the matter.*

"Petitioners' argument and authorities are largely concerned with the relation between a manufacturer and a retail merchant. * * * It is also sought to compare the instant situation with the relation existing between the automobile manufacturer and its local agent. This is another instance, however, of the agency conducting its business in its own right and in an independent manner. These illustrations have no analogy to the present situation. Here, the agent was clothed with apparent and, we think, real authority to speak and act for and on behalf of the principal, and the latter is bound thereby. *We know of no theory of law by which the company could hold out to the public these salesmen as its representatives, reap the fruits from their acts and doings without incurring such liabilities as attach thereto.*" [17] (Italics added.)

Thus the courts take the view that the principal is bound by the acts of the salesperson he chooses to employ, if within the actual or apparent scope of his authority, even *when unauthorized.* As said by the Court of Appeals for the Second Circuit:

"But however unauthorized the offending conduct of the salesmen may have been and however condemned and discouraged by their superiors, it still was conduct which subjects the employers to the jurisdiction of the Commission and to its cease and desist order." [18]

In a later case the same court, in dealing with misrepresentations in conjunction with the sale of books, held the principal responsible because the salesmen *were his authorized agents.* This, despite the fact that the Commission found that the misrepresentations were made in *violation of direct instructions.* The Court summed up the matter in these words:

"They were nevertheless the authorized agents of the corporate petitioners, * * * to sell the books. The misrepresentations they made *were at least within the apparent scope of their authority and part of the inducement by which were made sales that inured to the benefit of the corporate petitioner.* Unsuccessful efforts by the principal to prevent such misrepresentations by agents will not put the principal beyond the reach of the Federal Trade Commission Act." [19] (Italics added.)

In the case before us the petitioner himself, in his testimony, states that the weavers' course was sold almost entirely through salesmen all over the United States and Canada. The salesmen who, at times, numbered as many as eighty, were secured through advertisements in national trade and specialty magazines. They were supplied with a sales kit paid for by them. *They were not trained to teach the course, but to sell it.* They were furnished with credentials showing them to be representatives of the petitioner. The course was prepared and mailed by the petitioner and the contract of purchase of the course was made with the petitioner by the salesmen. So, regardless of the manner in which these salespersons may have been designated in contracts between them and the petitioner or were carried on his books, so far as the public was concerned, they were his authorized agents and acted not only within the apparent but also within the actual scope of their authority. And the Commission was right in holding him responsible for their acts.

IV

Cessation of Business

Before discussing specific objections to the findings, we dispose of the contention that the petitioner *is no longer* engaged in the business and, that, for this reason, the Order to Cease and Desist should be set aside and no order for its enforcement be issued by this Court.

At the first hearing the petitioner, while stating that for reasons of health, his operations have been suspended, added that "he might want to resume the business under another set-up." At the final hearing, he testified that he had sold the assets to a corporation named Weavers' Guild, Inc., which took over the salesmen and the materials used in making the sales as of December 31, 1953. The incorporators were

[17] *International Art Co. v. Federal Trade Commission,* 7 Cir., 1940 [1940-1943 TRADE CASES ¶ 56,304], 109 F. 2d 393, 398. And see, *Consumer Sales Corp. v. Federal Trade Commission,* 2 Cir., 1952 [1952 TRADE CASES ¶ 67,316], 198 F. 2d 404, 406-407.

[18] *Parke, Austin & Lipscomb, Inc. v. Federal Trade Commission,* 2 Cir., 1944 [1944-1945 TRADE CASES ¶ 57,234], 142 F. 2d 437, 440.

[19] *Standard Distributors v. Federal Trade Commission,* 2 Cir., 1954 [1954 TRADE CASES ¶ 67,689, 67,712], 211 F. 2d 7, 13.

the petitioner's daughter, her husband and a former employee. The petitioner receives a royalty for the use of the course. He has stated that he continues to act in an advisory capacity "at any time they want me". A letter dated April 20, 1954, was admittedly signed with his name as "Director" and was sent by his direction by an employee of the corporation.

Instances exist where courts have modified cease and desist orders directed against corporations which had been dissolved under state law and were no longer in business.[20] Nevertheless, as one of the aims of the statute is to prevent unfair and deceptive practices, orders will be sustained even when it is clearly shown that the practices have actually been abandoned.[21] The cogent and obvious reason is that there is no guarantee that the practice *might not* be resumed.[22]

In accord with these cases, this Court has approved the inclusion of an officer of a corporation in such an order when necessary.

> "to make it fully effective in preventing the practices it found illegal." [23]

And courts, generally, will sustain orders directed against the persons who manage and control a corporate body in order to *prevent resumption* of unlawful practices.[24] This accords with the general attitude of the courts to respect the judgment of regulatory agencies as to the scope of an order if it appears that it could reasonably have concluded that the order was necessary.[25]

In view of the facts recited, the Commission was within its authority in concluding that the change in the relationship was more apparent than real and that too much reliance should not be placed on a promise of discontinuance of activities or participation in them by the petitioner.

V

The Challenge to the Findings

In considering the challenge to the Findings, we state generally that a study of the record leads to the conclusion that there is substantial evidence in it, considered as a whole, to sustain them all,[26] in accordance with the standards which the Supreme Court has laid down.[27] We speak of these Findings as the Findings of the Commission. In reality, they were the Findings of the Hearing Examiner which the Commission, on appeal, adopted as their own, with one exception.

In what follows, we shall review some of the evidence relating to the Findings under attack.

A. The Use of the Word "Guild."

We begin with the finding as to the name because the use of the name "Weavers' Guild" is characteristic of the entire pattern of the business conducted by the petitioner. Its use since early in 1952 is deceptive. It conveyed the impression that it is a "national" organization, the importance of membership in which should be emphasized by salesmen to persons to whom they sought to sell the course of instruction, and who were to be impressed with the fact that they were needed to fulfill a "national" program.

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[20] *Galter v. Federal Trade Commission,* 7 Cir., 1951 [1950-1951 TRADE CASES ¶ 62,770], 186 F. 2d 810, 815-816.

[21] *Federal Trade Commission v. Goodyear Tire & Rubber Co.,* 1938 [1932-1939 TRADE CASES ¶ 55,181], 304 U. S. 257, 260. See, *National Labor Relations Board v. Mexia Textile Mills,* 1950, 339 U. S. 563, 567.

[22] *Perma-Maid Co. v. Federal Trade Commission,* 6 Cir., 1941 [1940-1943 TRADE CASES ¶ 56,310], 121 F. 2d 282, 284-285; *Standard Container Mfrs' Ass'n v. Federal Trade Commission,* 5 Cir., 1941 [1940-1943 TRADE CASES ¶ 56,119], 119 F. 2d 262, 265; *Philip P. Park, Inc. v. Federal Trade Commission,* 9 Cir., 1943 [1940-1943 TRADE CASES ¶ 56,328], 136 F. 2d 428, 430; *Consolidated Royal Chemical Corp. v. Federal Trade Commission,* 7 Cir., 1951 [1950-1951 TRADE CASES ¶ 62,930], 191 F. 2d 896, 900; *Oregon-Washington Plywood Co. v. Federal Trade Commission,* 9 Cir., 1952 [1952 TRADE CASES ¶ 67,217], 194 F. 2d 48, 50-51; *C. Howard Hunt Pen Co. v. Federal Trade Commission,* 3 Cir., 1952 [1952 TRADE CASES ¶ 67,286], 197 F. 2d 273, 281; *Standard Distributors, Inc. v. Federal Trade Commission,* 2 Cir., 1954 [1954 TRADE CASES ¶ 67,689, 67,712], 211 F. 2d 7, 14-16.

[23] *Tractor Training Service v. Federal Trade Commission,* 9 Cir., 1955 [1955 TRADE CASES ¶ 68,196], 227 F. 2d 420, 425.

[24] *Marlene's v. Federal Trade Commission,* 7 Cir., 1954 [1954 TRADE CASES ¶ 67,882], 216 F. 2d 556, 559-560.

[25] *May Stores Co. v. National Labor Relations Board,* 1945, 326 U. S. 376, 390; and see, *Federal Trade Commission v. National Lead Co.,* 1956 [1957 TRADE CASES ¶ 68,629], decided February 25, 1957, No. 63 Slip Decision, pp. 11 and 12.

[26] 5 U. S. C., § 1009(e).

[27] *Corn Products Refining Co. v. Federal Trade Commission,* 1945 [1944-1945 TRADE CASES ¶ 57,363], 324 U. S. 726, 739; *Federal Trade Commission v. A. E. Staley Mfg. Co.,* 1945 [1944-1945 TRADE CASES ¶ 57,364], 324 U. S. 746, 760; *Universal Camera Corp. v. National Labor Relations Board,* 1951, 340 U. S. 474, 490-491; *O'Leary v. Brown-Pacific-Maxon, Inc.,* 1951, 340 U. S. 504, 508-509.

Webster's Unabridged Dictionary, 1934, gives the following as the *first* definition of "guild":

> "An association of men belonging to the same class or engaged in kindred pursuits, or with common interests or aims, formed for mutual aid and protection."

The legal definition, is, in substance, the same.[28] They both refer to a non-profit association of persons engaged in the same craft for mutual assistance. The public has become familiar, in recent years, with the activities of the Newspaper Guild and of the various artists' guilds.

Courts have uniformly sustained Orders of the Federal Trade Commission prohibiting the use of misleading designations. Thus, a flour company was prohibited from using the word "milling" in its title, because the word was understood by dealers and the purchasing public to indicate concerns which grind wheat into flour, which the particular mill did not do.[29] This Court sustained an Order forbidding, in advertising a medicated douche powder, the use of the word "MD" because the purchasers would mistake it for an abbreviation of Doctor of Medicine, and imply medical approval. The Court said:

> "Above and beyond the oral evidence in this case—evidence which, we repeat, is both substantial and impressive—stands the mute and accusing testimony of the thing itself. We have examined the advertising matter and the container put out for the petitioners' douche powder. Like the Commission, we too have noticed that blatant emphasis on the letters 'MD'. We too have discerned the attempt—and, we believe, the conscious attempt—to capitalize upon the prestige of a profession that, for all its blunders and ineptitudes, from the very days of Hippocrates and Galen has built up a noble tradition of self-sacrifice and service to humanity.
>
> "We agree with the conclusion of the respondent that the use of the letters 'MD' is deceptive." [30]

In another case this Court forbade the use of the word "Hollywood" with the legend "favorite of the stars" in conjunction with a cosmetic preparation upon the ground that it gave the impression that it was a product of Hollywood's theatrical colony and was preferred by the motion picture stars.[31] And generally courts will sustain the acts of the Federal Trade Commission in prohibiting the use of a trade-name that might cause confusion, whether the name used is that of a competitor or not.[32]

The case before us was a proper one in which to apply the principles of these cases. No Weavers' Guild of America ever existed. The purchasers derived no benefit from it. It was merely a fictitious name under which the petitioner was doing business and its use was likely to mislead.

B. Representations as to Earnings.

The Commission found that earnings of $1452 in eleven days, $1368 in seven days and $1302 in ten days *are not typical* earnings of salesmen selling the petitioner's course. One of the exhibits in the record which the petitioner admitted that he disseminated, contained, among other things, the following statement:

> "Meet a few of our salesmen."

Below it were photographs of three persons, G. Worthingham, whose earnings for eleven days were listed as $1452, W. H. Orledge, whose earnings for seven days were listed as $1368 and S. Buda, whose earnings for ten days were $1302. Under each photograph topping the listing of the dates on which the various amounts which comprised the total were made, was the legend *"Typical earnings with us"*. The vice of the advertisement lay in the fact that these earnings

[28] Black's Law Dictionary, 1951, "guild", p. 835. A more comprehensive definition is:

> "a voluntary association of persons pursuing the same trade, art, profession, business, such as printers, goldsmiths, wool merchants, etc., united under a distinct organization of their own, analogous to that of a corporation, regulating the affairs of their trade or business by their own laws and rules and aiming, by cooperation and organization, to protect and promote the interests of their common vocation." (38 C. J. S., "Gild and Guild", p. 924)

[29] *Federal Trade Commission v. Royal Milling Co.*, 1933 [1932-1939 TRADE CASES ¶ 55,022], 288 U. S. 212.

[30] *Stanley Laboratories v. Federal Trade Commission*, 9 Cir., 1943 [1940-1943 TRADE CASES ¶ 56,330], 138 F. 2d 388, 389.

[31] *Howe v. Federal Trade Commission*, 9 Cir., 1945 [1944-1945 TRADE CASES ¶ 57,359], 148 F. 2d 561.

[32] *American Air Lines v. North American Air Lines*, 1956, 351 U. S. 79, 85-86, and cases there cited. This is in accord with the principle that *"Injury to competition need not be shown."* (*Koch v. Federal Trade Commission*, 6 Cir., 1953 [1953 TRADE CASES ¶ 67,526], 206 F. 2d 311, 319) (Italics added)

were, *in no way, typical.* They were exceptional. For they represented persons who had devoted *much time* and *were assisted* by others in selling the course. And the petitioner testified that he "would consider a man a very good man if he made one sale a day." For that he would receive $22.50. The sales price was $35.00. And the payment of a commission of $22.50 of this price is, by itself, of the character to induce salesmen to resort to questionable practices, which it is the duty of the Commission to prohibit.

So the Commission was justified in enjoining the representation that the *typical* earnings of persons selling the petitioner's course of instruction are greater than they actually are in fact.

C. Representation as to Materials to be Furnished to Salesmen.

The Commission found that the petitioner *did not* furnish to sales agents the names of prospective purchasers, or with everything necessary in selecting and closing sales. The advertisement already referred to contains this statement:

> "You buy Nothing—you demonstrate Nothing. We furnish everything from tested, proven sales talk to order closing sales kit. For full facts and proof—write quick, today, to Weavers Guild, Dept. 0-3, 4634 Hollywood Blvd., Hollywood 27, California.

Another advertisement contains the phrase in bold face:

> "You Work on Qualified Leads."

Still another repeated the statement:

> "You don't demonstrate anything. You work from qualified leads."

In every-day parlance, "the furnishing of a lead" to a salesman implies *supplying* the names of persons who *might* become purchasers. When to the words is added the adjective "qualified" the inference becomes almost a promise of "good prospects." The petitioner in his first interrogation before the Commission, was asked:

> "Q. Do you supply them (the salesmen) with the names of prospects or leads?"

and his answer was categorical:

> "No, we do not. I will qualify that by saying once in a great while we will get an inquiry of some kind and might refer it to the salesmen."

He also stated that salesmen were *required* to pay five dollars, *as a returnable deposit,* for the sales kit and that if they needed additional brochures to leave with the customers, they *would have* to pay for them.

So here again, there is substantial testimony to sustain the finding and the paragraph of the Order prohibiting such representation unless it is stated that the articles are furnished after the agents have made deposits or payments for them.

The foregoing three representations were alleged to have been made to salesmen to induce them to sell the course. We now come to the representations directed at the purchasers of the course of instruction.

D. Representations as to the Nature of the Course.

The Commission found that the petitioner's course was not a complete course in *reweaving.* While the petitioner called his "Nu-Weaving," his brochures and advertisements describing the course used the word "re-weaving" in such a manner that it would be difficult for a person not knowing how to differentiate between the various types of weaving to know that the lessons *did not* relate to reweaving.

In one of the exhibits, below the title "Learn and Earn with Nu-Weaving", occurs the following language:

> "The modern method of Invisible Re-Weaving"

In the same brochure it is written:

> "We furnish everything you'll need to learn. To reweave you must know the 3 basic weaves of cloth."

And at the end, there is this statement:

> "Reweavers earn as high as $100 a week."

The evidence before the Commission shows that *reweaving* is difficult to learn. For it involves the taking of threads identical to the yarn used in the cloth and weaving them into the threads that are in the material itself. The method is known as "invisible reweaving" or "French reweaving."

Another method is what is known as "patch weaving." It is done with swatches of material. The swatch is placed on top of the material and the threads are pulled from each side and the threads are woven back into the weave of the material, pulled underneath and into the weave of the material so as to give the appearance of one continuous piece. This method is not so

satisfactory as the French weaving because, as one witness stated, "the pattern is broken and is not perfect." This is known as "over-lay."

The third method is known as "end weaving." This is done by placing a piece of cloth over the hole, threads are pulled underneath into the weave, so as to make the thread become a part of the material itself. What the petitioner called "Nu-Weaving" was this third method. It required the use of a special needle to draw the threads fringing the patch through the cloth, and to hook them to the back. It implied, as the petitioner himself testified at the final hearing, the use of a pattern

> "over the damaged part of the material and interweaving of the fringes of the patch with the undamaged portion of the material so that it appears to be continuous in pattern."

The representations so intermingled the words "reweaving" with the others that they conveyed the impression that the more difficult form of reweaving was being taught. The Commission was right in requiring the petitioner to desist from representing that his course of instruction constitutes a complete course in reweaving "unless and until such is in fact true."

E. Representations as to the Ease in Learning the Craft.

The Commission found that the representation that reweaving is learned and can be mastered easily and by many in ten days was incorrect. The experts produced by the Commission, to whose testimony we have already referred in the preceding paragraph, testified that *true reweaving* is a difficult course taking many months to learn. The petitioner himself, in his testimony, stated that true reweaving was difficult to learn. So, in the main, we are confronted with the fact that the basis for the objection of the petitioner to this and the preceding Finding is his contention that *he did not* advertise the difficult two types of reweaving discussed.

The short answer to this claim is that the word "reweaving" was so intermingled with the word "Nu-Weaving" that the prospective purchaser to whom, in alluring and blatant terms, it was held out as a craft easily learned and from which great remuneration could be expected, with little effort, might be led to believe that the difficult reweaving was being actually taught *in a few easy lessons*. So here again, the Commission was warranted in requiring that the petitioner confine his representation as to his course "to the overweaving or patch type" of reweaving.

F. Representations as to Personal Instruction.

The Commission found that, at times, sales agents made the representation that prospective students would be given personal assistance in completing the course, when, as a fact, no such assistance was provided as a *regular* part of the course. There is evidence in the record that at least two salesmen made such representation. In one of the circularized letters signed by the petitioner, salesmen are instructed to hold out to women these inducements,

> "Their present security lies in the continued employment and good health of the breadwinner. If something happens to him, a strike, layoff, injury or death, then security vanishes.
>
> "You'll agree that's something for her to think seriously about. Every woman realizes these things and You Can Capitalize heavily on these ever present fears.
>
> "Women want to 'express' themselves. They want to do creative, useful work. The Man Who Shows Them 'How' Will Be Welcome and Will Reap A Harvest. They only need someone to show them 'how'.
>
> "If, in addition to that he opens up a Weavers Work Shop (*one of the three*) *opportunities open to everyone of my associates he can use the graduates to feather his own nest as employees in a permanent profitable business of his own.*
>
> *"Nothing could be sweeter for You.* One hand washes the other in this deal and you get yours coming and going." (Emphasis added.)

And in the questionnaire to be analyzed more fully in the next subdivision, the petitioner speaks of "assistance" which the salesmen can give to graduates "in starting their own business." The petitioner's insistence that such promises were unauthorized is contradicted by these facts. For they show that what the salesmen told the prospective students was, *in the spirit, if not to the letter,* of what they were *encouraged,* indeed, *coached* by him to tell. More, even if they were not fully authorized, the Commission was exercising its preventive powers in ordering him to desist, in view of the fact that they were made by the salesmen within the apparent and real scope of their authority.[33]

[33] See cases cited in Notes 16, 17, 18 and 19.

G. Representation as to Potential Earnings of those Completing the Course.

The Commission found that the representation that $25 per week for spare time work and from $50 to $200 per week could be reasonably expected was not true. The circular letter referred to tells salesmen.

> "You pitch to housewives mainly; you can see them all day long; they are now earning exactly nothing. They need only to be convinced that they can make as little as $15.00 a week in their spare time at home and they will buy."

The very alluring use of the words *"as little as"* is significant. In one of the advertisements the salesmen are advised:

> "You can show them how to earn up to $5.00 an hour continuously at home, with invisible Nu-Weaving."

A circular addressed to the salesmen entitled "Questionnaire", is very revealing. It contained the following preamble:

> "This is self-explanatory.
>
> "It was composed through a compilation of all the usual questions which arose in the prospect's mind. Read them through several times and 'fix' the answers in your mind. *Thus, you will have them all at your finger tips.* Already, unhesitant answers to any questions generates a prospect's confidence in the salesmen. With this knowledge, your first 'pitch' should be as good as any that follows." (Emphasis added.)

The questions themselves bear the following heading:

> "We Know You Must Have Loads of Questions to Ask Us but We Have Been Asked So Many Questions About Nu-Weaving We Think We Can Anticipate Most of Yours—So Read These Questions and Answers."

The first six questions are a complete answer to the attempt of the petitioner to thrust upon his salesmen the sole responsibility for the representations with which we are dealing.

Here we have instructions which use the words "invisible repair," "invisible weaving" and "reweaving," indiscriminately and almost interchangeably, and statements urging salesmen to represent that it is "easy" to earn $25 a week in "spare time" and that many "full-time" re-weavers "earn as high as $200 per week."

Because they disclose so thoroughly the manner in which the petitioner was "coaching" his salesmen, the questions are reproduced in their entirety:

> "Q. 1 What is Nu-Weaving? Ans. Nu-Weaving is a new method of invisible repair to damaged cloth. Through the use of specially designed hand instruments and a newly created method of doing invisible weaving, the time required for repairs on most jobs is about ⅓ of the time needed heretofore by the old methods.
>
> "Q. 2 What does all this mean to me? Ans. Because of this great saving in time, *operators are able to do this work at about ⅓ of the usual price and still earn as much per hour as operators using the old method.*
>
> "Q. 3 How much money can I expect to earn? Ans. *If you work only spare time it is easy to earn $25.00 a week. Many full-time reweavers earn as high as $200 a week.*
>
> "Q. 4 In just what way does this make Nu-Weaving an attractive trade? Ans. Because, while only a small 5% of the public could afford the old, expensive methods, Now—through Fast Nu-Weaving, this type of repair fits everyone's pocketbook; thus, a much greater field for this work is open and a much greater need exists for competent Nu-Weavers.
>
> "Q. 5 *Why haven't there been more invisible weavers in the past?* Ans. *Due to the long time necessary to teach the old way of doing invisible weaving, those 'in the know' have usually been reluctant to impart their knowledge to more than a limited number of apprentices.*
>
> "Q. 6 How long does it take to become competent? Ans. Many students trained have completed their course in a period of *two to three weeks.*" (Italics added.)

In another of the advertisements of the course the statement is made:

> "Reweavers earn as high as $100.00 per week."

There is testimony in the record that it was not possible to earn that amount, unless the person devoted all her time and had established a custom that would bring in work enough to produce such earnings. It certainly could not be obtained through cleaners and dyers who, in the same questionnaire, were declared to be the main source of custom and profit for the graduates of the course. Question 15 reads:

> "What assistance do you give graduates in starting their own business? Ans. The main source of Invisible Reweaving are

cleaners, upholsterers and insurance companies. If you will submit a list of not more than 20 such business concerns, we will contact them with advertising material and attempt to arrange for you to leave samples of your work for display. You will find them eager for the most part to give you their full co-operation. The lower price schedule; 3 days delivery and excellence of work is sufficient to encourage them to become Nu-Weaving agencies."

Operators of commercial weaving establishments testified that employees skilled in all types of reweaving could not earn the amounts which were held out as easy possibilities to the graduates of this course in a very limited type of weaving. These misrepresentations were of the type which courts have condemned repeatedly. The Commission was fully justified in ordering the petitioner to desist from representing that the potential earnings of those purchasing and completing his course and engaging in reweaving are greater than they are in fact.[34]

Of a similar Order this Court has stated:

"It does not preclude all future representations by petitioners of the earning experience of their graduates. It does preclude representations that petitioners' graduates earn wages in excess of the average net earnings which they actually receive. In short, the order says no more that that future representations by petitioners must have a basis of fact. The order is clear and definite and within the discretion delegated by Congress to the Commission to prescribe appropriate remedies."[35]

H. Representation as to Cost of Materials.

The Commission found that the representation that materials supplied with the course are worth $30 was false. Admittedly, they were not worth such amount. Replacements were sold for $1.00. In a brochure entitled "Sales Ideas on Nu-Weaving" copyrighted by the petitioner in 1952, is found the following:

"Sales Pitch in Nu-Weaving"

In following leads, the salesman is instructed with relation to the price:

"To impress them with the value of a set of needles, say, 'One can't put a price on these because we never sell them. We won't sell them to anyone. They go only with our course. But one firm, as you see here, sells a set of similar needles for $27.50."

This was palpably false. The needles referred to were of a different character and were hand-made. And the Commission was justified in assuming that the representation was not limited to the period when, as claimed, needles were scarce and in preventing recurrence by prohibiting the representation that the needles were worth more than the petitioner ordinarily charged for them.

I. Promise of Refund.

The Commission found that representations were made that the petitioner would make full refund of moneys paid on the contracts if the purchasers were unable to complete the course. There is evidence in the record that such representations were made and that the petitioner refused such refunds when demanded. There is a letter signed by the petitioner as "Director" of Weavers Guild on April 20, 1954, *at a time when, as he now contends, he was no longer connected with the business,* addressed to the Better Business Bureau of Los Angeles, who had evidently sought the cancellation of the contract of a dissatisfied purchaser from Waterbury, Connecticut in which he states:

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[34] *Tractor Trucking [Training] Service v. Federal Trade Commission,* 9 Cir., 1955 [1955 TRADE CASES ¶ 68,196], 227 F. 2d 420.

[35] *Tractor Trucking [Training] Service v. Federal Trade Commission, supra,* Note 34, p. 425. Of the type of advertising here involved and its capacity to deceive the public, the Court of Appeals for the Seventh Circuit has stated:

"The important question to be resolved is the impression given by an advertisement as a whole. Advertisements which are capable of two meanings, one of which is false, are misleading. * * * Advertisements which create a false impression, although literally true, may be prohibited. * * *

"The meaning of advertisements to the public and their capacity to deceive are questions of fact for the Commission to determine, and its conclusions may not be disturbed unless arbitrary or clearly wrong. * * * Applicable here is our statement in *Zenith Radio Corp. v. Federal Trade Commission,* 7 Cir., 143 F. 2d 29, 31, 'The Commission had a right to look at the advertisements in question, consider the relevant evidence in the record that would aid it in interpreting the advertisements, and then decide for itself whether the practices engaged in by the petitioner were unfair or deceptive, as charged in the complaint.' " (*Rhodes Pharmacal Co. v. Federal Trade Commission,* 7 Cir. [1953 TRADE CASES ¶ 67,607], 1953, 208 F. 2d 382, 387)

"There were no special circumstances in this case to make us desist from our usual policy of non-cancellable enrollments, which was clearly printed on the order form signed by Mrs. Hine."

Granted that these representations may have been made in derogation of the terms of the written contract and that they were unauthorized or even condemned after they occurred, the Commission, in view of the entire pattern of the venture, was authorized in holding the petitioner responsible for them and in ordering that no such representations be made in the future unless refunds are actually made upon demand by the purchaser.

J. Representations as to Approval of the Course for Veterans' Training.

The Examiner found that there was *no evidence* that petitioner's correspondence course was represented to prospective purchasers as having been approved for training by the Bureau of Education of the State of California and the United States Veterans' Administration. On appeal, the Commission disapproved the finding and instead of it substituted the following:

"The Commission finds that the respondent has falsely represented that his course of instruction has been approved for training by the Bureau of Education of the State of California and the United States Veterans Administration."

The petitioner insists that the Examiner was correct and that the evidence supports his conclusion and not that of the Commission.

The Findings of the Examiner are entitled to weight and consideration by the Commission. But there is no mandate that it must accept them. The reviewing court should

"accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial." [36]

We are of the view that the Commission properly rejected this Finding of the Examiner. In considering the evidence in this case, *the pattern and frame-work of the whole enterprise must be taken into consideration.*

The representations already discussed and the implications they carried are of the very type most likely to deceive.[37] In the petitioner's instructions to the salesmen, in telling them what line or "pitch" to use, fact and fancy, past and present activities are so intermingled that the salesmen were justified in applying to the present course official approval of a resident course formerly taught by the petitioner.

In forwarding the material as to the approval of that course by the Bureau of Education of the State of California and the United States Veterans Administration, instructions were given to refer to the fact in selling the present course. But nowhere was the dissimilarity between the two courses pointed out. The rider which accompanied the materials relating to the approval was equivocal. It read:

"The V. A. and State Approvals

"It is easy to get a letter of recommendation but it is something else when a public body actually sends their 'charges' to you for instructions and PAYS the tuition fee.

"You can imagine with what keen study they scrutinize our operations, what an acid test they used to evaluate the worth of our course.

"These photostats are Cynamite. If used effectively, think what confidence it must generate in your prospect. There are very many deals that would give their right eye to have a wallop like this in their kits. All right. You've got it—*Use it—Use it effectively—Use it to engender confidence.*"

And there is a letter addressed to one of the prospective salesmen under the date of January 28, 1952, which states:

"The fact that our course was accepted and successfully used in the training of G. I.'s is certainly one of the highest recommendations we could submit."

The home study course was never so approved. One of the objects of the Federal Trade Commission Act is to eradicate business methods *having a capacity to deceive.*[38]

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[36] *Universal Camera Corp. v. National Labor Relations Board, supra,* Note 27, p. 497.

[37] *Stanley Laboratories, et al. v. Federal Trade Commission, supra,* Note 30; *Charles of the Ritz Distributors Corp. v. Federal Trade Commission,* 2 Cir., 1944 [1944-1945 TRADE CASES ¶ 57,267], 143 F. 2d 676, 680; *Koch v. Federal Trade Commission,* 6 Cir., 1953 [1953 TRADE CASES ¶ 67,526], 206 F. 2d 311, 319; *Reddi-Spred Corp. v. Federal Trade Commission,* 3 Cir. [1956 TRADE CASES ¶ 68,251], 229 F. 2d 557.

[38] *Federal Trade Commission v. Algoma Lumber Co.,* 1934 [1932-1939 TRADE CASES ¶ 55,041], **291 U. S. 67, 81**; *Charles of the Ritz Distributors Corp. v. Federal Trade Commission, supra;* Note 37.

This accords with the policy of the Act to stop unfair methods of competition in their inception.[39] In the light of these objectives, the facts just referred to warranted the Commission in making a Finding contrary to that of the Examiner and adding to the Order a provision commanding the petitioner to desist from representing that his course of instruction had been approved for training by the Bureau of Education of the State of California or the United States Veterans Administration.

Summary and Conclusion

[*Evidence*]

In what precedes we have considered the objections, legal and factual, urged against the Order of the Commission. This has required the examination of a very voluminous record. No attempt has been made to summarize all the evidence relating to each of the facts bearing upon the specific Findings under attack. Some only were given but all facts relating to a particular subject appearing in the record, favorable or unfavorable to the particular findings, were considered, in obedience to the mandate to determine the correctness of the Conclusions on the factual issues before the Commission on the record as a whole.[40]

[*Locality of Practices*]

Much is made in the argument of the fact that a large portion of the practices found by the Commission to exist related to one region—the New Orleans Region. But they are not confined entirely to that area. The advertisements were published in trade magazines of national circulation and the various circulars to salesmen had wide, interstate distribution.

More, it is quite customary to find a particular territory fertile ground for the type of shrewd misrepresentation and equivocal advertising with which the record in this case is replete. The Commission by taking action when these practices are called to its attention, prevents their spread elsewhere, which is in true keeping with the object of the Commission to cause the discontinuance of unfair and deceptive practices at their inception. And courts, on review, may infer the existence of practices other than those proved.[41]

[*"Puffing"*]

One other observation is in order. It is argued earnestly that some of the representations, such as those relating to the character of the course, and the ease with which it may be learned, are nothing more than the "puffing" which is tolerated in modern commerce and may, in certain instances, be considered innocuous even in cases under the Federal Trade Commission Act. However, an examination of the cases referred to as countenancing this shows that in the particular instances, the "superlative" words were used in a context which negatived the idea that they were "calculated to deceive." In one of the cases cited, the Court remarked upon the characterization of a product as a "perfect" lubrication:

> "So far as we know, there is nothing 'perfect' in this world, but still it is a common term, which undoubtedly means nothing more than that the product is good or of high quality. *We can conceive of situations where the use of such words might be deceptive and even fraudulent.*"[42] (Italics added.)

In another cited case, the use of superlatives in an advertisement relating to a

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[39] *Federal Trade Commission v. Raladam Co.*, 1942 [1940-1943 TRADE CASES ¶ 56,203], 316 U. S. 149, 152; and see, *Federal Trade Commission v. Raladam Co.*, 1931, 283 U. S. 643, 647.

[40] 5 U. S. C., § 1009(e).

[41] As said of a similar contention that the number of persons deceived was small:

"The contention is made that there is no evidence to support the Commission's finding that a substantial portion of the public was induced to purchase petitioner's merchandise on the strength of these false representations, and therefore the Commission's action was not in the public interest. The argument is based on the *de minimus* concept; only fourteen housewives testified before the Commission although thousands of sales were made. *We are not persuaded by this reasoning, however. There is no indication that these were the only housewives to whom false representations were made.* On the contrary, the evidence shows that all salesmen carried order blanks marked 'Special Offer', and the brown envelopes were distributed to all buyers indicating that these fourteen witnesses were but a few of the many deceived. Substantial amounts of merchandise having been sold by false and misleading representations, the interest of the public in the proceeding was well established." (*Consumer Sales Corp. v. Federal Trade Commission, supra,* Note 17, p. 407) (Emphasis added)

And see cases cited in Note 37.

[42] *Kidder Oil Co. v. Federal Trade Commission*, 7 Cir., 1941 [1940-1943 TRADE CASES ¶ 56,085, 56,100], 117 F. 2d 892, 901.

modern course in reducing was held, in the circumstances, to contain "nothing deceptive."[43] However, this is not the situation here. Here, we have statements made to salesmen with the intention that *they be conveyed* by them to prospective purchasers and which *are aimed* to induce the purchase of a course of study. As to a similar situation, *the same court* which decided the two cases just referred to, said:

> "Neither are we impressed with the suggestion that representations relied upon can be excused on the basis that they are only 'puffing', as that expression is sometimes used. It seems plain that the representations were made in order to induce the purchase of petitioners' products, and those contained in printed matter as well as the false statements by the salesmen were made with that end in view. *Statements made for the purpose of deceiving prospective purchasers and particularly those designed to consummate the sale of products by fright cannot properly be characterized as mere 'puffing'.*"[44] (Emphasis added.)

It should be added that we are not in the realm of civil torts. Even in that realm the old rule of *caveat emptor* has been abandoned, in favor of the more ethical attitude that one dealing with another in business had the right to rely upon representations of facts as the truth.[45] And the Supreme Court has applied with great consistency this approach in dealing with the Federal Trade Commission by stating, in a leading case:

> "The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. *Laws are made to protect the trusting as well as the suspicious.* The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception."[46] (Emphasis added.)

[*Capacity to Deceive*]

In sum, *capacity to deceive and not actual deception* is the criterion by which practices are tested under the Federal Trade Commission Act. The record in this case shows a series of acts which were calculated to deceive, some practiced directly by the petitioner, others by salesmen encouraged by him to practice them and for which he should be responsible, because made within the actual and apparent scope of their authority.

[*Affirmed*]

The Order of the Commission is affirmed.

[¶ 68,691] **Jacques De Gorter and Suze C. De Gorter, as individuals and as co-partners, trading as Pelta Furs v. Federal Trade Commission.**

In the United States Court of Appeals for the Ninth Circuit. No. 15,184. Filed April 17, 1957.

On petition to review an order to cease and desist.

Fur Products Labeling Act

Fur Labeling—Fur Products Labeling Act—Validity of Federal Trade Commission Rule Relating to Price and Value Misrepresentations—Power To Prohibit Price and Value Misrepresentations.—The Federal Trade Commission acted within its powers under the

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[43] *Carlay Co. v. Federal Trade Commission*, 7 Cir., 1946 [1946-1947 TRADE CASES ¶ 57,443], 153 F. 2d 493, 496.

[44] *Steel Co. Stainless Steel, Inc. v. Federal Trade Commission*, 7 Cir., 1951 [1950-1951 TRADE CASES ¶ 62,786], 187 F. 2d 693, 697.

[45] *Byrnes v. Mutual Life Ins. Co. of N. Y.*, 9 Cir., 1954, 217 F. 2d 497, 502.

[46] *Federal Trade Commission v. Standard Education Society*, 1937 [1932-1939 TRADE CASES ¶ 55,170], 302 U. S. 112, 116. In a later case, Mr. Justice Black summed up the present-day attitude in this manner:

"That exceptionally acute and sophisticated readers might have been able by penetrating analysis to have deciphered the true nature of the contest's terms is not sufficient to bar findings of fraud by a fact-finding tribunal. *Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds.*" (*Donaldson, Postmaster General v. Read Magazine, Inc.*, 1948, 333 U. S. 178, 189) (Emphasis added)

And see, *Charles of the Ritz, etc. v. Federal Trade Commission, supra*, Note 38, p. 680, and cases cited in Note 37.

Fur Products Labeling Act in promulgating Rule 44 of the Rules and Regulations under the Act, which specifically prohibits various forms of misrepresentations as to the price and value of furs, even though the Fur Products Labeling Act itself does not expressly refer to misrepresentations as to price and value. The Commission in promulgating the rule correctly interpreted and carried into effect the intent of the Congress in passing the Act. The object of the Act was to prevent, among other things, false advertising of fur products or furs, "no matter to what it related." Although the word "price" does not appear in Section 5(a) of the Act which prohibits false advertising, the section declares fur products or furs to be falsely advertised if an advertisement "contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur (Section 5(a)(5))." This section prohibits other misrepresentations as to fur products or furs, including those relating to price and value. Under Section 3(a) of the Act, specific practices set forth in the Act and in the rules and regulations under the Act are declared to be unlawful, and the Federal Trade Commission, under Section 8(b) of the Act, is authorized to prescribe rules and regulations.

See Fur Labeling, Vol. 2, ¶ 6631.

Fur Labeling—Fur Products Labeling Act—Advertisements in Commerce—Interstate Commerce.—Sales of furs to persons residing outside of California, advertising in newspapers of interstate circulation, and out-of-state origin of approximately one-fourth of the fur products sold, taken together, established the fact that a furrier was engaged in interstate commerce as that term is defined in the Fur Products Labeling Act and in the Federal Trade Commission Act. There is no constitutional inhibition against regulating purely local affairs if, in the opinion of Congress, they have a deleterious effect on the commerce between states. Congress had the power to prohibit advertising in commerce of goods either originating in interstate commerce or which might be introduced into interstate commerce. The constitutional grant of power to regulate commerce between the states gives Congress a power which is both plenary and absolute.

See Unfair Practices, Vol. 2, ¶ 5005; Fur Labeling, Vol. 2, ¶ 6614.

Fur Labeling—Misrepresentations as to Prices and Values—Tendency of Advertising To Mislead—Sufficiency of Evidence.—A Federal Trade Commission order prohibiting a furrier from representing (1) that the regular or usual price of any fur product is any amount which is in excess of the price at which it usually sells such product, (2) that a sale price enables purchasers to effectuate any savings in excess of the difference between the said price and the price at which comparable products are sold, (3) that an amount set forth on price tags represents the value or the usual price at which the fur product had been customarily sold, (4) that any such product is of a higher value than is the fact, or (5) that any such product is from the stock of a business in a state of liquidation or from the stock of a business recently consolidated with another was affirmed. The Commission's findings that the furrier falsely and deceptively advertised its fur products were supported by substantial evidence. It is not necessary that the advertising be, in fact, misleading; if it has a tendency to mislead, it is within the power of the Commission to interdict.

See Fur Labeling, Vol. 2, ¶ 6625.20, 6631.30, 6632.20, 6645.

Federal Trade Commission Enforcement and Procedure—Fur Products Labeling Act Proceeding—Court Review—Duty of Court.—A United States Court of Appeals, in reviewing a Federal Trade Commission order prohibiting violations of the Fur Products Labeling Act, ruled that the enactment of the Administrative Procedures Act has placed upon the courts the responsibility of reviewing the entire record with the object of determining whether, on the whole, substantial evidence sustained the action of the administrative body. The findings of the administrative body are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole, and the courts will not substitute their judgment for that of the administrative body. Thus, in reviewing a Federal Trade Commission order, the court should not segmentize the facts but rather take a comprehensive view of the whole record in order to determine whether the Commission has exercised, in a legal manner, the functions committed to it by the

Congress. Also, the test of the proper scope of an order is whether the Commission might have reasonably concluded from the evidence that such an order was necessary.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8621.690.

For the petitioners: Walley & Davis, by J. J. Walley, Los Angeles, Cal.

For the respondent: Robert B. Dawkins, Assistant General Counsel, Federal Trade Commission; John Carter; and Earl W. Kintner, General Counsel, FTC, Washington, D. C.

Affirming a Federal Trade Commission cease and desist order in Dkt. 6297.

Before: LEMMON and CHAMBERS, Circuit Judges, YANKWICH, District Judge.

[*FTC Order—Review*]

YANKWICH, District Judge [*In full text*]: Before us is a petition to review Order of the Federal Trade Commission to cease and desist entered on May 11, 1956, in a proceeding instituted by a complaint filed on February 25, 1955, which charged Jacques De Gorter and Suze C. De Gorter, as individuals and as partners, trading as "Pelta Furs," with the violation of the Fur Products Labeling Act[1] and Rule 44 of the rules promulgated by the Commission under the Act.[2]

More particularly, in addition to the violation of the regulation cited, they charged violation of § 5(a)(1) and (6) of the special Act[3] and what are now §§ 2(a)(1) and 2(a)(6) of the Federal Trade Commission Act, as amended in 1952.[4]

The De Gorters will be referred to as "the petitioners." However, as Jacques De Gorter was a witness in the case, we shall, in speaking of his testimony and admissions, for brevity, refer to him as "De Gorter."

After hearings were had before a Hearing Examiner, he rendered an Initial Decision on November 18, 1955. We need not concern ourselves with its details, for on appeal, the Commission, with two members dissenting, set it aside and filed their own Findings and Order on May 11, 1956, directing the petitioners to cease and desist from (a) misbranding fur products, (b) falsely and deceptively invoicing fur products and (c) falsely and deceptively advertising fur products, all in particulars to be referred to in detail hereafter.

The Order was based on the findings of the Commission that the petitioners had violated the sections referred to of the Fur Products Labeling Act and Regulation 44 enacted under it, and that their activities also constituted

> "unfair and deceptive practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act."

I.

The Scope of Review

On this type of review, this Court will not entertain questions not raised before the Administrative body.[5] And the basic statute declares specifically that, on review, the Commission's Findings

> "as to facts, if supported by evidence, shall be conclusive."[6]

The courts, including this Court, have applied this mandate consistently.[7] In assaying the facts found by the Commission, the Courts are aware that, in dealing with unfair competition,

> "Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business."[8]

[1] 15 U. S. C. § 69 *et seq.*

[2] 16 C. F. R., 1949 ed., Supp., § 301.44.

[3] 15 U. S. C. § 69c(a)(1) and (6).

[4] 15 U. S. C. § 45(a)(1) and (6).

[5] *United States v. Tucker Truck Lines, Inc.*, 1952, 344 U. S. 33, 35-37; *Federal Power Commission v. Colorado Interstate Gas Co.*, 1955, 348 U. S. 492, 500-501.

[6] 15 U. S. C. § 45(c).

[7] "The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the commission." [*Federal Trade Commission v. Pacific States Paper Trade Association*, 1927, 273 U. S. 52, 63] And see, *Electro Thermal Co. v. Federal Trade Commission*, 9 Cir., 1937 [1932-1939 TRADE CASES ¶ 55,168], 91 F. 2d 477, 479; *Lane v. Federal Trade Commission*, 9 Cir., 1942 [1940-1943 TRADE CASES ¶ 56,320], 130 F. 2d 48, 50; *Philip R. Park, Inc. v. Federal Trade Commission*, 1943, 9 Cir. [1940-1943 TRADE CASES ¶ 56,328], 136 F. 2d 428, 429; *American Medicinal Products, Inc. v. Federal Trade Commission*, 9 Cir., 1943 [1940-1943 TRADE CASES ¶ 56,329], 136 F. 2d 426, 427; *E. F. Drew & Co., Inc. v. Federal Trade Commission*, 2 Cir., 1956 [1956 TRADE CASES ¶ 68,408], 235 F. 2d 735, 740-741.

[8] *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 1953 [1953 TRADE CASES ¶ 67,426], 344 U. S. 392, 394.

The enactment of the Administrative Procedures Act[9] has placed upon the courts the responsibility of reviewing the entire record with the object of determining whether, on the whole, substantial evidence sustained the action of the administrative body.[10] This means that

> ". . . the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole."[11]

So doing, Courts will not substitute their judgment for that of the Commission. As stated by the Court of Appeals for the Second Circuit recently,

> "It was for it, not for us, to pass upon the credibility of the witnesses and the weight to be given their testimony in the light of it all, conflicting or otherwise. * * * Having done so, the findings of the Commission, when, as here, the record as a whole gives them substantial support, are final *even though the evidence is so conflicting that it might have supported the contrary* had such findings been made."[12] (Italics added.)

In view of the aim of the Congress to vest in the Commission the power to determine what unfair practices are detrimental to interstate commerce, in reviewing an order to cease and desist we should not segmentize the facts but rather take a comprehensive view of the whole record in order to determine whether the Commission has exercised, in a legal manner, the functions committed to it by the Congress.[13]

II.

The Commerce Clause

Applying the rule which limits review to the questions presented to the Commission,[14] three questions are involved: (1) whether the petitioners are engaged in interstate commerce, (2) whether the practices are unfair under the terms of the particular Act, Rule 44 of the Commission, and the Federal Trade Commission Act, and (3) if they are, whether the Rule is within the rule-making authority conferred on the Commission by the Fur Products Labeling Act.[15]

The three problems thus postulated are so interrelated that, while we shall, in what follows, attempt to give a definite answer to each, in the interest of brevity and to avoid repetition, no clearly defined line will be drawn in discussing the legal principles or facts as they relate to one or the other of the problems. We begin by stating that the constitutional grant of power to regulate commerce between the states[16] gives the Congress a power which is both plenary and absolute. As stated by the Supreme Court in a noted case,

> "This power over commerce when it exists is complete and perfect."[17]

As stated succinctly in the same case, in exercising it the Congress may prohibit purely local activities:

> "Activities conducted within states lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependent upon them."[18]

And so we find, to refer only to some recent cases, that labor relations at local level, because they affect commerce, have been made the subject of federal regulation.[19] And standards established under the Fair Labor Standards Act of 1938 for fixing minimum wages and maximum hours have been applied to local manufacturers whose products were destined for interstate commerce.[20] The same statute has been applied to employees engaged in the maintenance and operation of a building when it appeared that the tenants of the building were engaged in the production of goods for inter-

[9] 5 U. S. C. § 1009(e).

[10] *Universal Camera Corp. v. National Labor Relations Board*, 1951, 340 U. S. 474, 490; see, *National Labor Relations Board v. Babcock & Wilcox Co.*, 1956, 351 U. S. 105, 112.

[11] *O'Leary v. Brown-Pacific-Maxon, Inc.*, 1951, 340 U. S. 504, 508-509. And see, *United States v. Storer Broadcasting Co.*, 1956, 351 U. S. 192, 203.

[12] *Standard Distributors v. Federal Trade Commission*, 2 Cir., 1954 [1954 TRADE CASES ¶ 67,689, 67,712], 211 F. 2d 7, 12. And see, *Tractor Training Service v. Federal Trade Commission*, 9 Cir., 1955 [1955 TRADE CASES ¶ 68,196], 227 F. 2d 420, 424-425.

[13] *Federal Trade Commission v. Standard Education Society*, 1937 [1932-1939 TRADE CASES ¶ 55,170], 302 U. S. 112, 117.

[14] See cases cited in Note 5.

[15] U. S. C. § 69f(b).

[16] United States Constitution, Art. I, § 8, Cl. 3.

[17] *United States v. Rock Royal Co-Operative, Inc.*, 1939, 307 U. S. 533, 569.

[18] *United States v. Rock Royal Co-Operative, Inc., supra* Note 17, p. 569.

[19] *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 1937, 301 U. S. 1, 31-32.

[20] *United States v. Darby*, 1941, 312 U. S. 100, 113-114.

state commerce.[21] An inspection statute of tobacco produced intrastate and destined to consumers within the state as well as without has been sustained.[22] So have marketing agreements relating to agricultural products.[23] These cases promulgate no novel doctrines. They merely reassert a fundamental principle obscured at times[24] that the criterion for exercise of the Congressional power to regulate interstate commerce *is the effect* of an act upon it and *not its source.*[25]

In passing upon regulatory measures enacted under the commerce clause the courts have not drawn any rigid distinction between articles which are in the flow of commerce and those which have come to rest. Illustrative is a case involving a section of the Federal Food, Drug and Cosmetic Act of 1938.[26] The section prohibits:

> "doing of any . . . act with respect to, a . . . drug . . . if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded."[27]

The court held that a retail druggist who had purchased sulfathiazole tablets from a wholesaler and who, *six months after,* removed them from a container *labelled according to the Act* and sold them in a container *not so labelled* was guilty of violation of the section. The court could find no constitutional infirmity in such application as the lower court had in relying on cases, some of which are relied on here.[28]

In regulating intrastate transactions it is not necessary that the regulation be confined to persons who are also engaged in interstate commerce.[29]

III.

The Purpose of the Fur Products Labeling Act

[*FTC Rules—Prices*]

As the Congress had the power to prohibit advertising in commerce of goods either originating in interstate commerce or which might be introduced into commerce, the question is (1) did it do so when it enacted the Fur Products Labeling Act and (2) was advertising relating to price and value within the interdictions of the Act?

The Federal Trade Commission answered in the affirmative by promulgating Rule 44 specifically prohibiting certain types of misrepresentations as to prices. The full text of the Rule is reproduced in the margin.[30]

In addition to questioning the finding of the Commission that they were engaged in interstate commerce, the petitioners' chief attack against the findings of the Commission relates to Paragraph C(2) of the Order

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[21] *Kirschbaum Co. v. Walling,* 1942, 316 U. S. 517.

[22] *Currin v. Wallace,* 1939, 306 U. S. 1, 9-11.

[23] *Mulford v. Smith,* 1939, 307 U. S. 38, 47-48.

[24] See, *Schechter Poultry Corp. v. United States,* 1935 [1932-1939 TRADE CASES ¶ 55,072], 295 U. S. 495: *Federal Trade Commission v. Bunte Bros.,* 1941 [1940-1943 TRADE CASES ¶ 56,098], 312 U. S. 349.

[25] *Southern Railway Co. v. United States,* 1911, 222 U. S. 20, 27; *Second Employers' Liability Cases,* 1912, 223 U. S. 1, 51. And see, *Stafford v. Wallace,* 1922, 258 U. S. 495, 516; *Binderup v. Pathé Exchange, Inc.,* 1923, 263 U. S. 291, 310, 311; *United States v. Food & Grocery Bureau of Southern California,* D. C. Cal., 1942, 43 F. Supp. 974; *United States v. Standard Oil Co. of Calif.,* D. C. Cal., 1948 [1948-1949 TRADE CASES ¶ 62,261, 62,269], 78 F. Supp. 850, aff'd. *sub nom. Standard Oil Co. of Calif. v. United States,* 1949 [1948-1949 TRADE CASES ¶ 62,432], 337 U. S. 293. Other statutes of like character and the cases sustaining them, dating back to the Hours-of-Service Act applicable to Railroads, which became a law on March 4, 1907, (34 Stat. 145, c. 2939) are listed by Mr. Justice Jackson in a *footnote (8)* to his opinion in *United States v. Five Gambling Devices,* 1953, 346 U. S. 441, 448.

[26] *United States v. Sullivan,* 1948, 332 U. S. 689. A ruling made under another section of the same Act, (§ 301(h)), upheld the application of the prohibition against a false guaranty to one engaged wholly or partly in interstate commerce irrespective of whether the guaranty *leads* in any particular instance to an illegal shipment in interstate commerce: *United States v. Walsh,* 1947, 331 U. S. 432. Very significant is this language of the Court:

"The commerce clause of the Constitution is not to be interpreted so as to deny to Congress the power to make effective its regulation of interstate commerce. Where that effectiveness depends upon a regulation or prohibition attaching regardless of whether the particular transaction in issue is interstate or intrastate in character, a transaction that concerns a business generally engaged in interstate commerce, Congress may act. Such is this case." (pp. 437-438)

[27] 21 U. S. C. § 301(k).

[28] See cases cited in Note 24.

[29] *United States v. Wrightwood Dairy Co.,* 1942 [1940-1943 TRADE CASES ¶ 56,184], 315 U. S. 110, 118-122.

[30] Rule 44, 16 C. F. R., 1949 ed., Supp., § 301.44, which reads:

"Misrepresentation of prices.

"(a) No person shall, with respect to a fur or fur product, advertise such fur or fur product at alleged wholesale prices or at alleged manufacturers cost or less, unless such representa-

pertaining to pricing. It is reproduced in the margin.[31]

The claimed insufficiency of the evidence to support this finding will be treated further on in the Opinion. For the present we advert to the contention that the Act does not prohibit misrepresentations as to prices and that the Commission in enacting Rule 44,[32] exceeded its statutory powers.

[*Local Activity*]

Our answer is that the Commission in enacting this rule correctly interpreted and carried into effect the intent of the Congress in passing the Act. It is obvious from the legal discussion which precedes that there is no constitutional inhibition against regulating purely local activities if, in the opinion of the Congress, they have a deleterious effect on the commerce between States.

[*Fur Act*]

The object of the Act under discussion is to make unlawful

"the introduction or manufacture for introduction, into commerce, or the sale, advertising or offering the sale in commerce, or the transportation or distribution in commerce, of any fur product which is misbranded or deceptively advertised or invoiced." [33]

The title of the Act and the subtitles to its various subdivisions indicate plainly that one of the evils sought to be stamped out is the *advertising* along with introduction into commerce, manufacture, for commerce and sale in commerce. Not only the specific acts codified as sections 69 to 69(j) of the Title, but also the rules and regulations to be prescribed under Section 69f(b) are declared to be

"an unfair method of competition and an unfair and deceptive act or practice in commerce under the Fair Trade Commission Act." [34]

The Act vests the Commission with the power to enforce these sections

"by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act." [35]

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tions are true in fact; nor shall any person advertise a fur or fur product at prices purported to be reduced from what are in fact fictitious prices, nor at a purported reduction in prices when such purported reduction is in fact fictitious.

"(b) No person shall, with respect to a fur or fur product, advertise such fur or fur product with comparative prices and percentage savings claims except on the basis of current market values or unless the time of such compared price is given.

"(c) No person shall, with respect to a fur or fur product, advertise such fur or fur product as being 'made to sell for', being 'worth', or 'valued at' a certain price, or by similar statements, unless such claim or representation is true in fact.

"(d) No person shall, with respect to a fur or fur product, advertise such fur or fur product as being of a certain value or quality unless such claims or representations are true in fact.

"(e) Persons making pricing claims or representations of the types described in paragraphs (a), (b), (c) and (d) of this section shall maintain full and adequate records disclosing the facts upon which such claims or representations are based.

"(f) No person shall, with respect to a fur or fur product, advertise such fur or fur product by the use of an illustration which shows such fur or fur product to be a higher priced product than the one so advertised.

"(g) No person shall, with respect to a fur or fur product, advertise such fur or fur product as being 'bankrupt stock', 'samples', 'show room models', 'Hollywood Models', 'Paris Models', 'French Models', 'Parisian Creations', 'Furs Worn by Society Women', 'Clearance Stock', 'Auction Stock', 'Stock of a business in a state of liquidation', or similar statements, unless such representations or claims are true in fact."

[31] "2. Represents directly or by implication:

"(a) That the regular or usual price of any fur product is any amount which is in excess of the price at which respondents have usually and customarily sold such products in the recent regular course of their business;

"(b) That a sale price enables purchasers of fur products to effectuate any savings in excess of the difference between the said price and the price at which comparable products were sold during the time specified or, if no time is specified, in excess of the difference between said price and the current price at which comparable products are sold;

"(c) That an amount set forth on price tags, or otherwise relating or referring to fur products, represents the value or the usual price at which said fur products had been customarily sold by respondents in the recent regular course of their business, contrary to fact;

"(d) That any such product is of a higher grade, quality, or value than is the fact, by means of illustrations or depictions of higher priced or more valuable products than those actually available for sale at the advertised selling price, or by any other means."

[32] Rule 44, 16 C. F. R., 1949 ed., Supp. § 301.44.

[33] 15 U. S. C. § 69a(a).

[34] 15 U. S. C. § 69a(a).

[35] 15 U. S. C. § 69f(a)(2).

In addition to this, Subdivision (b) of the same Section provides:

"The Commission is authorized and directed to prescribe rules and regulations governing the manner and form of disclosing information required by Sections 69-69(j) of this title, and such further rules and regulations as may be necessary and proper for purposes of administration and enforcement of said sections."[36]

[*Construction of Act*]

The petitioners ask us to apply narrowly the doctrine of *ejusdem generis* as expounded in some state cases,[37] so as to limit the power of the Commission to the subjects actually covered by the Act. Because the Act does not speak of misrepresentation as to *price and value*, we are urged to find that the Commission was without power to promulgate Rule 44, which specifically prohibits various forms of misrepresentations as to prices.

The Supreme Court of the United States has laid down rules for the interpretation of federal statutes. These are explicit, and are binding on us. So we need not, indeed we are not free, to resort to state decisions in interpreting a federal statute. The rule of *ejusdem generis*, as applied by the Supreme Court, has been succinctly stated by Mr. Chief Justice Hughes in this manner:

"The rule of *ejusdem generis* is a familiar and useful one in interpreting words by the association in which they are found, but it gives no warrant for narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards. 'The rule of "ejusdem" is applied *as an aid in ascertaining the intention of the legislature, not to subvert it when ascertained.*' *Texas v. United States*, 292 U. S. 522, 534."[38] (Emphasis added.)

In the case in which this statement was made, it was argued that an act[39] dealing with fraud against the Government should be limited to cases involving pecuniary or property loss. The Court declined to apply the narrow rule of construction and held that the presentation of *any* false statement was punishable by the Act, whether it resulted in loss to the Government or not. This accords with a concomitant rule that

"The policy as well as the letter of the law is a guide to decision."[40]

[*Object of Act*]

The object of the statute before us—as appears from the legislative history,[41] was to prevent, among other things, false advertising of fur products or furs, ***no matter to what it related.*** There is no rigid requirement of semantic perfection in the use of words by the Congress. All that is required is that the Congress make

"a choice of language which fairly brings a given situation within a statute."[42]

As stated by the Supreme Court in another case:

"Words generally have different shades of meaning and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purpose of the law, and the circumstances under which the words were employed."[43]

The word "price" does not occur in the section of the Act under consideration relating to false advertising.[44] However, the

[36] 15 U. S. C. § 69f(b).

[37] *State v. Thompson*, 1950, 38 Wash. 737, 232 P. 2d 87; *Smith v. Higginbothom*, 1946, 187 Md. 115, 48 A. 2d 754.

[38] *United States v. Gilliland*, 1941 [1940-1943 TRADE CASES ¶ 56,092], 312 U. S. 86, 93.

[39] 48 Stat. 996.

[40] *Markham v. Cabell*, 1945, 326 U. S. 404, 409. See, *Cox v. Roth*, 1955, 348 U. S. 207, 208-210.

[41] Congressional Record, February 22, 1950, p. 1510, June 18, 1951, p. 6850; Hearings on H. R. 3734, before the Committee on Interstate and Foreign Commerce, House of Representatives, 80th Congress, 2d session, April 7, 1948, pp. 141-146; Hearings on H. R. 97 and H. R. 3755, before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Congress, 1st session, May 11, 12, 13, 1949, pp. 37, 55-56, 194-200; Hearings on H. R. 2321, before the Committee on Interstate and Foreign Commerce, House of Representatives, 82d Congress, 1st session, April 17, 20, 1951, pp. 12-14, 160; Senate Committee on Interstate and Foreign Commerce, 82d Congress, 1st session, February 5, 1951, Report No. 78; Committee on Interstate and Foreign Commerce, House of Representatives, 82d Congress, 1st session, June 11, 1951, Report No. 546.

[42] *Barr v. United States*, 1945, 324 U. S. 83, 90.

[43] *Puerto Rico v. Shell Co.*, 1937 [1932-1939 TRADE CASES ¶ 55,172], 302 U. S. 253, 258. And see, *United States v. James Vernon Turley*, No. 289 Slip Decision, decided February 25, 1957.

[44] 15 U. S. C., § 69c.

Section declares fur products or furs to be falsely or deceptively advertised if an advertisement, representation, public announcement or notice which is intended to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of such fur product or fur among other facts given or omitted,

> "(5) contains the name or names of any animal or animals other than the name or names specified in paragraph (1) of this subsection or *contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur.*" [45]

It is evident that the last portion of this clause, *which we have italicized,* covers misrepresentations relating to other matters than the name or names of animals; otherwise it would be meaningless. For after specifying names of animals this provision prohibits specifically "any form" of misrepresentation or deception relating to *"such fur product or fur."* If the misrepresentations or deceptions which the Congress had in mind were misrepresentations *kindred* to names of animals, it would have used the words "with respect to such name or names." The use of the phrase "with respect to such fur product or fur" is proof that the clause meant to cover other representations than those relating to names, which were mentioned in the first paragraph of this subsection. Perhaps better grammatical construction might have required the placing of this clause in a separate paragraph at the end of this portion of the section. But we cannot destroy its obvious meaning because, in the slow and arduous process of the enactment of the statute, a clause which has a distinct meaning was inserted in the wrong place. Neither rules of grammar, punctuation nor syntax is decisive of the construction of a statute, if their strict observance would render ineffective any portion of it.[46] Because of this the Supreme Court has stated:

> "It has often been said that punctuation is not decisive of the construction of a statute. * * * Upon like principle we should not apply the rules of syntax to defeat the evident legislative intent." [47]

Some years ago this court, speaking through the late Wm. H. Sawtelle, Circuit Judge, expressed this thought in language which is both colorful and meaningful:

> "There is only one remaining basis for the contention of appellant on grammatical grounds that the opening phrase, 'within five years after entry,' is applicable to the classification under which he falls. That basis would be the closely related field of rhetoric, but it is neither the province nor the desire of this court to set itself up as an academy of letters to rule on questions of style. It may be admitted that the language of many statutes might be improved upon, but, so long as that language follows certain well-established rules of grammar, it is not our duty to judge it by its nicety of phraseology." [48]

More recently, this Court was called upon to determine whether the penalty in an amendment to the Immigration and Naturalization Act applied to a person who transports within the United States an alien who is illegally in the United States.[49] The section punishes several acts. It was argued that, because of the arrangements of the Section, there *was no penalty* for transporting an alien. While conceding that grammatically the Section might be incorrect, this Court held that the statute, *construed as a whole,* in the light of the purpose sought to be achieved, should be given effect in every one of its parts, and that the penalty should apply to *"any person"* doing any of the acts, although, at first glance, the statute made it uncertain whether the word "he" referred to the alien or to one who transports him or to both. The court said:

> "While the verbal arrangement of the statute may be thought awkward, we are of opinion that a reading of it as a whole in light of the congressional declaration of purpose leaves no rational doubt as to what was intended. That part of subsection 8(a), ending with the word 'who,' specifies the persons whose activities are the subject matter of the legislation. Paragraph (1) following relates to the activity of smuggling aliens into the United States; paragraph (2) to the transportation of aliens within the United States

[45] 15 U. S. C., § 69c(a)(5).

[46] 82 C. J. S., Statutes, §§ 340-341.

[47] *Costanzo v. Tillinghast,* 1932, 287 U. S. 341, 344. As said in *United States v. Shreveport Grain & Elevator Co.,* 1932, 287 U. S. 77, 82-83: "Punctuation marks are no part of an act. To determine the intent of the law, the court, in construing a statute, will disregard the punctuation or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed."

[48] *McLeod v. Nagle,* 9 Cir., 1931, 48 F. 2d 189, 191.

[49] 8 U. S. C., § 1324(a)(2).

by one who knows they are unlawfully here and who knows or has reason to believe that the alien's last entry occurred within three years prior to the transportation; paragraph (3) to the concealing, harboring or shielding of aliens unlawfully in the United States; and the first part of paragraph (4) is aimed at those who aid, abet or encourage the smuggling of aliens into this country. Except for the proviso at the end of paragraph (4) the whole of the subsection constitutes a single sentence, divided into paragraphs which are in the interest of clarity separated from each other by semicolons. The penalty provision is not separately stated in the paragraphs but is set forth in the last. The several types of conduct banned are all made subject to the same punishment there specified, namely, fine or imprisonment 'for each alien in respect to whom any violation of this subsection occurs.' The words 'this subsection' can only refer to subsection (a). Thus it is manifest that the 'he' and 'his' of paragraph (2) refer to the phrase 'any alien,' which finally shows up in paragraph (4) after the several prohibited activities in respect of the alien have been specified."[50]

[*Rule Upheld*]

We have a similar situation here where, in a regulatory statute, the aim of which is to protect commerce between the states, by, among other things, preventing false advertising of fur products or furs, a general clause prohibiting deceptive advertising practices *other than those enumerated* instead of being placed *after* the ultimate clause and made a separate clause is put in as a part of the penultimate clause. As already appears, the whole section spells out certain particular falsities in advertising. The particular clause prohibits *other misrepresentations as to fur products or furs.* To relate it merely to names would render it meaningless. By applying the principles in the cases just cited, and taking into account the legislative history of the Act, it is quite evident that the intention was to reach *all misrepresentations in advertising,* including those relating to prices and value. If any doubt exists about the matter the clause under consideration indicates the intention to include them. The Commission was right in so interpreting the statute and acted within its powers in promulgating the rule under discussion.

IV.

Were the Petitioners in Commerce?

In the light of what precedes, the disposition of the remaining questions presents no great difficulty. The Commission was right in holding that the petitioners advertised in commerce.[51] Eight specific sales (two to the same person) of furs destined for delivery outside California between September 29 and December 18 of one year were testified to by De Gorter. The fact that some were sold on time payments to persons not residing in the State and that no California sales tax was collected, the invoices stating "Export" or "Out of State," dispels any thought that this was done merely to accommodate the customer.

De Gorter also testified that there were, in addition to the enumerated sales, a few other out-of-state sales. He did not say what "a few" meant. Advertisements were placed in two Los Angeles newspapers which have circulation outside California. And De Gorter admitted that "approximately" 25 per cent of his fur products were shipped into the State by New York manufacturers. As these importations were continued over a long period of years, there is present *a constant flow* of goods in commerce which, by itself, would justify the finding of the Commission.[52]

The sales to persons residing outside California, the advertising in newspapers of interstate circulation, and the out-of-state origin of approximately one-fourth of the products sold, taken together, establish the fact that the petitioners were engaged in

[50] *Herrera v. United States,* 9 Cir., 1953, 208 F. 2d 215, 217. See, *Perko v. United States,* 8 Cir., 1953, 204 F. 2d 446, 447-448, in which the Court rejected a narrow application of the rule of *ejusdem generis,* which would have rendered meaningless the words "or other governmental purposes" in a section of the Air Commerce Act of 1926, relating to the power of the President:

". . . to provide by Executive order for the setting apart and the protection of airspace reservations in the United States for *national defense* or *other purposes* and, *in addition,* in the District of Columbia *for public safety purposes.*" (49 U. S. C., § 174.) [Italics added.]

[51] We are bidden to give great weight to the interpretation of the Commission; *Unemployment Compensation Commission of Alaska v. Aragon,* 1946, 329 U. S. 143, 152.

[52] *United States v. Food & Grocery Bureau,* D. C. Cal., 1942, 43 F. Supp. 975; *United States v. Standard Oil Co. of California,* D. C. Cal., 1948 [1948-1949 TRADE CASES ¶ 62,261, 62,269], 78 F. Supp. 850; *McComb v. Dessau,* D. C. Cal., 1950, 89 F. Supp. 295, 296.

interstate commerce as that term is defined in the special Act under consideration and in the Federal Trade Commission Act.[53] Both from a legal and social standpoint, an interpretation that would eliminate false advertising as to value and price at a local level, from the evils which the special Act sought to eradicate, would render it ineffective. Such exclusion would open the door to the type of advertising which is most harmful—a type of advertising which, as will appear further on in the discussion—was characteristic of that carried on by the petitioners. In these days when, through the various media of communication, advertising has so important a part in promoting a wider sale and distribution of products on which the productivity and the well-being of the American economy depend, misrepresentations as to value and price are more likely to have a harmful effect on interstate commerce than misbranding or false invoicing.

All these reasons converge in calling us to reject the narrow interpretation which the petitioners would have us place upon the statute in question in order to avoid the consequences of a type of advertising of prices which the Commission characterized in its findings as "fictitious." This brings us to a consideration of the last point—whether the facts in the record warrant the finding that the advertisements were false as to prices.

V.

The Falsity of the Advertising

[*Price Representations*]

A study of these advertisements, in the light of the testimony introduced at the trial, compels the conclusion that the finding in this respect is sustained by substantial evidence on the record considered as whole.[54] Indeed, an analysis of the exhibits, in the light of De Gorter's own testimony shows that they were blatantly false. One advertisement speaks of

"Tremendous Inventory
1000 Selected Furs
Priced Regardless of Cost!"

Another uses this phraseology:

"Tremendous Inventory of
Selected Furs
Priced Regardless of Cost!"

Each of these advertisements listed high, *apparently* former prices ("values up to"), and reduced prices ("now"), giving but a fraction, in some instances a third, of the alleged value. They need not be given in detail here. Some of them will be referred to further on. A third advertisement reads:

"Pelta Fur consolidates with famous
wholesale mink manufacturer
More room required!
complete stock $250,000.00 exquisite
styles now on Sale ½ price
present unchanged price tags remain
on garment
You May Deduct One-Half!!!"

[*Evidence*]

De Gorter, by his own testimony and admissions, demonstrated the falsity of these representations. His very pricing system had the badge of deceit in it. He objects to the finding that the prices were "fictitious." The word does not appear in the Act, but it is in the Regulation.[55] By applying it to the facts in the case, the Commission sought to indicate that the entire system of pricing was so arranged that the customer was given the false impression that he was purchasing either a fur at a reduced price, *percentagewise* or *otherwise,* when, in reality, *no price ticket represented the actual price* at which the garment *was required* to be sold by any salesperson.

"Fictitious" means founded on fiction, having the character of a fiction; false, feigned, or pretended.[56] Each of the last three adjectives could be applied to this method. On each garment there were three prices: a ticketed top price written in dollars and cents, fixed arbitrarily by the petitioners. To guide the salesperson, two additional prices, *in code,* were placed upon the tag—at either of which the fur could be sold, the percentage of the salesperson's commission depending on the price secured. The ticketed price was merely a *bargaining* price, of the type which characterizes oriental huckstering.

[53] 15 U. S. C., § 44. See, *Fox Film Corp. v. Federal Trade Commission,* 2 Cir., 1924, 296 Fed. 353; *Binderup v. Pathé Exchange,* 1923, 263 U. S. 291, 309-310.

[54] 15 U. S. C., § 45(c); 5 U. S. C., § 1009(e). And see cases cited in Notes 7 to 12 *supra.*

[55] 16 C. F. R., 1949 ed., Supp., § 301.44.

[56] *Kropp Forge Co. v. Employers' Liability Assur. Corp., Ltd.,* 7 Cir., 1949, 159 F. 2d 536, 538. This definition accords with that in Webster's New 20th Century Dictionary, 1951 ed., which the petitioners cite in their brief.

On one date the petitioners' books reflect nine sales of which *only one* brought the ticketed price. The others were at either the second or the third code price. De Gorter admitted that, on the whole, he received the ticketed prices in not more than ten percent of his sales. *Not one of the prices had any systematic relation to cost or was set up on a definite pattern of profit.*

The advertisements trumpeted widely to the prospective customers that they were buying furs of a higher value at a reduced price "regardless of cost" or "at half price." The salespeople re-echoed these statements.

As already appears, the ticketed price was merely the highest price that the petitioners had placed on the garment, which, when reduced by the salesperson to the coded prices, led the customer to believe that he was "picking up" a bargain which, in reality he was not.

We particularize by referring to some sales as to which De Gorter testified. In one instance, the advertised value of $189 appeared on the price tag, but the *supposedly reduced* figure $68 appeared only *in code*. In another instance mink coats had a ticketed price of $895 which was represented in the advertisement as the *value* of the garment. It was sold and shipped to Ohio at $488, the only coded alternative price the garment had.

As to the "half price sales" touted from another advertisement, the evidence shows that a plainly *arbitrary* price was put on the tickets and the customer informed that *he could halve it*. There is no evidence that any of the garments *ever had* the full value claimed for them or that they were intended to sell or had been offered for sale at the higher price. Equally unreliable were the statements as to the relation of price to cost. The phrases used were "discount sale," sales "many at cost," "below cost," "regardless of cost," "at a fraction of original price," "actually below wholesale."

The testimony showed that, as to one item which cost $150, the ticketed price was $298 and the garment was sold for $300, including tax. On another item, of which the purchase price was $69.50, the ticketed price was $249 and the two coded prices were $159 and $198. The garment was actually sold for $163.77, i. e. $159 and the tax. A third item cost $49.50, the ticketed price was $198 and the coded prices $149 and $98. De Gorter did not know what it sold for. So these sales were not "below" or "at cost," or sold "regardless of cost," as the advertisements claimed.

The deceptive character of these advertisements is also illustrated by the fact that when an advertisement stated, for instance, that a garment worth up to $295 was now priced at $150, the ticket price on the supposedly advertised garment *was not changed* to conform to the advertisement. The customer could not, therefore, identify the advertised product. As De Gorter testified, he might be shown a fur that had a mark of $298 on the ticket and be told that he could buy it for $149. One of the advertisements stated:

> "Complete stock now on sale,
> half price, present unchanged price tags
> remain on garments, you may
> deduct one-half."

In the interrogation as to it before the Hearing Officer, De Gorter was asked:

> "Were you selling all of your merchandise at that time at one-half of your plainly-ticketed price?"

His answer was:

> "No sir, it was indicated exactly in numbers how many and what was sold. It says here 25 beautiful coats and jackets and the type of fur, it says here how many stoles, capes, and the different types, 150 stoles and so on, the different types."

Here again, we have insidious and insinuative language, conveying a false impression, and the attempt to evade its *probable* and, we may assume, *intended* effect. For the reader of the advertisement would receive the impression that the "entire" stock of the establishment was being liquidated. He would consider the enumeration of items as particularizing some of the "bargains" that could be picked up. De Gorter tried to defend his method as a practice which obtains locally in the trade and which was forced on him by various month-end and other methods of sales resorted to by other furriers. But no such rationalization can justify the practice. Nor is a Commission charged with preventing unfair and deceptive practices in commerce required to tolerate them because they may be accepted in a definite locality.

Indeed, it is against this type of deception that the Federal Trade Commission Act and the special Fur Products Labeling

Statute and the regulations under it were directed.

[*Tendency To Mislead*]

In this field of the law, it is not necessary that the advertising be, *in fact,* misleading. If it has a tendency to mislead, it is within the power of the Commission to interdict. A case which arose under the 1950 amendment to Section 12 of the Federal Trade Commission Act,[57] can readily be applied to the situation before us, especially in view of the fact that the Commission here found violation of that Act also. A section of the latter Act makes it unlawful to disseminate or to cause to be disseminated

> "any false advertisement—for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, or cosmetics;"[58]

A seller of a product called "Reddi-Spred" which, under the statute, is a margarine,[59] issued advertisements which, without actually claiming that the product was butter, so interwove the word "butter," *in bold face,* with the phrasing of the advertisement, that it clearly gave the impression that a *butter product* was involved. In sustaining the action of the Commission which declared the advertising to be false and deceptive under the statute, the Court of Appeals for the Third Circuit used this language:

> "The issue before us is not whether the advertisements of Reddi-Spred have the tendency or capacity to deceive the purchasing public into believing that it is in reality a dairy product or something sold under a trade name which is actually different from oleomargarine. Nor does the Commission contend there is no butter in Reddi-Spred. It does justifiably decide that the shrewd featuring of the word butter in the advertisements coupled with skillfully worded statements which infer that because of its butter content Reddi-Spred is substantially different from margarine suggests that Reddi-Spred is a dairy product and so violates the letter and spirit of the statute. With the advertisements before us it is impossible to say that the Commission's finding is arbitrary or clearly wrong."[60]

The special statute before us aims to protect interstate commerce from false advertising relating to fur products and furs. The advertisements under consideration here were alluredly false. For they conveyed the false impression that the purchaser was benefiting from reductions in prices.

As already appears, the sales were neither at a reduction from (a) a price at which the fur product or a similar product sold before, nor were they at (b) half price or (c) below cost.

[*Order Affirmed*]

In viewing the cease and desist order of this and other regulatory agencies, the decisions teach that the test of the proper scope of an order is

> "whether the Board might have reasonably concluded from the evidence that such an Order was necessary."[61]

We are of the view that the Commission reached such reasonable conclusion in issuing the Order to Cease and Desist before us.

It follows that the Order should be and is hereby affirmed.

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[57] 15 U. S. C., § 52.

[58] 15 U. S. C., § 52(a)(1).

[59] 15 U. S. C., § 55(f).

[60] *Reddi-Spred Corp. v. Federal Trade Commission,* 3 Cir., 1956 [1956 TRADE CASES ¶ 68,251], 229 F. 2d 557, 559. Indeed, as stated very recently by the Court of Appeals for the Second Circuit, the Commission *may draw on its own experience*

"The Commission, which is deemed to have expert experience in dealing with these matters, *Federal Trade Commission v. R. F. Keppel & Bro., Inc.,* 1934, 291 U. S. 304, 314, 54 S. Ct. 423, 78 L. Ed. 814, is entitled to draw upon its experience in order to determine, in the absence of consumer testimony, the natural and probable result of the use of advertising expressions." (*E. F. Drew & Co. v. Federal Trade Commission,* 2 Cir., 1956 [1956 TRADE CASES ¶ 68,408], 235 F. 2d 735, 741.)

In dealing with matters of this character, the Courts reject the rule of *caveat emptor* and insist that the fact that the careful reader of the advertisement might detect their true nature presents no obstacle in enforcing orders of the Commission directed at false and deceptive practices: *Federal Trade Commission v. Standard Education Society,* 1937 [1932-1939 TRADE CASES ¶ 55,170], 302 U. S. 112, 116; and see, *Book-of-the-Month Club, Inc. v. Federal Trade Commission,* 2 Cir., 1953 [1953 TRADE CASES ¶ 67,435], 202 F. 2d 486.

[61] *May Stores Co. v. National Labor Relations Board,* 1945, 326 U. S. 376, 390; and see, *Federal Trade Commission v. National Lead Co.,* 1956, decided February 25, 1957 [1957 TRADE CASES ¶ 68,629], No. 63 Slip Decision, pp. 11 and 12.

[¶ 68,692] Seagram Distillers Corporation v. The Mills Cut Rate Liquor Mart, Incorporated, and Hillard Donner and Joseph Donner.

In the Circuit Court for Anne Arundel County, State of Maryland. In Equity. No. 9733 Equity. Filed April 12, 1957.

Maryland Fair Trade Act

Fair Trade—Enforcement of Fair Trade Prices—Consent Judgment—Contempt—Effect of *Schwegmann* Decision.—A consent judgment restraining a non-contracting retailer from selling a fair trader's alcoholic beverages below their established fair trade prices will not be dissolved in view of the *Schwegmann* decision (1950-1951 Trade Cases ¶ 62,823, 341 U. S. 384) since the decision did not invalidate agreements voluntarily entered into by the parties pursuant to the provisions of the Maryland Fair Trade Act as protected by the Miller-Tydings Act. The consent judgment has the force and effect of an agreement or voluntary contract; therefore, the decision does not apply. If the retailer had not consented to the entry of a decree against him, and had not entered into a fair trade contract with the fair trader, and if a decree had nevertheless been entered against him pursuant to the terms of the Maryland Fair Trade Act under the supposed protection of the Miller-Tydings Act, he would have been entitled to have had the decree vacated. Since the consent decree had not been vacated or rescinded, the retailer was guilty of contempt of court when he sold one of the fair trader's products below its established fair trade price. The fact that the sale was made by an employee of the retailer does not constitute a defense. Furthermore, it is no defense that the fair trader changed its corporate name after the entry of the consent judgment since no new party was introduced into the action.

See Fair Trade, Vol. 1, ¶ 3132, 3258.22, 3380.22.

For the plaintiff: Morris Rosenberg, Baltimore, Md., and William J. McWilliams, Annapolis, Md.

For the defendants: George B. Woelfel and Thomas J. Curley, Annapolis, Md.

Opinion

[*Fair Trade Injunction*]

James Macgill, Judge [*In full text*]: On July 12th, 1949, Seagram Distillers Corporation, a body corporate, filed its bill of complaint for an injunction against The Mills Cut Rate Liquor Mart, Incorporated, a corporation, and Hillard Donner and Joseph Donner, of Annapolis, Maryland.

The bill of complaint recited that the Complainant, in March, 1947, adopted a system of doing business under the authority of Chapter 239 of the Acts of 1937, known as "The Fair Trade Act," as codified under Sections 102 to 110 of Article 83 of the Annotated Code of Maryland, and pursuant thereto had entered into fair trade contracts with a number of retail liquor dealers in the State of Maryland, whereby uniform minimum resale retail prices to consumers for the products of the Complainant were established in accordance with certain schedules furnished by the Complainant. The bill of complaint went on to recite that such a Fair Trade Contract was entered into by the Complainant with a retail dealer in the City of Baltimore on March 10th, 1947, and that the Defendants refused to observe the minimum resale retail prices established by the Fair Trade Contracts entered into by the Complainant. The bill prayed for a temporary restraining order and an injunction, and this Court by its order of July 12th, 1949, granted a temporary restraining order, restraining the Defendants from selling certain alcoholic beverages at prices lower than the prices established by the Complainant for such products pursuant to the agreement or contracts made by the Complainant with retail dealers of the State of Maryland under the authority of the Maryland Fair Trade Act.

The Defendants on August 29th, 1949, filed their answer to the bill of complaint, admitting the allegations thereof and consenting to the passage of a decree granting the relief therein prayed. Thereupon this Court, by its decree of the same date, permanently enjoined the Defendants from selling certain of the products of the Complainant, therein named, at prices lower than the prices established pursuant to the agreements or contracts made by the Complainant with retail dealers in the State of

Maryland under the authority of the Maryland Fair Trade Act. The Defendants consented to the passage of the decree in the form set forth.

[*Dissolution of Injunction Sought*]

On May 25th, 1950, the Defendants filed a petition in this Court and after reciting the passage of the decree referred to, and their assent thereto, alleged that thereafter they had ascertained that their competitors were permitted to sell alcoholic beverages at prices lower than those set by the Complainant, and, as a result thereof, the Defendants were being unjustly discriminated against. It was, therefore, prayed that the decree of August 29th, 1949, be set aside and the injunction issued thereunder be dissolved. To this petition, the Complainant, on June 8th, 1950, filed a combined answer and demurrer. On May 25th, 1951, apparently at the verbal urging of the Defendants, the late Judge James Clark passed an order setting the petition and answer for a hearing on May 31st, 1951. No action appears to have been taken as a result of this hearing, if such a hearing took place. It was suggested to this Court by counsel that in view of the fact that the Supreme Court on May 21st, of that year, handed down its decision in the case of *Schwegmann Brothers v. Calvert Distillers Corporation* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384, it was contemplated that the Defendants would amend their petition to recite that decision as an additional ground for the dissolution of the injunction.

[*Contempt*]

On August 10th, 1954, the Plaintiff Corporation filed its petition asking this Court to require the Defendants to show cause why they should not be punished for contempt for violating the terms of the order of this Court of August 29th, 1949. Thereafter, the individual Defendants, Joseph Donner and Hillard Donner, filed their answers to the contempt petition and later, on September 24th, 1954, they filed a petition for a dissolution of the injunction, giving as grounds therefor the *Schwegmann* case herebefore referred to, and also the ruling of this Court by the late Judge James Clark in the case of *Seagram Distillers Corporation v. Albert A. Block,* No. 9775 Equity. To this petition, the Complainant Corporation filed again a combined answer and demurrer, assigning as one of the grounds for the demurrer that the Defendants by consenting to the passage of the final decree made an agreement or contract to observe the minimum retail resale prices established under the Maryland Fair Trade Act, and, therefore, the *Schwegmann* decision did not apply.

[*Issues*]

There were two questions presented to this Court at the hearing before it on August 16th, 1956; (1) whether or not the individual Defendants, on the evidence submitted at that time, should be adjudged in contempt for violating the injunction of August 29th, 1949, and (2) whether the order of that date by this Court should be dissolved in view of the *Schwegmann* case. Although testimony was taken, first, to determine whether or not the individual Defendants had violated the order of this Court, the second question will be first considered in this opinion.

[*Dissolution Denied*]

It is clear that if the Defendants had not consented to the entry of a decree against them, and had not entered into a Fair Trade Contract with the Complainant Corporation, and if a decree had nevertheless been entered against them pursuant to the terms of the said Fair Trade Act under the supposed protection of the Miller-Tydings Act, they, on seasonal application, would have been entitled to have had the decree vacated, on the strength of the *Schwegmann* decision. The latter decision, however, did not invalidate agreements voluntarily entered into by the parties pursuant to the provisions of the Fair Trade Act as protected by the Miller-Tydings Act. This Court is of the opinion, as contended by counsel for the Plaintiff, that the consent decree in the case at bar has the force and effect of an agreement or voluntary contract.

> "A consent decree is an agreement of the parties under the sanction of the Court as to what the decision shall be."

(*The Ansaldo San Giorgia,* 73 Federal (2) 40, see also *Hodgson v. Vroom,* 266 Federal 267, *People ex rel. Nelson v. Joliet Trust and Savings Bank,* 42 Northeast (2) 90, *Fidelity Union Trust Company v. Union Cemeteries Association,* 40 Atlantic (2) 205, and *City of Kankakee v. Lang,* 54 Northeast (2) 605.) Even if it should be held otherwise, it would not avail the Defendants. The final decree in this case had neither been re-

scinded nor modified. The Defendants had ample opportunity to move for a vacation of the decree after the decision in the *Schwegmann* case on the ground of its invalidity and failed to do so. Their attempt to do so now, after they have been cited for contempt, comes too late.

"Certainly, where changes in the relations of the parties or the conditions upon which it is based, occurring after a final decree of the nature of that passed in this case, render its further operation unreasonable, unjust, oppressive or inequitable, the court which passed it necessarily must have the right to dissolve it, and it is wholly unnecessary to resort to so disorderly a proceeding as the commission of a contempt to secure relief." (*Emergency Hospital v. Stevens*, 146 Maryland 159, 166). "[An] order may be based upon erroneous facts . . . or an erroneous conception of the law, ... Nevertheless, it must be obeyed until such time as it is stricken out on application, or reversed on appeal, or otherwise ceases to be a vital and subsisting direction of a court with proper jurisdiction over the parties to the case." (*Donner v. Calvert Distillers Corporation* [1950-1951 TRADE CASES ¶ 62,740], 196 Maryland 475, 489).

[*Price Violation*]

Without going into the details of the testimony adduced by the Complainant to establish a violation of a decree issued by this Court, it appears clear from such testimony and evidence that on July 27th, 1954, Alex Donner, one of the employees of the Defendant, Hillard Donner, (the Defendant Corporation has been dissolved since the passage of the decree, and, thereafter, the liquor store was operated by said Hillard Donner) sold to Elizabeth S. Todd, the wife of an investigator employed by the Complainant a fifth of Seagram's "Ancient Bottle" gin for the price of $3.77 when the minimum resale price, as established under the Fair Trade Act at that time, to consumers for that brand of gin produced by the Complainant, was $4.03. It is also the opinion of this Court, on the evidence, that Mr. Hillard Donner and his employees, Mr. Joseph Donner and Mr. Alex Donner, were all well aware of this minimum price list at the time the sale was made.

[*Plaintiff's Change of Name*]

The Defendants have filed a motion of *ne recipiatur* as to the Complainant's petition to amend the title of its case to conform to the present name of the corporate Plaintiff. The Plaintiff filed its petition reciting that by amendment of its certificate of incorporation filed on June 26th, 1954, its name was changed to Distillers Distributing Corporation, and by further amendment filed on August 18th, 1955, its corporate name was changed to The House of Seagram, Inc. It was prayed that the title of the action be amended to show the name of the Plaintiff as "Seagram Distillers Corporation," now known as "The House of Seagram, Inc." On that petition, together with the exhibits filed and verification thereof, this Court on June 25th, 1956, ordered that the title of the action be amended as prayed. It is contended on behalf of the Defendants that the change of the corporate name brought a new Plaintiff into the action who was not a party to the original proceeding, and that, since the original decree was restricted to the benefit of the original Plaintiff, the new Plaintiff could not claim the advantage thereof. This Court finds no merit in this contention. No new party has been introduced into this proceeding; the Corporation remains the same in so far as the record discloses, but merely operates under another name. There is nothing here to indicate that the present Plaintiff is a legal entity separate and distinct from the original Plaintiff, either by way of being a successor corporation or an assignee of the Corporation as originally named.

The fact that the sale in question was made to Mrs. Todd by an employee of the Defendant, Hillard Donner, is of no avail to him as a defense. The act of Mr. Alex Donner, for the puropse of this proceeding, was the act of Mr. Hillard Donner. (*Carroll v. State*, 63 Maryland 551.)

[*Contempt*]

This Court must adjudge the Defendant, Hillard Donner, in contempt of this Court. The corporation, The Mills Cut Rate Liquor Mart, appears to have been dissolved prior to the violation cited, and the other individual Defendant, Joseph Donner, so far as this Court can determine, was at that time, neither a partner nor a co-licensee and so cannot be held.

Before passing an order against the said Hillard Donner, this Court will hear such testimony as may be offered as to the measure of punishment.

[¶ 68,693] P. & D. Manufacturing Co., Inc. v. Federal Trade Commission.

In the United States Court of Appeals for the Seventh Circuit. September, 1956 Term—April, 1957 Session. No. 11798. Dated April 30, 1957.

On Petition for Review of a Final Order of the Federal Trade Commission.

Robinson-Patman Price Discrimination Act

Price Discrimination—Volume Discounts—Effect Upon Competition—Legality—Sufficiency of Evidence.—A Federal Trade Commission order prohibiting a manufacturer from discriminating in prices in the sale of its automotive ignition line and fuel-pump line to automotive parts jobbers or distributors was affirmed. There was substantial evidence to support the Commission's findings that purchasers of the manufacturer's products were competitively engaged in the resale of such products and that the manufacturer's discriminatory prices have an adverse effect upon competition. The price paid by jobber customers was based in the first instance on the manufacturer's jobber price list. Jobbers purchasing ignition products on the basis of a franchise agreement were accorded discounts of 20 per cent and 2 per cent from the jobber base price schedule, and jobbers purchasing ignition products on the basis of a rebate agreement were accorded instead of the usual 2 per cent, varying discounts from the jobber base price schedule depending on the total volume of monthly purchases. Essentially the same type of pricing was used for sales in the fuel-pump line. Also, the evidence established that within each classification or line the products were of one grade and quality.

See Price Discrimination, Vol. 1, ¶ 3505, 3505.390, 3508.495, 3508.652.

Federal Trade Commission Enforcement and Procedure—Enforcement of Prohibitions Against Price Discrimination—Postponement of Effective Date of Order—Sufficiency of Evidence.—On a petition to review a Federal Trade Commission order prohibiting a manufacturer of automotive products from discriminating in prices, the manufacturer's request, made on oral argument, that the effective date of the Commission's order be postponed until some future time was denied. There was no evidence that the manufacturer would be forced out of business if the traditional pricing practices which it followed would be denied to it, while its competitors were left free to continue such practices. Furthermore, the request made at the time of the oral argument came too late.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8801.

For the petitioner: Harold T. Halfpenny, Richard F. Hahn, and James F. Flanagan, Chicago, Ill.

For the respondent: Robert B. Dawkins and James E. Corkey, Washington, D. C.

Affirming a Federal Trade Commission cease and desist order in Dkt. 5913.

Before DUFFY, Chief Judge, and FINNEGAN and SWAIM, Circuit Judges.

[*Price Discrimination Order*]

DUFFY, Chief Judge [*In full text*]: This is a petition to review and set aside a cease and desist order of the Federal Trade Commission. The complaint charged petitioner with discrimination in price between different purchasers of its automotive products of like grade and quality in violation of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (15 U. S. C. § 13).

At the conclusion of the testimony and evidence which comprised the Commission's case, petitioner moved to dismiss the complaint on the ground that a *prima facie* violation of subsection (a) of section 2 had not been established. This motion was denied. Petitioner did not present any evidence but again moved for dismissal which motion was likewise denied.

The hearing examiner entered an initial decision and made detailed findings of fact. He found that petitioner sold its products in commerce; that these products were of like grade and quality; that they were sold to petitioner's customers at different prices; that the customers who were accorded the different prices, competed with each other in the resale of such products; that the different prices were discriminatory and had

the proscribed adverse effect upon competition. The examiner concluded that petitioner had violated section 2(a) of the amended Clayton Act, and entered a provisional order to cease and desist. Petitioner appealed and the matter came before the Commission for decision. The Commission denied the appeal, and adopted the findings, conclusions and order of the examiner as those of the Commission.

[*Petitioner's Business and Practices*]

P. & D. Manufacturing Co., Inc., is located in New York. It sells and distributes in commerce, certain automotive products and supplies which it groups into two lines, an ignition line and a fuel-pump line. The record shows that within each classification or line petitioner's products are of one grade and quality.

Petitioner's domestic sales volume in 1950 was approximately $1,685,000, and sales were made to some 700 automotive parts jobbers who petitioner calls distributors. They, in turn, resell these parts to garages, service stations, fleet owners, car dealers and other jobbers. The price paid by these jobber customers was based in the first instance on petitioner's jobber price list which is the base price schedule. Jobbers purchasing ignition products on the basis of the franchise agreement were accorded discounts of 20% and 2% from the jobber base price schedule. Jobbers purchasing ignition products on the basis of rebate agreements were accorded instead of the usual 2%, varying discounts from the jobber base price schedule depending on total volume of monthly purchases. Essentially the same type of pricing was used for sales in the fuel-pump line.

[*Substantial Evidence*]

We hold there is substantial evidence to support the Commission's findings that purchasers of petitioner's products are competitively engaged in the resale thereof; also that substantial evidence supports the Commission's finding that petitioner's discriminatory prices have an adverse competitive effect such as is proscribed by the statute. Of course, all the statute requires is that the practices complained of may substantially lessen competition. See *Federal Trade Commission v. Morton Salt Co.* [1948-1949 TRADE CASES ¶ 62,247], 334 U. S. 37, 46 and *Corn Products Refining Co., et al. v. Federal Trade Commission* [1944-1945 TRADE CASES ¶ 57,363], 324 U. S. 726, 738. We are also of the view that the Commission's order properly responds to the findings and conclusions of the Commission.

A more detailed discussion of our reasons for holding as hereinbefore indicated would seem to be unnecessary in view of our decisions in recent cases where practically the same issues were raised. These cases are: *E. Edelmann & Company v. Federal Trade Commission* [1956 TRADE CASES ¶ 68,558], 239 F. 2d 152; *Whitaker Cable Corporation v. Federal Trade Commission* [1956 TRADE CASES ¶ 68,559], 239 F. 2d 253, and *C. E. Niehoff & Co. v. Federal Trade Commission* [1957 TRADE CASES ¶ 68,587], decided January 9, 1957, our No. 11526.

[*Postponement*]

On oral argument petitioner's counsel requested that we adopt here the same procedure as we did in the *Niehoff* case, that is, postpone the effective date of the Commission's order until some indefinite time in the future.

In *Niehoff* there was evidence in the record that C. E. Niehoff & Co. would be forced out of business if the traditional pricing practices which it then followed would be denied to it, while its competitors were left free to continue such practices. No such proof or argument was made in the case at bar. The suggestion made at the time of oral argument comes too late.

[*Affirmed*]

The order of the Commission is affirmed.

[¶ 68,694] **National Lead Company v. Federal Trade Commission. The Sherwin-Williams Company v. Federal Trade Commission. The Eagle-Picher Company, et al. v. Federal Trade Commission. Anaconda Copper Mining Company, et al. v. Federal Trade Commission.**

In the United States Court of Appeals for the Seventh Circuit. September Term 1956, April Session 1957. Nos. 10839—10842, respectively. Dated April 30, 1957.

Federal Trade Commission Act

Unfair Practices—Conspiracy To Fix Prices—Zone Delivered Pricing System—Validity of Federal Trade Commission Order Prohibiting Individual Use of System—Modification of Court of Appeals Decision.—On remand from the United States Supreme Court, a Federal Trade Commission order prohibiting manufacturers of lead pigments from individually adopting a zone delivered pricing system or a similar system of pricing for the purpose or with the effect of "matching" the prices of competitors was affirmed by a United States Court of Appeals. Also, the Court of Appeals struck that portion of its original opinion holding that the Federal Trade Commission did not have authority to prohibit the individual use of the zone delivered pricing system.

See Unfair Practices, Vol. 2, ¶ 5035.56; FTC Enforcement and Procedure, Vol. 2, ¶ 8621.

For the petitioners: Miles G. Seeley, Chicago, Ill., and James D. Ewing and Eugene L. DuBose, New York, N. Y., for National Lead Co. Miles G. Seeley, Chicago, Ill., for Sherwin-Williams Co. Nathan S. Blumberg, Jacob Logan Fox, Wallace R. Sollo, Chicago, Ill., and Edmund P. Wood, Cincinnati, Ohio, for Eagle-Picher Company. Harlan L. Hackbert, Chicago, Ill., for Anaconda Copper Mining Co. Horace G. Hitchcock, New York, N. Y., for Anaconda Copper Mining Co. and International Smelting and Refining Co.

For the respondent: Robert B. Dawkins and James E. Corkey, Washington, D. C.

Affirming a Federal Trade Commission cease and desist order in Dkt. 5253, pursuant to a decision of the U. S. Supreme Court, 1957 Trade Cases ¶ 68,629, reversing, in part, a decision of the U. S. Court of Appeals, Seventh Circuit, 1955 Trade Cases ¶ 68,211.

Before LINDLEY, SWAIM and SCHNACKENBERG, Circuit Judges.

Order and Opinion upon Remand from the Supreme Court

PER CURIAM [*In full text*]: The Supreme Court, in *Federal Trade Commission v. National Lead Company* [1957 TRADE CASES ¶ 68,629], 352 U. S. 419, has held that the paragraph quoted from the Commission's order on page 21 of our original opinion and on page 840 of the reported opinion [1955 TRADE CASES ¶ 68,211] (227 F. 2d 825), represented proper exercise of its functions by the Commission in determining the remedy to be employed in enforcing its order. Consequently, what we have said in our original opinion to the contrary in that respect, including all that part beginning with and following the last paragraph on page 24 of the printed opinion, and with the last paragraph on page 841 of the reported opinion, is stricken. The said quoted paragraph of the Commission's order is now approved. Accordingly, the order, as modified by our original opinion and as now modified, is affirmed. The Commission shall, within 20 days, submit a proposed decree modifying its order in accord with the views expressed in our original opinion as modified hereby and in that of the Supreme Court on review, and submit the same to petitioners, and this court. Within 10 days thereafter petitioners shall consent or file objection thereto. The final decree will then be entered.

[¶ 68,695] Esso Standard Oil Company v. Secatore's, Inc.

In the United States Court of Appeals for the First Circuit. No. 5188. Dated May 2, 1957. Petition for rehearing denied, 1957 TRADE CASES ¶ 68,746.

Appeal from the United States District Court for the District of Massachusetts. WYZANSKI, District Judge.

Massachusetts Fair Trade Act and McGuire Act

Fair Trade—Resale Price Fixing Between Competitors—Producer's Suit To Enjoin Retailer from Selling Below Fair Trade Prices—McGuire Act—Competition Between Parties—Test.—An oil company could not maintain a suit to restrain an operator of two retail gasoline stations, a nonsigner of a fair trade contract, from selling the company's

gasoline at less than the fair trade prices established under the Massachusetts Fair Trade Act, since the oil company and the station operator competed with each other in the sale of gasoline to commercial accounts. The company was engaged in interstate commerce; therefore, its fair trade contracts with its retailers, even though authorized by state law, were illegal *per se* under federal antitrust legislation unless exempted therefrom by the Miller-Tydings and McGuire acts. These acts provide that the grant of immunity from federal condemnation shall not make lawful any contract providing for the establishment of resale prices "between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." The oil company and the operator competed with each other for the business of a not insubstantial class or type of consumers and therefore were corporations in competition with each other. Although their techniques of doing business differed they were nonetheless competitors, and this excluded the application of the exemption from antitrust legislation. The fact that their competition was not on the same "functional level" was irrelevant. Any competition for customers is an absolute bar to price maintenance agreements between competitors. Also, the company was not entitled to partial injunctive relief, that is, relief as to the separate class of business for which it and the operator did not actually or potentially compete.

See Resale Price Fixing—Fair Trade, Vol. 1, ¶ 3015.80, 3100.

For the appellant: Robert W. Meserve, with whom Charles W. Bartlett; John R. Hally; Austin Broadhurst; Nutter, McClennen & Fish; and Ely, Bartlett, Thompson & Brown, Boston, Mass., were on the brief.

For the appellee: Albert U. Rosa, East Boston, Mass.

Affirming a decision of the U. S. District Court, District of Massachusetts, 1956 Trade Cases ¶ 68,547.

Before WOODBURY and HARTIGAN, Circuit Judges, and ALDRICH, District Judge.

Opinion of the Court

[*Fair Trade Suit*]

WOODBURY, Circuit Judge [*In full text*]: This appeal is from a judgment dismissing a complaint in a suit brought under federal diversity jurisdiction to enjoin a "nonsigner" retailer from selling the plaintiff's *Esso* and *Esso Extra* gasolines in Massachusetts for less than the minimum retail prices established therefor in fair-trade agreements entered into by the plaintiff with third party retailers pursuant to the Massachusetts Fair Trade Law, Mass. G. L. c. 93 § 14A-B, quoted in material part in the margin.[1]

[*Requirements Contract*]

The plaintiff, Esso Standard Oil Company, is a Delaware corporation engaged in the production, distribution and marketing of gasoline and other petroleum products throughout the United States and in foreign countries. In September, 1953, it entered into a three-year contract to take effect on May 1, 1954, with the defendant, Secatore's, Inc., a Massachusetts corporation operating two large gasoline service stations in East Boston, Massachusetts, whereby it agreed to sell to the defendant and the defendant agreed to buy from the plaintiff, all of the buyer's requirements of

[1] "Section 14A. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, or the vending equipment from which said commodity is sold to consumer bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the commonwealth by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

"(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

* * *

"Section 14B. Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the preceding section, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is hereby declared to constitute unfair competition and to be actionable at the suit of any person damaged thereby."

Esso and *Esso Extra* gasolines at the seller's posted tank wagon prices "in effect at the time and place from which delivery is made."

[*Fair Trade Contracts*]

At the time when this contract was made the plaintiff had not entered into any fair trade agreements with anyone in Massachusetts. On August 7 and 8, 1956, however, while its contract with the defendant was in force, the plaintiff negotiated resale price maintenance agreements with several of its retail dealers in Massachusetts fixing minimum retail prices for its *Esso* and *Esso Extra* gasolines. The defendant was promptly notified of these agreements and directed to observe the minimum prices therein established. It refused to do so and asserts the right to persist in its refusal unless the court orders it to comply.

[*Federal Fair Trade Laws*]

It is obvious, and indeed it is freely conceded, that the plaintiff is engaged in interstate commerce. Thus its minimum price fixing agreements with its retailers, even though authorized by state law, are illegal *per se* under federal antitrust legislation unless exempted therefrom by the Miller-Tydings amendment, 50 Stat. 693 (1937), of § 1 of the Sherman Act and the McGuire amendment, 66 Stat. 632 (1952), of § 5(a) of the Federal Trade Commission Act.[2] *Schwegmann Bros. v. Calvert Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384, 386 (1951); *United States v. McKesson & Robbins, Inc.* [1956 TRADE CASES ¶ 68,368], 351 U. S. 305, 310, 311 (1956), and cases cited. The Miller-Tydings amendment, and in almost identical language the McGuire amendment also, provide in material part that nothing in federal antitrust legislation "shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions" under local law. But both amendatory acts provide that the grant of immunity from federal condemnation "shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

[*Issue*]

The critical, and as we see it the controlling, question before the court below and before us is whether the plaintiff and defendant are "corporations in competition with each other."

[*Trial Court Ruling*]

With its complaint the plaintiff filed a motion for a temporary injunction and the court below held a hearing on the motion. At that hearing the defendant stipulated that practically all of the allegations of fact in the complaint could be accepted as true and made three points in defense. It asserted, first, that the plaintiff's contract with the defendant barred the relief sought, second, that the plaintiff was "in competition" with the defendant and its other retailers, and, third, that the plaintiff had been lax in requiring its other retailers to observe its fair trade agreements. On the basis of the evidence introduced at this hearing the court in a carefully prepared opinion rejected all of these defenses and granted the plaintiff the temporary relief for which it asked.

Later on, however, after a hearing on the merits, the court below found on the basis of further evidence that the plaintiff was "in competition" with the defendant and its other retailers. Thus it concluded that the plaintiff's price maintenance agreements were not within the exemption of the Miller-Tydings and McGuire amendments and so were illegal under federal antitrust legislation. Wherefore it vacated forthwith the temporary injunction it had granted and entered the judgment dismissing the plaintiff's complaint which is before us on this appeal.

[2] The McGuire amendment not only reaffirmed the policy of the Miller-Tydings amendment, but it also eliminated the restrictive effect of the Supreme Court's decision in the *Schwegmann Bros.* case by exempting from the antitrust laws minimum price-fixing agreements made binding by state law on "non-signers" of such agreements.

[*Competition Between Parties*]

The plaintiff-appellant not only supplies its gasolines to its retail dealers who in turn sell to ultimate consumers at their filling stations, but it also sells direct to some ultimate customers. It has several hundred so-called "commercial accounts" in Massachusetts, all of whom use a substantial quantity of gasoline per year. These for the most part are operators of fleets of trucks or taxicabs, although some of them also use gasoline for lift-trucks and other off-the-road vehicles. In many cases the plaintiff at its own expense provides, installs and maintains underground tanks and pumps on the respective premises of these customers and it delivers gasoline to them from its bulk plants by tank truck in quantities never less than 300 gallons except in emergency. It charges them one cent per gallon above its posted tank wagon price. There is no set minimum annual consumption required to qualify for a commercial account, but the plaintiff will sell to any such account on which it thinks it can make a profit. Some of these accounts use less than 5,000 gallons annually, but most of them use much more. It actively solicits this type of business and in 1955, the last year for which complete figures were available, it amounted in Massachusetts to over $3,000,000 per year, or about 10% of the appellant's gross local business.

The defendant-appellee also does a substantial annual business at its filling stations with operators of fleets of motor vehicles. There is no evidence of the dollar volume of this business but in 1955 it had 45 accounts using over 5,000 gallons per year, so it clearly is not inconsiderable. It services these accounts at its filling stations in the customary way that filling stations generally service their customers. That is to say, the fleet operators' trucks or taxicabs are driven to the defendant's station and there the defendant's employees fill the vehicles' tanks and perform the incidental services ordinarily performed by filling station attendants.

[*Interpretation of Federal Laws*]

Thus, as the District Court found, there is most certainly an area in which the plaintiff and the defendant are in competition with each other. While their competitive techniques are different, one gives less service for a lower price and the other more service for a higher price, the fact remains that each in its own way is striving for the business of supplying gasoline directly to those who operate fleets of motor vehicles. And the area of their competition is not so small that it can be disregarded by application of the *de minimis* maxim. Nevertheless the plaintiff-appellant contends that its competition with the defendant-appellee does not exclude application of the exculpatory provisions of the Miller-Tydings and McGuire Acts because their competition is not on the same "functional level." It argues that by application of the rule of *ejusdem generis* the general language of the concluding phrase, "persons, firms, or corporations in competition with each other," is controlled by the preceding reference to six specific categories of competitors, and that therefore the phrase alludes only to retailers, wholesalers etc. who go under another name in commercial jargon, as perhaps "jobbers" or "agents." Alternatively it argues that in context the final phrase refers only to the type of competition which occurs between retailer and retailer or between wholesaler and wholesaler, and so forth, which it asserts is competition in serving the same "function." In short, by putting stress on "function" the plaintiff-appellant seeks to distinguish competition *in* rendering the same service from competition *for* the same customers.

[*McKesson & Robbins Case*]

We think these arguments must be rejected on the language and rationale of the Supreme Court in *United States v. McKesson & Robbins, Inc.* [1956 TRADE CASES ¶ 68,368], 351 U. S. 305 (1956). The defendant in that case manufactured a line of drug products which it marketed under its own brand name and it also acted as a wholesaler of its own and other commodities sold in drugstores. It entered into resale price maintenance agreements with respect to its own branded merchandise with other wholesalers of like products and the United States proceeded against it under § 4 of the Sherman Act for injunctive relief asserting that the agreements constituted an illegal restraint of trade. McKesson & Robbins contended in defense that it had made the price maintenance agreements in its role of manufacturer, and therefore the agreements were not "between wholesalers."

The Supreme Court, refusing to compartmentalize the defendant's business, re-

jected this defense. It might, perhaps, have rested its decision solely on the proposition that McKesson & Robbins was a wholesaler because it did "wholesale" selling or, alternatively, that it was more a wholesaler than a manufacturer, and hence its price maintenance agreements were "between wholesalers." But it did not so limit its rationale. It said at pages 312-13:

> "Any doubts which might otherwise be raised as to the propriety of considering a manufacturer-wholesaler as a 'wholesaler' are dispelled by the last phrase of the proviso in question, which continues the proscription against price-fixing agreements 'between persons, firms, or corporations in competition with each other.' Congress thus made as plain as words can make it that, without regard to categories or labels, the crucial inquiry is whether the contracting parties compete with each other. If they do, the Miller-Tydings and McGuire Acts do not permit them to fix resale prices."

[*Schwegmann Case*]

It is true that the Court then went on to say that it had been said in *Schwegmann Bros. v. Calvert Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384, 389 (1951), that the statutory language "'expressly continues the prohibitions of the Sherman Act against "horizontal" price fixing by those in competition with each other at the same functional level,'" and followed this with the statement: "Since appellee competes 'at the same functional level' with each of the 94 wholesalers with whom it has price-fixing agreements, the proviso prevents these agreements from falling within the statutory exemption." And on page 315 of its *McKesson* opinion the Court said that "the language of the proviso in question is unambiguous" and "excludes from the exemption from the *per se* rule of illegality resale price maintenance contracts between firms competing on the same functional level."

[*Test*]

Thus the Supreme Court in the *McKesson & Robbins* case, as in the *Schwegmann Bros.* case, made several direct references to competition "on the same functional level." But from reading the opinions in both cases in their entireties we think the Supreme Court in each instance was using the phrase in a descriptive rather than a restrictive sense. The word "functional" itself is not precise in meaning and it does not seem to have any clear significance in either case. In neither case is the word defined and it may well have been used in contradistinction to "categories or labels" to broaden the construction of "competition" beyond that between businesses of the same nomenclature. Indeed, this interpretation is in keeping with the admonition, to be considered more fully later, that the exemption accorded by Congress in the Miller-Tydings and McGuire Acts from the ban of the Antitrust Acts is to be narrowly construed. As we read the long quotation from the *McKesson & Robbins* case above, "categories or labels" are not the "crucial inquiry." What is determinative is "whether the contracting parties compete with each other." The parties before us on this appeal, as we have shown, are in a real sense competing with each other for the business of a not insubstantial class or type of consumers of gasoline. Although their techniques of doing business differ, they are nonetheless competitors, and this excludes application of the exemption from antitrust legislation.

In short, we think the Antitrust Acts are not so much concerned with the preservation of competition in performing given functions as such as they are with preserving to consumers the benefits which result from competition between different businesses to serve a particular consumer need. And we do not think that Congress in the Miller-Tydings and McGuire Acts intended to limit or restrict full achievement of that major concern.

[*Partial Injunctive Relief*]

But the appellant contends that even though there is competition between the parties to a limited extent, nevertheless it is entitled to injunctive relief as to the separate class of business for which it and the defendant do not actually or potentially compete. That is to say, it contends that it is entitled to enforce resale price maintenance with respect to that separable portion of the defendant's trade as to which it does not compete, *i. e.* ordinary retail sales in relatively small amounts to the ordinary run of motorists.

The appellant did not make this suggestion in the court below. Thus there may well be unexplored practical difficulties, if not difficulties under local statutes, which would render it inexpedient to grant the partial

relief asked for. This does not prevent us from considering the suggestion, however, for we could remand for further hearing. But we shall not take that course for we do not think the statute permits the partial relief requested.

No authority is cited for a grant of limited relief, and the possibility of granting such relief is not mentioned in any case which has come to our attention. Nevertheless, it can be said that the Miller-Tydings and McGuire amendments do not specifically forbid it, and in the many situations in which wholesalers and retailers in general are in competition for large accounts, to allow partial relief of the sort requested would effectuate the avowed purpose of the amendment to permit price maintenance as to trade marked or brand named goods in order to prevent destructive cutthroat competition and to cure the evils attendant upon the use by some retailers of "loss leaders." We cannot accept the argument, however, in view of the strictness with which the amendments were construed in the *Schwegmann Bros.* case, and also in the *McKesson & Robbins* case, wherein at the conclusion of the Court's opinion on page 316 it is said:

> "Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy."

Our conclusion, therefore, is that any competition for customers is an absolute bar to price maintenance agreements between the competitors.

[*Other Defenses*]

This conclusion renders unnecessary any consideration of the other defenses raised below and of the additional defense suggested on this appeal that gasoline cannot be fair-traded under the Miller-Tydings and McGuire Acts because it is not "a commodity which bears, or the label or container of which bears, the trademark, brand, or name" of its producer.

A judgment will be entered affirming the judgment of the District Court.

[Concurring Opinion]

ALDRICH, District Judge, (concurring). I concur in Judge Woodbury's opinion on rehearing [1957 TRADE CASES ¶ 68,746]. However, now that it appears that appellant did raise the matter of partial injunctive relief below, I feel I must face up more squarely to that issue. Upon further consideration my prior concurring opinion is now withdrawn in toto, and the following observations substituted.

I do not quarrel with the view that the parties are "persons in competition with each other." The McGuire Act does not, contrary to appellant's argument, exempt from permissible fair trade agreements contracts between "producers, wholesalers, brokers, factors, retailers, or other persons in competition with each other," which might call for the application of the rule of *ejusdem generis* to limit competition to so-called horizontal levels, but reads "persons," not "other persons." Hence it withholds approval of agreements, express or by operation of law, between all competitors. If there were doubt of this interpretation the history and purpose of the Sherman Act, and the fact that McGuire's intent is to carve limited exceptions thereto, would supply the answer. True, since most competition is on horizontal levels, courts in particular cases may naturally fall into the use of that terminology. But, as appellant suggests as to the Sherman Act, quoting from *Times-Picayune Publishing Co. v. United States* [1953 TRADE CASES ¶ 67,494], 345 U. S. 594, at 615, ". . . the Act deals with competitive realities, not words." If bona fide competition exists here, I see no basis for restricting the language of the statute.

Competition has many meanings. In a sense the movie house and the television retailer are in competition with each other for the "amusement dollar." But here the essential commodity, gasoline, is the same. The servicing, etc., may be only the fringe. If owners of fleets of trucks or taxi-cabs may be influenced in their choice of purchasing gasoline from appellant or appellee by the question of price, I believe the latter are "persons . . . in competition with each other" within the Act, I can not say that the finding below that they are is plainly wrong. But if the parties are thus persons in competition it is because of appellee's unusual activities distinguishing it from other retailers whose business is less extensive. If those activities are truly severable, it seems arguable that the bar to appellant's

injunction should be equally so. If appellant manufactured, and fair-traded, both gasoline and toothpaste, and appellee sold both, but the parties were actually in competition only as to the former, I could not say they were persons in competition as to both.

However, I suggest appellant's rights here are lost not because of appellee's special activities which made them persons in competition, but because its own activities made it a retailer. Agreements between retailers are not protected. The statute supplies no definition of retailer. The dictionary supplies two: one who sells in small quantities, and one who sells to the ultimate consumer. Of these the latter seems the more in keeping with the concept of the Fair Trade acts. It clearly covers appellant's "commercial accounts."

Either competition or retailing would result in the denial of complete relief to appellant, but the second must be fatal to even partial relief. It would be one thing to say that with respect to separable activities as to which the parties were not competing they were not "persons in competition with each other." It would be quite another to say that if appellant is to be classed as a retailer it can escape the force of the Act, even in part, by showing it is something additional. Price-fixing agreements between retailers are invalid per se, irrespective of the area of competition. On this basis there could be no possible issue of partial relief.

[¶ 68,696] Eli Lilly & Co. v. Rosenblum.

In the New York Supreme Court, New York County, Trial Term, Part III. 137 N. Y. L. J., No. 80, page 8. Dated April 25, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Fair Trade Agreements Between Competitors—Validity of Contract.—In a fair trade enforcement action brought by a manufacturer against a retailer, the retailer's contention that the manufacturer's fair trade contract was invalid because it was a horizontal price fixing agreement was rejected, and the manufacturer was granted injunctive relief and damages in the amount of $1,000. The contract was not a horizontal price fixing agreement between persons, firms, or corporations competing on the same functional level. The contract was between a manufacturer and a retailer, and it complied with the provisions of the New York Fair Trade Act.

See Fair Trade, Vol. 1, ¶ 3100.

[*Validity of Contracts*]

BENVENGA, Justice [*In full text*]: In this action plaintiff, a manufacturer of branded and trade marked products, seeks to enjoin defendant, a retailer selling directly to the public, from selling its products at prices below those established in accordance with the Fair Trade Law (see General Business Law, section 369-a). The evidence shows repeated violations by defendant of plaintiff's fair trade rights. The Fair Trade Law, as has been pointed out, permits a manufacturer, whose trade mark or brand name may represent a large advertising investment and a carefully nurtured good will, to prevent retailers, over whom he would otherwise have little control, from seriously impairing the value of that trade mark and good will by reselling his identified products at unreasonably low prices (*General Elec. Co. v. Masters* [1954 TRADE CASES ¶ 67,776], 307 N. Y., 229, 238-239, appeal dismissed [1954 TRADE CASES ¶ 67,907] 348 U. S. 892). Although defendant admits the existence of plaintiff's fair trade contract, he denies its validity and enforcibility, relying upon *United States v. McKesson & Robbins* [1956 TRADE CASES ¶ 68,368] (351 U. S., 305) and *United States v. Meredith Pub. Co.* (U. S. D. C., S. D. N. Y., May 14, 1956, Civ. 109, 292, not officially reported). These cases hold, in substance, that the Fair Trade Law does not apply to "horizontal" price-fixing agreements between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations "in competition with each other at the same functional level" (see 351 U. S., at pp. 311, 313, 315). The contract here involved is not a "horizontal" price-fixing agreement between persons, firms or corporations competing on the same functional level. It is an agreement between a

manufacturer and a retailer; it complies with the provisions of the Fair Trade Law, and is substantially similar to the contracts which were upheld in the *General Electric Co.* case (*supra,* at p. 241). And, apparently, the contract here in suit was upheld in *Schwegmann Bros. v. Eli Lilly & Co.* [1953 TRADE CASES ¶ 67,516] (205 F., 2d, 788, cert. denied 346 U. S., 856, 905), cited with approval in the *General Electric Co.* case (*supra,* at p. 240). Judgment is therefore directed for plaintiff in accordance with prayer for relief and damages are assessed in the sum of $1,000. Settle judgment.

[¶ 68,697] E. I. du Pont de Nemours & Company v. Leo Wallach, doing business as Bay Tire Co.

In the New York Supreme Court, Kings County, Special Term. Dated December 12, 1956.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Violation of Injunction—Contempt. —A retailer, who was adjudged guilty of contempt of court for willfully violating a preliminary fair trade enforcement injunction, was fined the sum of $500. The fair trader did not show any pecuniary loss arising from the violations, and the retailer pleaded for leniency.

See Fair Trade, Vol. 1, ¶ 3380.34.

For the plaintiff: Cravath, Swaine & Moore.

For the defendant: Louis Weiser.

[*Contempt*]

A. DAVID BENJAMIN, Justice [*In full text*]: On the testimony offered before me at the hearing on November 29, 1956, I find that the defendant in the several instances claimed has willfully and deliberately violated the order of this court entered November 15, 1955 granting a preliminary injunction herein (General Business Law, § 369-a *et seq.;* Fair Trade Law).

His conduct in so violating the temporary restraining order was calculated to impair, impede, defeat and prejudice the rights of the plaintiff and to flout the mandate of this court. He is therefore adjudged guilty of contempt of court (Judiciary Law, § 753, subd. A, pars. 1, 2, 3).

The plaintiff has shown no pecuniary loss arising from the offenses. The defendant is now contrite. He is aware of the seriousness of his offenses; he will not suffer them to be repeated and pleads for leniency. He conducts a small neighborhood retail business. He wife is hospitalized and he is the sole support of his young daughter and his aged mother. The court in assessing punishment herein is not unmindful of defendant's circumstances. He is fined the sum of $500. Motion granted. Submit order accordingly.

[¶ 68,698] General Electric Company v. Golden Rule Appliance Co., Inc.

In the New York Supreme Court, Appellate Division, First Department. No. 10965. Dated April 23, 1957.

Appeal from order of the Supreme Court at Special Term (LYNCH, J.) entered February 14, 1957 in the New York County Clerk's office adjudging defendant guilty of two separate contempts.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Violation of Injunction—Contempt—Hearing.—An order adjudging a defendant guilty of contempt for violating a fair trade enforcement injunction was affirmed, where the order was entered on affidavits, without a hearing. The affidavits were not so hopelessly complicated, when considered with other

factors, as to require a hearing. The record showed prior violations of the injunction, and the defendant failed to produce certain sales records.

See Fair Trade, Vol. 1, ¶ 3380.34.

For the plaintiff-respondent: White & Case (William D. Conwell, of counsel).

For the defendant-appellant: Raphael, Searles, Levin & Vischi (Thomas J. Burns, of counsel).

For a prior decision of the New York Supreme Court, New York County, see 1955 Trade Cases ¶ 68,068.

[*Contempt—Hearing*]

PER CURIAM [*In full text*]: This Court has repeatedly held that orders of reference upon the disposition of motions are not encouraged and should be made rarely and resorted to only in exceptional cases where the interests of justice require the unraveling of complicated facts which cannot be determined upon hopelessly conflicting affidavits. (*Shillman v. Toulson*, 211 App. Div. 336; *Slutzkin v. Gerhard & Hey, Inc.*, 195 App. Div. 559; *Weinberger v. Metropolitan Traction Co.*, 63 App. Div. 240; *Wamsley v. Horton & Co.*, 68 Hun. 549.) It does not appear that the affidavits herein were so hopelessly complicated, when considered with the other factors, as to require Special Term to order a hearing.

There are no affidavits from the sales persons or the bookkeeper to support the claim of defendant's president that he instructed said employees not to sell products manufactured by the plaintiff or that they, in fact, made no such sales. There have been eleven prior violations of the permanent injunction resulting in four adjudications of contempt. Each such violation was categorically denied. Nine of the denials were subsequently withdrawn and in lieu thereof admissions made of said violations. The record abundantly sustains Special Term's exercise of its discretion in granting the motion to punish for contempt.

Furthermore, the affidavit of defendant's president, which lacks a verification date, is equivocal. The affidavit states (referring to sales slips produced by plaintiffs):

> "The defendant Golden Rule Appliance Co., Inc., has no such register which would give this type of receipt. It is impossible to get a receipt of this kind from your deponent's store, since we have no available machine which would give a receipt of this kind or one similar to it. Our sales slip is a handwritten one, which is written out when a sale is consummated."

The affidavit fails to state that the defendant never had such a machine or that such a register was never in defendant's store.

Although the aforementioned affidavit states that the business practice in Golden Rule Appliance Co., Inc. is to keep a tape which shows every sale made each and every day, no such tape was presented to Special Term.

The order appealed from should be affirmed, with $20 costs to the respondent.

All Concur.

[¶ 68,699] Cott Beverage Corporation v. Canada Dry Ginger Ale Incorporated, et al.

In the United States Court of Appeals for the Second Circuit. No. 234—October Term, 1956. Docket No. 24430. Submitted March 19, 1957. Decided May 3, 1957.

Appeal from the United States District Court for the Southern District of New York, JOHN F. X. MCGOHEY, Judge.

Clayton and Sherman Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Appeal and Error—Jurisdiction of United States Court of Appeals—Judgment Dismissing Some, But Not All, Claims—Appealability.—An appeal from an order dismissing two of the four causes of action into which a complaint was divided and ordering corrections by way of an amended complaint in the others was dismissed, although the trial court filed the findings of finality set forth in Rule 54(b) of the Federal Rules of Civil Procedure to make a judgment on one

of several claims appealable. All of the acts alleged in the complaint were intertwined to make one conspiracy; therefore, the action was a single claim, not a multi-claim, controversy. The order therefore was not appealable.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.400; Private Enforcement and Procedure, Vol. 2, ¶ 9006.30, 9015.12, 9024, 9060.

For the plaintiff: Bader and Bader (I. Walton Bader, of counsel), New York, N. Y.

For the defendants: Cravath, Swaine & Moore (Ralph L. McAfee, Allen F. Maulsby, and Charles G. Moerdler, of counsel), New York, N. Y.

Dismissing an appeal from a decision of the U. S. District Court, Southern District of New York, 1956 Trade Cases ¶ 68,531.

Before: CLARK, Chief Judge, and LUMBARD and WATERMAN, Circuit Judges.

[*Appeal*]

Plaintiff appeals from an order, D. C. S. D. N. Y. [1956 TRADE CASES ¶ 68,531], 146 F. Supp. 300, entered in its action charging defendants with a conspiracy to restrain interstate commerce in soft drinks which dismissed two of its four causes of action, struck out parts of the other two causes, and ordered the filing of an amended complaint embodying these and other corrections or amplifications of the retained causes. Defendants have moved to dismiss the appeal. Motion granted.

[*Partial Dismissal of Claims*]

PER CURIAM [*In full text*]: The complaint herein, as Judge McGohey shows in his reasoned opinion, D. C. S. D. N. Y. [1956 TRADE CASES ¶ 68,531], 146 F. Supp. 300, charged an extensive conspiracy to restrain interstate commerce in soft drinks. Judge McGohey was not impressed with certain of the claims and therefore dismissed two of the four causes of action into which the complaint was divided and ordered extensive corrections by way of an amended complaint in the others. Thus he held insufficient a count alleging a conspiracy between a corporation and its own officers and directors, as well as a count alleging a well-known and apparently valid trade-mark now void and unenforceable. All the acts alleged are intertwined to make one conspiracy, so that this is a single claim, not a multi-claim, controversy. True, after we had once dismissed this appeal, Judge McGohey was persuaded belatedly to file the findings of finality set forth in F. R. 54(b) to make a judgment on one of several claims appealable. But we have held that dismissal must follow, notwithstanding the finding, if but a single over-all claim is stated. See, *e.g., Leonidakis v. International Telecoin Corp.*, 2 Cir., 208 F. 2d 934; *Zwack v. Kraus Bros. & Co.*, 2 Cir., 237 F. 2d 255.

[*Appeal Dismissed*]

Plaintiff relies on certain expressions, apart from context, in *Sears, Roebuck & Co. v. Mackey* [1956 TRADE CASES ¶ 68,370], 351 U. S. 427, and *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U. S. 445, as extending claim to mean not a single happening, transaction, or occurrence, but in effect any variation in legal theory, and that the district judge's certificate must be accepted by us unless there is abuse of discretion. 351 U. S. at page 452. We do not think Justice Burton intended to go thus far; the whole tenor of his discussion, as well as the actual decisions, seems to us to re-enforce the point of our cases stated above. But if we are in error here, then we must find an abuse of discretion in the granting of the finding of finality. There is here but one species of economic activity and coercion stated, though it may have taken various forms and may have violated differing rules of statutory or common law. We cannot decide the issues intelligently piecemeal and, if we so attempt, are sure to find ourselves uttering pious generalities only which will come back to plague us later. We doubt if plaintiff will actually find itself limited in proof that it may wish to offer at trial and we venture the prophecy that this present issue will be quite moot after trial.

Motion granted; appeal dismissed.

[¶ 68,700] Philip Schechtman v. Louis E. Wolfson et al.

In the United States Court of Appeals for the Second Circuit. No. 147—October Term, 1956. Docket No. 24225. Argued February 4, 1957. Decided May 2, 1957.

Appeal from the United States District Court for the Southern District of New York, EDWARD J. DIMOCK, Judge.

Clayton Antitrust Act

Interlocking Directorates—Enforcement of Clayton Act Prohibition—Stockholder's Derivative Action—Attorney's Fees Where Action Rendered Moot.—Where a stockholder's derivative action to enjoin certain individuals from serving on the boards of directors of two corporations at the same time in violation of the Clayton Act was rendered moot when the individuals resigned as directors of one of the corporations, the plaintiff stockholder was not entitled to counsel fees in his derivative action since he failed to prove sufficient benefit to his corporation to entitle his attorney to reimbursement. Section 16 of the Clayton Act allows "injunctive relief * * * when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings * * *." The modern equity practice is to allow counsel fees to successful prosecutors of derivative suits, although no judgment has been obtained, if they show substantial benefit to the corporation through their efforts. The court rejected the theory that counsel fees could not be recovered because the stockholder could have obtained for his corporation gratuitously from the Federal Trade Commission everything for which he now asks the corporation to reimburse his attorneys. Also rejected was the contention that antitrust derivative suits cannot be brought under Section 16 of the Clayton Act.

See Interlocking Directorates, Vol. 1, ¶ 4407; Private Enforcement and Procedure, Vol. 2, ¶ 9024.35.

For the plaintiff-appellant: Irwin M. Taylor, of Kaufman, Imberman & Taylor, New York, N. Y.

For the defendants-appellees: Bruce A. Hecker (William A. Shea and Ralph L. Ellis, of Manning, Hollinger & Shea, on the brief), New York, N. Y.

Affirming a judgment of the U. S. District Court, Southern District of New York, 1956 Trade Cases ¶ 68,371.

Before: CLARK, Chief Judge, MEDINA, Circuit Judge, and SMITH, District Judge.

[*Appeal*]

Philip Schechtman appeals from a judgment, D. C. S. D. N. Y., 141 F. Supp. 453 [1956 TRADE CASES ¶ 68,371], denying him counsel fees in his shareholders' derivative action brought against the directors of Merritt-Chapman & Scott Corporation. Affirmed.

[*Stockholder's Action—Counsel Fees*]

CLARK, Chief Judge [*In full text*]: Plaintiff appeals from the refusal to allow him counsel fees in a shareholders' derivative action involving somewhat novel circumstances. The action was aimed at interlocking directorates in competing corporations in violation of § 8 of the Clayton Act, 15 U. S. C. § 19. Judge Dimock in a reasoned opinion, D. C. S. D. N. Y., 141 F Supp. 453 [1956 TRADE CASES ¶ 68,371], denied recompense to counsel on the ground that the primary remedy was with the Federal Trade Commission, which has jurisdiction under 15 U. S. C. § 21 to issue cease and desist orders in the premises. The judge thought that plaintiff could have obtained for his corporation gratuitously from the Commission everything for which he now asks the corporation to reimburse his attorneys. Since we can see no showing of ultimate benefit to the corporation we think the result reached was correct, although we do not accept the basis assigned below.

Plaintiff is a shareholder in Merritt-Chapman & Scott Corporation and brought this action as a derivative suit on behalf of the corporation primarily to enjoin defendants Louis E. Wolfson and Alexander Rittmaster from serving as directors of this corporation at the same time as they served

as directors of Montgomery Ward & Co., Inc. He alleged that the two corporations or subsidiaries were in competition in the manufacture and sale of paint and some household appliances. Other relief in addition to the mandatory injunction was sought, including damages, reimbursement of defendant Merritt and its subsidiaries of expenses or penalties incurred and counsel fees for himself. Judge Herlands denied a defendants' motion to dismiss for failure to state a claim, and thereafter Wolfson and Rittmaster resigned as directors of Montgomery Ward. Defendants then sought dismissal on the ground that the case had become moot, while plaintiff without contesting this point sought counsel fees of $25,000 by cross motion. Judge Dimock, in the opinion above cited, ordered the action dismissed, but refused plaintiff counsel fees as stated above. This appeal is not from the dismissal, but only from the refusal of counsel fees.

There is nothing in the record to make clear who is to pay the counsel fees. Obviously no fund has been built up or recovered from which they can be paid. The demand for judgment for counsel fees is directed against all the defendants, thus including Merritt and its two subsidiary corporations, as well as the directors of Merritt or its subsidiaries, and also including at least one Ward director. Presumably plaintiff expects payment eventually at least from the corporation he claims to be benefiting, but the ambiguity inherent in his demand tends to highlight the uncertain nature of the supposed benefits.

[*Private and Public Remedy*]

There is nothing in the statute which restricts remedy against interlocking directorates to action by the Commission. It seems well known that the Commission has found little occasion, and perhaps little incentive, to take action in the premises. See Kramer, *Interlocking Directorships and the Clayton Act After 35 Years,* 59 Yale L. J. 1266; 105 U. of Pa. L. Rev. 261, 264, notes 27, 28; 54 Col. L. Rev. 130. Apparently competitors, who could sue under 15 U. S. C. § 15 or § 26, have little motivation to pursue this obviously preventive remedy against antitrust violations[1] until there is more direct prospect of harm and of treble damages than mere interlocking suggests. Actually the two reported cases to date were government injunction actions. *United States v. W. T. Grant Co.* [1953 Trade Cases ¶ 67,493], 345 U. S. 629; *United States v. Sears, Roebuck & Co.,* D. C. S. D. N. Y. [1953 Trade Cases ¶ 67,481], 111 F. Supp. 614. Vicarious prosecution has been quite usual and presumably effective in various areas of public interest, and there seems little doubt but that the spur of counsel fees adds greatly to the likelihood of private law enforcement. As urged in several critical notes on this case, 70 Harv. L. Rev. 369; 66 Yale L. J. 413; 105 U. of Pa. L. Rev. 261; 9 Stan. L. Rev. 387, it seems not in the public interest to require shareholders to await delaying or nonexistent agency action. Enforcement of antitrust policy will be better advanced by complementary action within the grasp of both public and private interests. Such seems to be the view in representative analogous situations. Thus, though the New York Attorney General is under a legal duty to sue to right corporate wrongs, no one has thought that shareholders should therefore be deprived of allowances for counsel. N. Y. General Corp. Law §§ 60, 61, 61-b; *Shielcrawt v. Moffett,* 294 N. Y. 180, 61 N. E. 2d 435. Similar are cases involving derivative suits pressed while S. E. C. proceedings were not only possible, but pending, e.g., *Howard v. Furst,* D. C. S. D. N. Y., 140 F. Supp. 507; *Horwitz v. Balaban,* D. C. S. D. N. Y., 112 F. Supp. 99; *Dederick v. North American Co.,* D. C. S. D. N. Y., 48 F. Supp. 410. See also *Goldstein v. Groesbeck,* 2 Cir., 142 F. 2d 422, 154 A. L. R. 1285, certiorari denied 323 U. S. 737 (derivative action permitted where S. E. C. had jurisdiction); *De Koven v. Lake Shore & M. S. Ry. Co.,* D. C. S. D. N. Y., 216 F. 955 (same, where Attorney General could have enjoined merger).

[*Stockholders' Suits—Antitrust Laws*]

The defendants also urge that the motion for counsel fees be denied under *Decorative Stone Co. v. Building Trades Council of Westchester County,* 2 Cir., 23 F. 2d 426, 428, certiorari denied 277 U. S. 594, and *Milgram v. Loew's Inc.,* 3 Cir. [1950-1951 Trade Cases

[1] See *United States v. Sears, Roebuck & Co.,* D. C. S. D. N. Y. [1953 TRADE CASES ¶ 67,481], 111 F. Supp. 614, 616 (Weinfeld, J.): "* * * what Congress intended by § 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates."

¶ 62,938], 192 F. 2d 579, 587, certiorari denied *Loew's Inc. v. Milgram,* 343 U. S. 929, both holding that 15 U. S. C. §§ 15, 26, prevent bringing a derivative suit to enforce the antitrust laws "at law" and prevent an award of counsel fees if the suit is brought "in equity," since the provision therefor of § 15 applies only at law. Disallowance of counsel fees means that for all practical purposes there will be virtually no derivative suits brought to enforce the antitrust laws under these sections. See the law review notes *supra* and the authorities they cite. In *Fanchon & Marco, Inc. v. Paramount Pictures,* 2 Cir. [1953 TRADE CASES ¶ 67,452], 202 F. 2d 731, 734-735, we rejected the idea that antitrust derivative suits could not be brought under 15 U. S. C. § 26; and it would be foolish indeed not to hold that, although the suits can be brought, counsel fees cannot be recovered. This contention stems from ancient learning quite out of place under modern conditions and with the fused civil action of the federal rules.

[*Benefit to Corporation*]

The defendants' third argument, however, has merit. We agree that the plaintiff has failed to prove sufficient benefit to the corporation to entitle his attorney to reimbursement from the defendants. 15 U. S. C. § 26 allows "injunctive relief * * * when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, * * *." The modern equity practice is to allow counsel fees to successful prosecutors of derivative suits although no judgment has been obtained if they show substantial benefit to the corporation through their efforts, e.g., *Pergament v. Kaiser-Frazer Corp.,* 6 Cir., 224 F. 2d 80; *Baker v. Seattle-Tacoma Power Co.,* 61 Wash. 578, 112 P. 647; *Greenough v. Coeur D'Alenes I and Co.,* 52 Idaho 599, 18 P. 2d 288. Nor is it necessary that a cash fund be produced. See cases cited in Hornstein, *Legal Therapeutics: The 'Salvage' Factor in Counsel Fee Awards,* 69 Harv. L. Rev. 658, 678, 680; *Abrams v. Textile Realty Corp.,* Sup., 97 N. Y. S. 2d 492. But there should be some check on derivative actions lest they be purely strike suits of great nuisance and no affirmative good, and hence it is ruled generally that the benefit to the corporation and the general body of shareholders must be substantial.

In lengthy and detailed affidavits by his counsel, plaintiff attempted to show a variety of important and valuable benefits he had conferred on the corporation. It is obvious that he has included all that can be thought of even remotely in this connection. But the very vigor of assertion highlights their fanciful, contrived, and mutually inconsistent character. Thus he stresses the possibility of penalties and damages being assessed; but while these might have affected the individuals, it seems highly doubtful that they could have been assessed against the corporation.[2] Next plaintiff contends that, even if no action could have been brought successfully against Merritt, he saved the corporation from the expense and publicity of having to defend. Thus plaintiff anomalously counts it as a benefit that he exposed the corporation to litigation expense and notoriety in an effort to erase the risk that others might do the same thing. Finally plaintiff points to the fact that Merritt now has more of Mr. Wolfson's services which it previously shared with Montgomery Ward. Presumably Montgomery Ward's claim to Mr. Wolfson's efforts was as valid as Merritt's, and the district court would not have enjoined Mr. Wolfson to devote himself solely to Merritt; at best plaintiff could have obtained an injunction forcing the erring directors to choose one corporation or the other. Having thus jeopardized Merritt's claim to what plaintiff calls "a man of unusual ability and imagination * * * capable and invaluable," plaintiff can hardly count it a benefit that Mr. Wolfson eventually chose this corporation rather than the other. Indeed, in almost the same breath he claims to have saved the corporation from Wolfson's activities and reputation as an overdaring financier. That he thus cannot himself determine which way the benefit lies and indeed which corporation he is benefiting is convincing demonstration of the purely speculative nature of his claim.

Affirmed.

[2] The corporation was joined as a party defendant in the two cases cited, but the point was not referred to in *United States v. Sears, Roebuck & Co.,* D. C. S. D. N. Y. [1953 TRADE CASES ¶ 67,481], 111 F. Supp. 614, and was particularly reserved in *United States v. W. T. Grant Co.* [1953 TRADE CASES ¶ 67,493], 345 U. S. 629, 634, note 8.

[¶ 68,701] **United States v. Maryland and Virginia Milk Producers Association, Inc., et al.**

United States v. Maryland Cooperative Milk Producers, Inc., et al.

In the United States District Court for the District of Columbia. Criminal Case Nos. 991-55 and 992-55, respectively. Filed April 18, 1957.

Case Nos. 1260 and 1259, respectively, in the Antitrust Division of the Department of Justice.

Sherman Antitrust and Robinson-Patman Price Discrimination Acts

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Grand Jury Proceedings—Production of Documents—Return of Copies of Documents After Dismissal of Criminal Actions.—Where the Government made copies of documents which it obtained by a subpoena *duces tecum* served during a grand jury proceeding in which indictments charging violations of the antitrust laws and the Robinson-Patman Act were returned, the Government will not be compelled to return the copies of the documents where the Government subsequently dismissed the indictments and filed civil suits for injunctions based on the same transactions as those involved in the indictments. The Government had returned the original documents. Under ordinary circumstances, the copies should be returned. However, in the instant case, if the copies were returned, the Government would immediately have the right to secure the same documents by discovery proceedings in the civil actions. The owner of the documents therefore would not be benefited or harmed by the failure of the Government to return the copies of the documents.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8021.750.

For the plaintiff: Joseph J. Saunders, Edna Lingreen, and Joe E. Waters, Department of Justice, Washington, D. C.

For the defendant: Herbert A. Bergson, William J. Hughes, and Daniel H. Margolis, Washington, D. C.

For prior opinions of the U. S. District Court, District of Columbia, see 1956 Trade Cases ¶ 68,517, 68,518.

Opinion

[*Motion*]

ALEXANDER HOLTZOFF, District Judge [*In full text*]: This is a motion by a defendant in two criminal cases for a return by the Government of copies of certain documents.

[*Prior Proceedings*]

In these two cases the grand jury returned indictments charging the defendant with violations of the anti-trust laws and the Robinson-Patman Act. During the investigation that led to the indictments, the Government secured the production by the defendant by subpoenas *duces tecum* of a large number of documents. During the grand jury proceeding the Government for its convenience made copies of some of these documents. Eventually these indictments were dismissed on motion of the Government without a trial, and immediately after the dismissal, the Government filed civil suits for injunctions based on the same transactions as those involved in the indictments. The Government has returned the original documents that the defendant had produced in response to subpoenas *duces tecum,* but has retained the copies that it had made of some of them. The defendants now move for a return of the copies.

[*Return of Copies*]

There is no doubt that it was both lawful and proper for the Government in the course of its investigations to make copies for its use in the proceedings of documents which had been lawfully produced by the defendant. The question is, however, whether the proceedings having been terminated, the copies that were lawfully made should be turned over to the defendants.

In the case of *United States v. Wallace Co.*, 336 U. S. 793, 801, the Supreme Court in a somewhat similar situation made the following statement:

"Return of the photostats, like return of the originals, necessarily followed from the dismissal of the indictment."

Under ordinary circumstances in the light of this statement, this Court would order return of the copies. If, however, the copies were returned, the Government would immediately have the right to secure the same documents by discovery proceedings in the civil actions, pursuant to Rule 34 of the Federal Rules of Civil Procedure. The Court is unable to perceive that any benefit or advantage would inure to the defendant by requiring this circumlocution. There is no question in this case of any unlawful search and seizure or of the privilege against self incrimination. All that is involved is a matter of practice and procedure.

The Court feels, in accordance with the modern tendency to eliminate technicalities and to simplify procedure, that no legitimate advantage would be obtained and that no disadvantage would be involved if this motion were denied instead of the Government being directed to return the copies and then be permitted to make a motion under Rule 34 for their production, which would undoubtedly delay further proceedings in these cases. The law will not require a party to do a futile thing.

The motion is denied.

[¶ 68,702] Edward D. Durwood, et al. v. Twentieth Century-Fox Film Corporation, et al.

In the United States District Court for the Western District of Missouri, Western Division. No. 7089. Dated April 4, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Interrogatories.—An interrogatory requesting that motion picture distributors state the total number of feature pictures released during certain periods of time was too general in scope because it was not limited to any geographical area. Also, an interrogatory requesting a defendant to state the total grosses of two theatres during a certain period of time was too remote. The evidence which might be produced as a result of such information would not be admissible or lead to evidence that would be admissible. However, an interrogatory requesting that the distributors state the total film rental received for each feature picture released in a certain area during a specified period of time was proper if limited to one city.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.875.

For the plaintiffs: Wm. G. Boatright, Kansas City, Mo.; and Nick C. Spanos, New York, N. Y.

For the defendants: Joseph J. Kelly, Jr., of Spencer, Fane, Britt and Browne, Kansas City, Mo.; and James C. Wilson, of Watson, Ess, Marshall & Enggas, Kansas City, Mo.

Order

[*Interrogatories*]

R. M. DUNCAN, Chief Judge [*In full text*]: Plaintiff has propounded the following three interrogatories to the defendant, to which the defendant objects:

"Interrogatory No. 1.

"That each distributor-defendant states the total number of feature pictures released by each distributor (a) during each year of the damage period, and (b) during each year thereafter to date."

The objection to Interrogatory No. 1 is sustained. The court has heretofore passed upon this question. The interrogatory does not limit the distribution of pictures to any area, but is apparently general in scope, and would include the whole United States.

"Interrogatory No. 2.

"That each distributor-defendant state the total film rental received by it for each feature picture released by such defendant from the exhibition of such fea-

ture pictures in the Kansas City Film Exchange Territory from January 1, 1954 to date."

It is my opinion that the plaintiff would be entitled to the information sought, if it were limited to the City of Kansas City. I am not advised as to the extent of the Kansas City Film Exchange Territory, but if this information can be furnished on a purely local basis, it is information that might become important in view of the scope this case is likely to take with respect to damages. If the parties cannot agree upon this matter, it may be further presented to the court.

"Interrogatory No. 3.

"That the Paramount defendant state the total grosses of the Newman Theatre and the Liberty Theatre from July 4, 1931 to September 15, 1932, during the time that both threatres were operated first run by Publix-Dubinsky Brothers Theatres, a subsidiary and affiliate of Paramount."

It seems to me that the information sought in Interrogatory No. 3 is entirely too remote, and that the evidence which might be produced as a result of such information, would not be admissible or lead to evidence that would be admissible, and the objection is therefore sustained.

[¶ 68,703] Farbenfabriken Bayer, A. G. v. Sterling Drug, Inc.

In the United States District Court for the District of New Jersey. Civil 908-55. Filed February 5, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Who May Bring Suit—Parties Plaintiff—Foreign Corporation and Former Enemy Alien. —A German corporation, formerly an enemy alien within the meaning of the Trading with the Enemy Act of 1917, could maintain an action for injunctive relief and treble damages under the antitrust laws. The contention that the corporation had no right to maintain the action in view of House Joint Resolution No. 289, 65 Stat. 451, was rejected on the ground that the House Joint Resolution was not applicable.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.

For the plaintiff: Baily & Schenck, Newark, N. J.

For the defendant: O'Mara, Schumann, Davis & Lynch, Jersey City, N. Y.

Opinion

[*Plaintiff—Complaint*]

SMITH, District Judge [*In full text*]: This is a civil action under the antitrust laws, and particularly Section 15 of the Clayton Act, 15 U. S. C. A. 15. The plaintiff, a corporation organized under the laws of Germany, was formerly an enemy alien within the meaning of Section 2(a) of the Trading with the Enemy Act of 1917, 50 U. S. C. A., App. 2(a). The complaint charges that the defendant and others, not named as defendants, are, and have been for more than six years next preceding the commencement of the action, engaged in a conspiracy in restraint of trade. The plaintiff seeks to enjoin the alleged illegal conduct and to enforce its claim for treble damages.

[*Right to Maintain Action*]

The defendant filed an answer to which it is alleged, as an affirmative defense, that the plaintiff has no right to "institute or maintain" the action. The defense rests solely upon an express limitation in House Joint Resolution No. 289, 65 Stat. 451, approved October 19, 1951, 50 U. S. C. A., App. XX. The defense is raised at this time on the dual motion of the defendant, to wit, a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, 28 U. S. C. A., and a motion for summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure, 28 U. S. C. A.

The argument urged by the defendant in support of the motion is the same as that urged in support of the motion in the

companion case, *Farbenfabriken Bayer, A. G., v. Sterling Drug, Inc.*, Civil 909-55. This argument was fully discussed in the opinion filed in the companion case and we see no reason to repeat the discussion. We are of the opinion that the argument will not avail the defendant in the instant case.

The cause of action upon which the claim in the instant case is predicated accrued within six years next preceding the commencement of the action. This cause of action was not subject to seizure and vesting prior to January 1, 1947. The Joint Resolution is, therefore, not applicable. It may be argued that the plaintiff has a cause of action based upon the alleged conspiracy in restraint of trade prior to January 1, 1947, but is must be noted that this cause of action, if it existed, is not the basis of the present claim. The claim asserted in the instant case is necessarily limited by the statute of limitations.

The motion for judgment will be denied.

[¶ 68,704] United States v. Memphis Retail Appliance Dealers Association, Inc.; C. D. Akers & Sons Hardware & Furniture Co., Inc. (also known as C. D. Akers & Sons, Inc.); Home Equipment Company; Wallace Johnston Appliances, Inc.; Sam Fortas House Furnishing Company, Inc.; Ace Appliance Company; Hollis Appliance Company; and Ben Gruber, doing business as Gruber Appliance Company.

In the United States District Court for the Western District of Tennessee, Western Division. Civil Action No. 3016. Filed April 25, 1957.

Case No. 1308 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Fixing Resale Prices and Limitations on Trade-In Allowances—Boycotting—Retail Appliance Dealers and Trade Association.—An association of retail appliance dealers was prohibited by a consent decree from entering into any understanding or plan to (1) fix or maintain manufacturers' suggested retail list prices on appliances, (2) fix or maintain maximum limitations on trade-in allowances for used appliances, (3) boycott or otherwise refuse to do business with any person, or (4) refuse to advertise appliances at prices lower than the manufacturer's list prices, or refuse to advertise fixed trade-in allowances for used appliances. Retail appliance dealers were prohibited from combining with each other or with any other retail appliance dealer to take any action, through the association or any other association, to do any of the acts prohibited above.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.533, 2017; Resale Price Fixing, Vol. 1, ¶ 3015.20.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Amendment of Association's By-Laws—Self Enforcement Provision.—A retail appliance dealers' association was ordered by a consent decree to (1) cancel and revoke any provision of its by-laws, rules, and regulations which is inconsistent with any provision of the decree, (2) serve upon each of its present members a copy of the decree, (3) institute such proceedings as may be necessary to amend its by-laws so as to incorporate therein a provision of the decree and require as a condition of membership or retention of membership that all present and future members be bound thereby in the same way that it and other defendants are bound, (4) furnish to all its present and future members a copy of its by-laws, as amended, and (5) expel from membership any member who violates the provisions of its by-laws containing the provision of the decree when it has knowledge of such violation.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.60, 8401.21, 8421.

For the plaintiff: Victor R. Hansen, Assistant Attorney General, and W. D. Kilgore, Jr., Baddia J. Rashid, Philip L. Roache, Jr., Harry N. Burgess, Charles F. B. McAleer, and Stanley R. Mills, Jr., Attorneys, Department of Justice.

For the defendants: Hal Gerber, Memphis, Tenn., and Abe Fortas, of Arnold, Fortas & Porter, Washington, D. C.

Final Judgment

Marion S. Boyd, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on November 1, 1956, and each of the defendants having appeared herein, and the plaintiff and the defendants, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or admission by the defendants in respect of any such issue;

Now, therefore, before any testimony or evidence has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I.

[*Sherman Act*]

The Court has jurisdiction of the subject matter herein and all the parties hereto. The complaint states a claim against the defendants and each of them under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

[*Definitions*]

As used in this Final Judgment:

(A) "Defendant Association" means the defendant Memphis Retail Appliance Dealers Association (MRADA):

(B) "Defendant retail dealers" means all of the defendants and each of them, except the Defendant Association;

(C) "Defendants" means the Defendant Association and the defendant retail dealers;

(D) "Person" means any individual, partnership, firm, corporation, association, or other business or legal entity;

(E) "Appliances" means gas and electrical equipment used primarily in the home such as refrigerators, home freezers, ranges, television sets, room air conditioners, fans, water heaters, radios, washers, ironers, vacuum cleaners, clothes dryers, dishwashers, disposals and similar items.

III.

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to any defendant shall apply to each such defendant and to his or its officers, agents, servants, employees, subsidiaries, successors and assigns, and to all persons in active concert or participation with such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV.

[*Practices Enjoined*]

The Defendant Association is hereby enjoined and restrained from entering into, maintaining or furthering, or claiming any rights under, any contract, combination, conspiracy, agreement, understanding, plan or program to:

(a) Fix, establish, or maintain manufacturers' suggested retail list prices on appliances;

(b) Fix, establish, or maintain maximum limitations on trade-in allowances for used appliances;

(c) Boycott or otherwise refuse to do business with any person;

(d) Refuse to advertise appliances at prices lower than the manufacturer's list prices, or refuse to advertise fixed trade-in allowances for used appliances.

V.

[*Action Through Association*]

The defendant retail dealers are hereby enjoined and restrained from combining, conspiring, or agreeing with each other or with any other retail appliance dealer to take any action through the defendant association, any successor thereto or any other association with the intent, purpose, or effect of doing any of the acts or things prohibited by Section IV of the judgment, *Provided* that nothing in this final judgment shall prevent any retailer defendant from exercising any rights it may have pursuant to the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or the Act of Congress of July 14, 1952, com-

monly called the McGuire Act, and the laws of the State of Tennessee relating to resale price maintenance in effect pursuant thereto and consistent therewith; *Provided further* that nothing in this final judgment shall be construed to prevent any defendant retail dealer from unilaterally exercising his right to select the distributors, dealers, consumers, or other persons with whom he will deal.

VI.

[*Notice of Judgment*]

Each Defendant is hereby ordered and directed to give notice of the terms of this Final Judgment to its officers, directors, and employees and to take such steps as are necessary to cause such persons to comply with said terms.

VII.

[*Amendment of By-Laws*]

Defendant Association is ordered and directed:

(a) To cancel and revoke any provision of its by-laws, rules, and regulations which is inconsistent with any of the provisions of this Final Judgment;

(b) Withing thirty (30) days after the entry hereof to serve by mail upon each of its present members a conformed copy of this Final Judgment and to file with this Court and with the Attorney General or the Assistant Attorney General in Charge of the Antitrust Division, proof by affidavit of service upon each such member;

(c) To institute forthwith and to complete within thirty (30) days from entry of this Judgment such proceedings as may be appropriate and necessary to amend its by-laws so as to incorporate therein Section IV of this Judgment and require as a condition of membership or retention of membership that all present and future members be bound thereby in the same way that the defendants herein are now bound;

(d) To furnish to all its present and future members a copy of its by-laws as amended in accordance with subsection (a) of this Section VII;

(e) To expel promptly from membership any present or future member of the defendant association who shall violate the provisions of its by-laws which shall incorporate Section IV of this Judgment when the said defendant association shall have knowledge of such violation.

VIII.

[*Inspection and Compliance*]

For the purpose of securing compliance with the Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in Charge of the Antitrust Division, and on reasonable notice to any defendant, be permitted, subject to any legally-recognized privilege, (a) reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Final Judgment, and (b) subject to the reasonable convenience of such defendant, and without restraint or interference, to interview officers and employees of such defendant, who may have counsel present, regarding any such matters. For the purpose of securing compliance with this Final Judgment, any defendant, upon the written request of the Attorney General, or the Assistant Attorney General in Charge of the Antitrust Division, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment. No information obtained by the means permitted in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

IX.

[*Jurisdiction Retained*]

Jurisdiction of this cause is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith and punishment of violations thereof.

[¶ 68,705] **Floyd M. Caraway v. Ford Motor Company, Rudy Fick, and Berl Berry.**

In the United States District Court for the Western District of Missouri, Western Division. No. 10655. Dated February 27, 1957.

Clayton and Sherman Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Jurisdiction of Federal Courts—Removal of Proceeding from State Court—Remand to State Court—Common Law Conspiracy.—Where an action for fraudulent misrepresentation and for common law conspiracy had been removed from a state court to a United States District Court on the ground that the controversy involved a substantial federal question, that is, redress for violations of the Sherman and Clayton Antitrust Acts, the action was remanded to the state court since there was no federal question involved in the action. The plaintiff's cause of action predicated upon a theory of common law conspiracy in the state court by pleadings which avoided reference to the federal antitrust statutes placed the jurisdiction of the state court beyond question. The state court had jurisdiction of the subject matter of the action. The fact that a violation of common law rights may also be a violation of a federal statute does not deprive a state court of jurisdiction unless Congress conferred exclusive jurisdiction on the federal courts as to all rights and remedies in respect thereto. There is no Congressional intent or expression to such an effect.

See Private Enforcement and Procedure, Vol. 2, ¶ 9007.35.

For the plaintiff: Robert L. Jackson, George V. Aylward, and Dean C. Allard, Kansas City, Mo.

For the defendants: Lathrop, Righter, Blackwell, Gordon and Parker, Kansas City, Mo., for Ford Motor Co.; and Kuraner, Freeman, Kuraner and Oberlander, Kansas City, Mo., for Rudy Fick and Berl Berry.

For a related opinion of the U. S. District Court, Western District of Missouri, Western Division, see 1956 Trade Cases ¶ 68,536.

Memorandum and Order

[*Removal to Federal Court*]

R. Jasper Smith, District Judge [*In full text*]: Plaintiff's motion to remand and defendants' motion to dismiss are before me for ruling. I dealt with this case earlier under similar circumstances, rendering my decision then in *Caraway v. Ford Motor Co., et al.* [1956 Trade Cases ¶ 68,536], 144 F. Supp. 295. That opinion provides background for this question, and reveals in detail the procedural steps leading up to my decision where I dismissed without prejudice that part of plaintiff's complaint based on alleged violations of the Sherman Anti-Trust Act and the Clayton Act, and remanded to the state court the remainder of the complaint which sought redress for fraudulent misrepresentation.

Thereafter, plaintiff filed an amended complaint in the state court, supplementing his count for fraudulent misrepresentation with an additional count for common law conspiracy. Again the action was removed here upon the petition of defendants, on the ground that the controversy involved a substantial federal question, specifically, redress for violations of the Sherman and Clayton Acts.

[*Motion To Remand*]

Defendants now move to dismiss the complaint. Plaintiff counters with a motion to remand to the state court.

[*Issue*]

The critical question involved is whether the state court has jurisdiction of the subject matter of this action. Plaintiff argues that his complaint asserts an actionable common law conspiracy. Defendants claim that it purports to allege an action arising under the anti-trust laws of which federal courts have exclusive jurisdiction. I must decide, concerning the alleged conspiracy, whether plaintiff may sue under the state common law in a state court, or whether his exclusive remedy is under the Sherman and Clayton Acts in the federal courts.

[*Common Law Rights*]

Nothing is found in the federal anti-trust statutes expressly or impliedly providing

exclusive jurisdiction in federal courts respecting violations of individual, private rights. The statutes provide only two civil remedies, i. e., injunctive relief against a threatened or continued violation of the Acts, or treble damages in an action at law. These remedies are not available to plaintiff in a state court action because they are cognizable in federal courts exclusively, and the state court has no jurisdiction to give relief thereon. But these provisions relate to remedies. It is unreasonable to maintain that the anti-trust statutes were intended to exclude persons who had common law rights, arising from something also forbidden or declared to be unlawful by the acts, from pursuing their remedies in a proper jurisdiction.

[*State Court Jurisdiction*]

There is considerable diversity of theory of recovery between a case that is commenced solely for redress of violation of the federal anti-trust laws, and is dependent for its sustention upon the existence of the remedies prescribed in those laws, and a case in which the injured party merely attempts to assert violations of his common law rights, which may also be protected by federal legislation. The fact that a violation of common law rights may also be a violation of a federal statute does not deprive a state court of jurisdiction unless Congress conferred exclusive jurisdiction on the federal courts as to all rights and remedies in respect thereto. I find no Congressional intent or expression to such an effect here.

A person who has been injured in his trade or business by the activities of an unlawful monopoly, combination or restraint is entitled to recover damages in an action at law for the loss suffered, recovery being sustainable both at common law and under the federal anti-trust statutes. *Southern States Oil Co. v. Standard Oil Co. of New Jersey et al.*, 26 F. Supp. 633; *Hand v. Kansas City Southern Ry. Co.*, 55 F. 2d 712; and *Guiterman v. Pennsylvania R. Co.*, 48 F. 2d 851.

Plaintiff's new cause of action predicated upon a theory of common law conspiracy in the state court by pleadings which avoid reference to the federal anti-trust statutes place the jurisdiction of the state court beyond question. Thus, having eliminated any possibility of federal question jurisdiction, and observing the lack of diversity of citizenship between the parties, I must sustain plaintiff's motion and remand this case to the court from whence it was removed, the Circuit Court of Jackson County, at Kansas City.

This ruling also disposes of defendants' motion to dismiss, and necessarily requires the denial of that motion without prejudice. It is so ordered.

[¶ 68,706] B. B. Rogers, et al. v. The Douglas Tobacco Board of Trade, Inc., et al. Charles B. Holcomb, Administrator, and Virginia H. Gambill, Administratrix, of the estate of Rady E. Holcomb, deceased v. B. B. Rogers, et al.

In the United States Court of Appeals for the Fifth Circuit. No. 16284. Dated May 9, 1957.

Appeals from the United States District Court for the Southern District of Georgia. FRANK M. SCARLETT, District Judge.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Allocation of Selling Time Among Tobacco Warehouses—Legality of Allocation by Board of Trade—Reasonableness of Method of Allocation—Limitation on New Warehouses.—A tobacco board of trade, composed of persons operating on a tobacco market, did not violate the Sherman Act by allocating available selling time among auction tobacco warehouses in a local Georgia market. The available selling time for tobacco was limited; therefore, the total available selling time had to be allocated among the warehouses. That necessity gave rise to a custom by which the function of allocating selling time among local warehouses devolved upon the local board of trade. The court took judicial notice of such a custom in Georgia. Also, the board of trade did not violate the Sherman Act when it changed from the floor space system (allocation based on a warehouse's square foot area) of allocating selling

time to the performance system (allocation on the basis of a warehouse's last year's performance) of allocating selling time when a new warehouse, larger in area than any one of the existing warehouses, was constructed in the local market. Under the former system, the new warehouse would have received approximately 36 per cent of the available selling time, while, under the latter system, the new warehouse received approximately 14 per cent of such time, leaving approximately six-sevenths of such selling time for apportionment among the six other warehouses in the local market. Under the performance system, a new warehouse larger than average size would receive the same selling time as the average of the other warehouses. However, no justification for percentage limitations on increases or decreases in selling time during subsequent selling seasons could be found. Such a limitation practically froze the seven warehouses in the prior year's competitive positions and eliminated, in major part, the hope of gain and risk of failure inherent in a true performance system. If evidence shows that the limitation tends to prejudice the public interest, it may constitute an undue and unreasonable restraint of trade.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.468; Monopolies, Vol. 1, ¶ 2610.

Private Enforcement and Procedure—Suit for Civil Damages—Parties Defendant—Survival of Action Against Personal Representatives of Deceased Defendant—Limitation on Damages Recoverable.—A treble damage action survived against the personal representatives of the estate of a defendant who had died after the commencement of the action and after process had been served on him. Combinations in restraint of trade or tending to create or maintain a monopoly give rise to causes of action at common law; however, public injury alone justifies the threefold increase in damages. The policy of the federal statute requires the survival of the cause of action to the extent that actual damages may be recovered. Trebling of damages is in the nature of a penalty for a public wrong. The personal representatives should not be liable for more than actual damages. The same result would be reached under the applicable state law.

See Private Enforcement and Procedure, Vol. 2, ¶ 9006.50, 9011.

For the appellants: Norman M. Littell and Charles J. Alexander, Washington, D. C., and John G. Kopp and J. Edwin Peavy, Waycross, Ga., for B. B. Rogers and others. George E. Maddox, Douglas, Ga.; R. Glen Key, Winston-Salem, N. C.; and Montgomery L. Preston, Douglas, Ga., for Charles B. Holcomb and others.

For the appellees: E. Kontz Bennett, Waycross, Ga., for Douglas Tobacco Board of Trade, Inc., and others.

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges.

[*Trial Court Ruling*]

RIVES, Circuit Judge [*In full text*]: In an action for treble damages for alleged violations of the Sherman Anti-Trust Act,[1] the district court sustained the motions of the defendants to dismiss and for judgment on the pleadings, and this appeal ensued.

[*Allocation of Selling Time*]

The basic facts as established by the pleadings, admissions and affidavits are sub-

[1] 15 U. S. C. A. §§ 1, *et seq.* In pertinent part §§ 1, 2, and 15 of said Act provide as follows:

"§ 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty*

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"§ 2. *Monopolizing trade a misdemeanor; penalty*

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"§ 15. *Suits by persons injured; amount of recovery*

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor

stantially without dispute. We shall therefore heed Judge Sibley's wise admonition,[2] and go directly to the facts.

Beyond the control of the defendants, according to the present record, are many of the facts and circumstances from which it is claimed that the necessity arose for the allocation of selling time among tobacco warehouses in each of the local markets in the flue-cured area.[3]

The internal allocation of selling time among the warehouses on any local market is done by the tobacco board of trade of the particular city where the market is located. The defendants, as majority voting members of The Douglas Board of Trade, are responsible for the allocations of selling time among the warehouses on the Douglas, Georgia, tobacco market, and those allocations give rise to the present action.

[*Douglas Market*]

The Douglas market has been in continuous existence since 1918. At the present time it includes seven tobacco warehouses, one of which is operated and controlled by the plaintiffs, and six by various parties named as defendants. Tobacco is brought

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in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages, by him sustained, and the cost of suit, including a reasonable attorney's fee."

[2] "Under the Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings." *De Loach v. Crowley's, Inc.*, 5th Cir., 128 F. 2d 378, 380.

[3] Clearly and succinctly stated in the affidavit of Fred S. Royster, President of the Bright Belt Warehouse Association, Inc.:

"It is necessary to allocate selling time among warehouses on each local market for the following reasons:

"Tobacco is a perishable commodity. It must be heat treated (referred to in the trade as redrying) within a short period of time after purchase and removal from the warehouse floors. The aggregate facilities of the tobacco buying companies and dealers for the redrying of producers' tobacco in the flue-cured area have a maximum capacity of about 120,000,000 pounds weekly. The limit of this capacity is such that the volume of tobacco sold at auction in any one week must be regulated in order to prevent tobacco from deteriorating before it can be processed.

"Regulation of the flow of tobacco from producer to manufacturer on an over-all basis within the flue-cured area is accomplished in the following manner:

"The flue-cured area is divided into 'belts.' In each belt there is in existence a Tobacco Warehouse Association operating in that belt, which is composed of all or most of the various warehouses. Membership by the individual warehouses is voluntary. Each of the five belt associations elect six of their members to serve on the Board of Governors of an organization known as the Bright Belt Warehouse Association. The Board of Governors of the Bright Belt Warehouse Association represent the vast majority of the entire tobacco warehouse industry in the flue-cured area comprising Virginia, North Carolina, South Carolina, Georgia, and Florida and, through a 'sales committee', performs the following functions:

"(1) The Board of Governors sets the date for the opening of the tobacco auction markets in each of the five belts, beginning with the extreme southern belt and moving northward through the five belts. The markets in the Georgia-Florida belt open around July 15 to July 25 and operate for approximately four or five weeks. The South Carolina and Border Belt opens approximately one week to two weeks after the Georgia-Florida Belt and remains open approximately seven weeks. The Eastern North Carolina Belt opens approximately two weeks after the opening of the South Carolina Border Belt. The Middle Belt opens one or two weeks after opening of the Eastern North Carolina Belt. The old Belt follows, opening about two weeks after the Middle Belt.

"(2) The Sales Committee determines the number of hours per day during which all tobacco markets in each belt may operate. The maximum hours of operation for any market are 5½ hours since this is the maximum working day for United States Department of Agriculture Graders and is the generally accepted work day throughout the industry. In the event the sales committee finds it necessary to reduce sales hours, the markets are given 48 hours' notice.

"The sales committee does not distinguish between markets and allot more hours for sale to one market within the same belt than to another—all are allotted the same.

"(3) The Board of Governors determines the maximum number of baskets of tobacco which may be auctioned per hour per set of buyers. The maximum rate of speed is 400 piles per hour, or about 9 seconds per basket. This is the reasonable maximum speed for conduct of an auction sale and it is generally accepted in the industry as the best speed.

"The effect of the foregoing regulations promulgated by the Bright Belt Warehouse Association is that this association determines and controls the maximum amount of tobacco which may be sold in one day by each market. For example, one market has five sets of buyers. Since each set of buyers, under the regulations, can purchase a maximum of 400 baskets per hour, if the sales day is set at five hours, this means that one set of buyers in that market can purchase five times 400 baskets, or 2,000 baskets. Thus five sets of buyers can purchase five times 2,000, or 10,000 baskets per day. Since the sales committee of the Bright Belt Warehouse Association knows the average weight per basket of tobacco, it can effectively

by the farmer-growers to the warehouses where it is sold at auction by the basket or pile to buyers assigned to the market by the buying companies (see footnote 3, *supra*). Those companies have assigned to the Douglas market two sets of buyers, from which it follows that only two auction sales can be conducted simultaneously, and that the maximum amount of tobacco that can be sold on the Douglas market in any one day of the four or five weeks of the selling season is 4400 baskets. The opportunities of each of the seven tobacco warehouses to sell any part of this 4400 baskets is controlled by the local Board of Trade, which assigns to each of the warehouses a certain portion of each selling day during which sales can be held at that warehouse. The buyers attend only those sales held pursuant to the schedule of selling time issued by the Board. Eligible for membership in the Board of Trade are the tobacco warehousemen, the buyers, and all persons operating on the tobacco market. The defendants comprise the majority of the participating or voting membership of The Douglas Board of Trade and, hence, control and direct the policies and practices of the Board.

[*Method of Allocation*]

For many years prior to the opening of the 1954 tobacco market season, it was the custom and practice of the Douglas Board of Trade to allocate selling time to each of the warehouses on the basis of the "Unit Floor-Space System." Each warehouse was credited with one unit for each 55,000 square feet of floor space. Five of the warehouses owned by various defendants were one-unit warehouses, and the sixth was a two-unit warehouse. Thus, prior to the construction of plaintiffs' warehouse, there were [was] a total of seven units, the two-unit warehouse operated and controlled by one set of defendants, two of the one-unit warehouses by another set of defendants, and each of the three other one-unit warehouses by a separate set of defendants. There being a total of seven units of floor space in the six warehouses, the two-unit warehouse was allotted two-sevenths of the selling time, and each of the other warehouses one-seventh thereof. In May of 1954 the plaintiffs commenced the construction of a four-unit or 220,000 square foot warehouse in Douglas. If the "Unit Floor-Space System" of allocation had remained in effect, the plaintiffs, upon completion of their warehouse in time for the opening of the 1954 season

control the total tonnage moving through the markets by simply controlling the rate of sale and the hours of sale per day.

"In the final analysis the precise amount of tobacco which can be sold on any market in any one day is controlled by the number of sets of buyers on the market. The number of sets of buyers assigned to a market is determined exclusively by the buying companies and the Bright Belt Warehouse Association has nothing to do with the assignment of buyers to a market. Thus, if the buying companies choose to send another set of buyers to a particular market, that market would automatically be able to auction more tobacco per day.

"As hereinbefore stated, the maximum combined redrying capacity of the buying companies is approximately 120,000,000 pounds weekly. Thus, the reason that sales on the market must be geared to the overall redrying capacity is because there are redrying facilities on some markets and not on others and there is a cross movement of tobacco between markets for processing. In other words, for example, the American Tobacco Company may purchase tobacco on a particular market and ship it to some other locality for redrying. Of course, the Bright Belt Warehouse Association cannot tell a given buyer where to take his green tobacco for redrying nor on what markets to buy his tobacco.

"The sales committee of the Bright Belt Warehouse Association obtains a daily report from the United States Department of Agriculture of the total pounds sold on all markets on the preceding day and in this way the sales committee does keep a check on tonnage flow of tobacco to see that it does not exceed maximum processing capacity. Also, a particular buying company may notify the sales committee that their purchases have been so heavy that their redrying facilities cannot handle the tobacco and may request a curtailment of sales hours for a period of time. The sales committee, of course, gives serious consideration to such a request because it is to the interest of the farmers and the auction market system as a whole that buyers of a particular company not be withdrawn from the market because of an inability of that company to process its purchase. When in the considered judgment of the sales committee the public interest requires a temporary curtailment of the volume of tobacco flowing through the warehouses to the processing plants because of inability of the plants to redry the tobacco, it takes remedial action by either reducing sales hours or suspension of all sales until processing can catch up.

"The authority of the Bright Belt Warehouse Association derives from the consent of its membership and the farmers and industry generally. There is no statutory authority.

"The Bright Belt Warehouse Association takes no action with respect to the internal allocations of selling time among warehouses on any market."

on July 15, 1954, would have been entitled to considerably more than one-third of the total selling time available for the Douglas market.

[*Plaintiffs' Warehouse*]

As soon as the defendants learned of the plaintiffs' intention to construct a warehouse and throughout the period of construction differences arose, the defendants accusing the plaintiffs of trying to force them to buy the new warehouse rather than let the plaintiffs "hog" the market, and the plaintiffs accusing the defendants of trying to prevent them from engaging in the tobacco auction business on the Douglas market. The plaintiffs' warehouse, commonly known as the Big Independent 1, 2, 3, and 4, was completed by the end of June, 1954, at a cost of $200,000.00.

[*New Method of Allocation*]

On July 10, 1954, about ten days after the completion of plaintiffs' warehouse and five days before the 1954 season opened, The Douglas Board of Trade adopted new by-laws to provide for the allocation of selling time as follows:

"ARTICLE III.

"Warehousemen.

"Section 1. Any warehouse desiring membership in the Douglas Tobacco Board of Trade, Inc., and desiring to sell tobacco as a member of said association shall be built within the city limits of Douglas, Georgia, or within a reasonable distance from said city limits and within Coffee County, Georgia. A tobacco warehouse shall be a building suitable for selling tobacco, with proper lighting, scales, trucks and other necessary fixtures and shall be easily accessible, both to farmers and to buyers.

"Section 2. It is further provided that a warehouse under this provision is any warehouse building under one continuous roof (not connected with any other roof, and over one continuous floor (not connected with any other floor), and provided further that no single warehouse building shall be divided for the purpose of being counted as two or more warehouses. After a warehouse is originally built, no alterations or changes can be made to such warehouse in order to make more than one original house. Any concern operating more than one warehouse may transfer sales from one warehouse to another as they see fit."

"ARTICLE IV.

"Section 1. Until a change of conditions shall warrant a change in these By-Laws, and until there is such a change in these By-Laws, limited selling time available for the several auction warehouses on the Douglas Tobacco Market shall be divided among and allocated to the several warehouses doing business on the Douglas market at Douglas, Georgia, in accordance with the following rules, to-wit:

"A. If all of the warehouses on said market for any given year shall agree unanimously in writing upon the division of selling time among these warehouses then such unanimous agreement shall be recognized by the Douglas Tobacco Board of Trade and the selling time shall be allocated among the said warehouses in accordance with said unanimous agreement, which shall be signed by all warehousemen and the original filed with the secretary of the association and available to all interested parties.

"B. Inasmuch as 1954 season will be the first season after the formation of the Douglas Tobacco Board of Trade, Inc.,[4] the selling time for 1954 shall be allocated to each warehouseman in such proportion as the gross sales of tobacco in such warehouse were to the total gross sales on the Douglas, Georgia, tobacco market for the two years preceding the allocation provided, however, that after the 1954 season in arriving at gross sales no amount of tobacco sold in resale in excess of 10% of the total sales of gross sales of any warehouse will be considered. That is to say, after the 1954 season the allocation shall be in proportion to sales by each warehouseman to total sales, based on producers sales, plus 10% of resales of tobacco, provided further

"That the said selling time in each warehouse shall not vary more than 3½% from the allocated selling time for the preceding season.

"Provided further, however, that in the event of a new warehouse and/or a warehouse which did not operate on the Douglas, Georgia, tobacco market during the preceding season, claiming selling time, then the selling time allotted to such new warehouse or warehouse not operating the preceding season claiming selling time, shall be allotted on an average and in proportion with the amount of selling time available to all warehouses

[4] The Board of Trade had theretofore been an unincorporated association.

operating as a part of Douglas, Georgia, tobacco market; provided, further, if such new warehouse and/or warehouse which did not operate the preceding season is smaller in size than the average of all warehouses comprising the Douglas, Georgia, tobacco market, then the selling time shall be allotted according to the proportion of its size in relation to all other warehouses. Provided further that if said new warehouse or warehouses which did not operate the preceding season is larger in size than the average of all warehouses operating on the Douglas, Georgia, tobacco market, such warehouses or warehouse shall not receive any consideration in selling time for the size in excess of the average of all warehouses and shall in no event be allocated more than its equal pro-rata share of selling time as it is determined by the number of warehouses operating as herein before set forth.

"C. The total remaining selling time allotted to the market after selling time has been allotted to a new warehouse and/or a warehouse which did not operate on the market during the preceding season shall be allotted to the remaining houses which did operate the preceding season in accordance with the first paragraph of subsection B above."

The parties are agreed that under the "Unit Floor-Space System" theretofore in effect the plaintiffs would have received approximately 36.36 per cent of the available selling time or an opportunity to sell 1600 baskets of tobacco a day during the 1954 market season, while, under the "Modified Experience Basis" adopted by the new by-laws, they were actually allocated one-seventh, 14.28 per cent, of the available selling time, limiting them to the sale of 628 baskets of tobacco a day during the 1954 season. The farmer-growers brought to the plaintiff's warehouse during the 1954 season more tobacco than could be sold within the allotted selling time.

The 1955 season opened on July 21, 1955, with the same maximum limitation on the total amount of tobacco that could be sold on the market in any one day—4400 baskets a day. The plaintiffs' allocation of selling time was increased from 14.28 to 14.77 per cent of the available selling time, or from a maximum of 628 to 650 baskets of tobacco a day. If the 3½ per cent (3½% of 14.28%) limitation had not been applied and the plaintiffs had been allocated selling time on the basis of their performance during the 1954 season, it is estimated that they would have received an allocation of selling time sufficient to sell 924 instead of 650 baskets of tobacco a day during the 1955 season.

[*Basic Question*]

The basic question for decision is whether, under the foregoing facts, the defendants were entitled to a judgment as a matter of law.

[*Necessity of Allocating Selling Time*]

Considering first the earlier year, 1954, the defendants insist that some form of allocation of selling time among local tobacco warehouses was necessary and that the change from the "Unit Floor-Space System" to the "Modified Experience Basis" was reasonable.

All of the responsible parties are not before the court, and the issues are not so framed as to call for a review of the necessity for some form of allocation of selling time. That necessity arises for the reason set forth in the affidavit of Fred S. Royster (footnote 3, *supra*), for none of which is there any claim that the defendants are responsible. The tobacco buying companies and dealers can preserve and redry only so many pounds of tobacco per week. There is thus a natural limit to the amount of tobacco they can purchase. They choose to make such purchases by open competitive bidding at tobacco auction markets. Their right to make that choice has not been questioned. In all probability the auction method provides each farmer-grower with more competition for the purchase of his tobacco than he would otherwise have. The buying companies assign to each market the number of sets of buyers they see fit, and again no one has questioned their right so to do. Certainly none of the defendants can require them to assign a greater number of buyers. Automatically the number of sets of buyers determines the amount of tobacco which can be sold on any market in any one day. When the buying companies and the Bright Belt Warehouse Association have acted, the total selling time of each local market and the total amount of tobacco which can be sold on such market have become fixed. The tobacco auction market system is thus an organized and restricted rather than an uncontrolled and completely free arrangement. This action is not a frontal attack upon that entire system, but is restricted to one relatively small segment,

namely, the internal allocations of selling time on the Douglas market.

Auction tobacco warehouses do much more for the farmer than simply storing and preserving his highly perishable tobacco. One of their chief functions is to obtain the best possible price for his tobacco. At an auction sale the "man in the hole" represents the warehouse, keeps the bidding lively so as to get the highest price possible, and in so doing often has a pile of tobacco "knocked down" or sold to the warehouse itself. A farmer dissatisfied with the last bid has the privilege of rejecting all bids.

With two sets of buyers assigned to the Douglas market, and, hence, only two auction sales being conducted simultaneously, with a maximum working day of 5½ hours, and the market operating for only four or five weeks, and with the possibility of selling only 400 piles of tobacco per hour, it becomes obvious that for the tobacco auction market system to be workable at all, the limited total available selling time must be allocated among the warehouses upon some basis. That necessity has given rise to a custom adhered to generally throughout the flue-cured area by the buyers and by the warehouses alike by which the function of allocating selling time among the local warehouses devolves upon the local board of trade. In North Carolina that custom has been carried forward into a statute formally vesting such authority in the Tobacco Boards of Trade of the several towns and cities. North Carolina Public Laws, 1933, Chapter 268. Georgia has no similar statute granting specific authority to boards of trade. They have, however, exercised such authority for the past thirty-five years with the consent of all interested parties, so that the custom or usage has become the subject of judicial notice. See 20 Am. Jur., Evidence, Secs. 109 and 110.

[*Systems Used*]

Various local boards of trade have developed successively different systems of apportioning selling time among warehouses. Examples of such systems are "wall-to-wall," or the sale of all available tobacco in each warehouse before proceeding to the next; the "unit" system, under which each warehouse is counted as one unit; "floor space," or the allocation of the total available selling time among the warehouses in proportion to their square foot area; and the "performance" system, under which selling time is allocated to each warehouse on the basis of its individual last year's performance.

Up to the time of plaintiffs' advent upon the Douglas market, the operators of the six other warehouses had been able to reach unanimous agreement upon the amount of selling time to be allotted to each warehouse. Plaintiffs' appearance on the scene resulted in the adoption by the Board of Trade of the new by-law with which we are here concerned, and the effect of which, broadly speaking, was to switch from the "floor space" system to the "performance" system.

[*Test of Legality*]

This case does not involve any plan of market price fixing either directly or indirectly. There is, therefore, no conclusive presumption of illegality.[5] The guiding principle in this case is that stated in *Chicago Board of Trade v. United States*, 246 U. S. 231, 238:

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

See, also, *United States v. Tarpon Springs Sponge Exchange*, 5th Cir. [1944-1945 TRADE CASES ¶ 57,236], 142 F. 2d 125, 128.

[5] Compare *United States v. Trenton Potteries Co.*, 273 U. S. 392; *Dr. Miles Co. v. John D. Parks & Sons Co.*, 220 U. S. 373; *F. T. C. v. Beech-Nut Packing Co.*, 257 U. S. 441; *United States v. Socony-Vacuum Oil Co., Inc.* [1940-1943 TRADE CASES ¶ 56,031], 310 U. S. 150; *United States v. Griffith* [1948-1949 TRADE CASES ¶ 62,246], 334 U. S. 100.

The Sherman Act does not erect any standards for the positive conduct of trade and commerce, it is prohibitory legislation. Men may conduct their businesses as they see fit so long as they do not tend to restrain trade or commerce. As recently expressed by the Supreme Court:

"That there is a national policy favoring competition cannot be maintained today without careful qualification. It is only in a blunt, undiscriminating sense that we speak of competition as an ultimate good. Certainly, even in those areas of economic activity where the play of private forces has been subjected only to the negative prohibitions of the Sherman Law, this Court has not held that competition is an absolute. See *Chicago Board of Trade v. United States,* 246 U. S. 231; *cf.* Mason, Monopoly in Law and Economics, 47 Yale L. J. 34.

"Prohibitory legislation like the Sherman Law, defining the area within which 'competition' may have full play, of course loses its effectiveness as the practical limitations increase; as such considerations severely limit the number of separate enterprises that can efficiently, or conveniently, exist, the need for careful qualification of the scope of competition becomes manifest. Surely it cannot be said in these situations that competition is of itself a national policy. To do so would disregard not only those areas of economic activity so long committed to Government monopoly as no longer to be thought open to competition, such as the post office, *cf., e. g.,* 17 Stat. 292 (criminal offense to establish unauthorized post office; provision since superseded), and those areas, loosely spoken as of natural monopolies or—more broadly—public utilities, in which active regulation has been found necessary to compensate for the inability of competition to provide adequate regulation. It would most strikingly disregard areas where policy has shifted from one of prohibiting restraints on competition to one of providing relief from the rigors of competition, as has been true of railroads. Compare, *e. g., United States v. Trans-Missouri Freight Assn.,* 166 U. S. 290, and *United States v. Joint Traffic Assn.,* 171 U. S. 505, with the Transportation Act of 1920, 41 Stat. 456, 480; *Consolidation of Railroads,* 63 I. C. C. 455." *Federal Communications Commission v. RCA Communications, Inc.,* 346 U. S. 86, 91, 92.

[*Legality of Allocation*]

We are led to the conclusion that the Douglas Tobacco Board of Trade did not violate the Sherman Act simply by exercising the regulatory powers, necessarily devolving upon it, of allocating selling time among the warehouses on the local market. As said by Mr. Justice Frankfurter concurring in *Associated Press v. United States* [1944-1945 TRADE CASES ¶ 57,384], 326 U. S. 1, 27:

"* * * ever since the Sherman Law was saved from stifling literalness by 'the rule of reason,' *Standard Oil Co. v. United States,* 221 U. S. 1; *United States v. American Tobacco Co.,* 221 U. S. 106; it is not sufficient to find a restraint. The decisive question is whether it is an unreasonable restraint. This depends, in essence, on the significance of the restraint in a relation to a particular industry. Compare *Chicago Board of Trade v. United States,* 246 U. S. 231, 238."

[*Legality of Method*]

So here, the real issues revolve about the legality and reasonableness of the methods of allocating selling time. The legality of the "performance" method of allocating selling time has been sustained by the North Carolina Supreme Court and by the Federal Trade Commission.[6]

[*FTC and Court Rulings*]

The opinion of the hearing examiner *In the Matter of Wilson Tobacco Board of Trade,* F. T. C. Docket No. 6262, contains a full and clear comparison of the various methods of allocating sales time from which he concludes that the performance system is best in that it transfers the area of competition from "butting dollar against dollar" in the construction of unneeded warehouse space to competition in the rendering of more and better service to the farmer.

The hearing examiner said:

"This system compels more intensive competition where it should be—on service, instead of bankroll—and puts the control of time share on the producer rather than on the financially powerful warehouse-

[6] *Day v. Asheville Tobacco Board of Trade* [1955 TRADE CASES ¶ 68,057], 242 N. C. 136, 87 S. E. 2d 18. *In the Matter of the Wilson Tobacco Board of Trade,* F. T. C. Docket No. 6262: *Initial Decision of Hearing Examiner In the Matter of Asheville Tobacco Board of Trade, Inc.,* F. T. C. Docket No. 6490. See, also, *Cooperative Warehouse v. Lumberton Tobacco Board of Trade* [1955 TRADE CASES ¶ 68,056], 242 N. C. 123, 87 S. E. 2d 25.

man. However, it brings problems with it also, such as equitable provision of time for a new entrant, who has no previous experience of 'performance to serve as a base * * *.'" F. T. C. Docket No. 6262 at p. 22.[7]

The Commission, in its decision of August 23, 1956, approved that finding of the Hearing Examiner, saying in part:

"Weighing and judging the reasonableness of the performance system in the light of its intent and effect, and in the framework of realities of the market place, as established on the record here, there remains no alternative but for us to conclude on the whole record that the initial decision is correct in upholding the reasonableness of the performance system." F. T. C. Docket No. 6262, p. 5.

As noted by the Hearing Examiner, however, a difficult problem is presented under the performance system to provide for a new entrant with no performance experience. In that case, the Board's regulation of December 5, 1952,

"provided that any newcomer on the Wilson market should be allotted for his ensuing first year of operation, the same amount of selling time as the last previous entrant (Liberty) had for that year, provided the new entrant built as large a warehouse as Liberty's; if not, then time is cut down in proportion to the size built." F. T. C. No. 6262, p. 31.

The Hearing Examiner concluded that that regulation was an unreasonable restraint of trade, saying:

"It is, in the hearing examiner's opinion, inherently unreasonable and unfair to fix a man's opportunity to engage in competition on the basis of the ability and performance of only one of his competitors. A broader base, such as an average of all, for one year, or over a period, would be more reasonable and, of course, some account should be taken of the entrant's initial investment, in relation to that of others, already operating." F. T. C. Docket No. 6262, p. 32.

That part of the initial decision was not appealed, though the Commission in a footnote to its decision commented:

"The resolution in question established an allotment of selling time for newcomers on the Wilson market, the same amount as the last previous entrant (Liberty) had for that year provided the new entrant built a warehouse equally as large as Liberty with proportionate reduction of time if smaller. The hearing examiner found it to be unreasonable and unfair to fix opportunity to compete on the basis of the ability and performance of only one competitor, suggesting some other broader basis such as an average of all competitors on the market. Respondents have not appealed from that finding." F. T. C. Docket 6262, at p. 3.

The case of *Day v. Asheville Tobacco Board of Trade* [1955 TRADE CASES ¶ 68,057], 242 N. C. 136, 87 S. E. 2d 18, involved a by-law strikingly similar to the by-law adopted by the Douglas Board of Trade. The selling time was allotted on the basis of the sales of the warehouses the previous year, with a provision that a new warehouse larger than average size would receive the same selling time as the average of the other warehouses. The Court said:

"And the rule by which the allotment was made to plaintiff by the Board appears fair and equitable. Indeed, it does not appear that there is any restraint of trade in the rule." 87 S. E. 2d at p. 24.

[*Action of Board of Trade*]

The allocation of selling time among the local warehouses, as has been shown, was a necessity. So long as they were in unanimous agreement there was no objection to the "Unit Floor-Space System." With the advent of a new and powerful competitor, no agency existed for the necessary allocation of time except the Douglas Board of Trade. The time within which it had to take action was brief. Construction of the new warehouse began in May. Various, albeit heated, discussions ensued.

[7] "In summary, then, the Hearing Examiner is of the opinion and therefore finds:

"1. That under the exigencies and unchangeable market conditions, generally, and at Wilson, North Carolina specifically, the performance system of allocating sales time is per se a reasonable regulation and therefore not illegal because,

"(a) it promotes rather than hinders competition among warehousemen by putting a premium on additional sales effort—solicitation, advertising, etc. and increases the area of that competition,

"(b) puts the competitive emphasis solely on the warehouseman's economic function—service,

"(c) penalizes laziness and other inefficiency in that service: * * *." F. T. C. Docket No. 6262, at p. 33.

The warehouse was completed the last of June, and the new by-law adopted the 10th of July five days before the opening of the 1954 season. The plaintiffs themselves, by the timing of their project, bear the primary responsibility for the extremely brief period of time within which action by the Board of Trade became necessary.

The most directly pertinent decisions then available by which the Board of Trade might chart its course were those which we have discussed. Under those decisions, we think that it was not unreasonable for the Board of Trade to conclude that the allotment to the newcomer of more than one-third of the total available selling time was inequitable, and instead to allot to it one-seventh of such time, leaving six-sevenths thereof for apportionment among the six other warehouses in accordance with their performances during the preceding year.[8]

Some doubt is cast upon that conclusion by the Initial Decision of the Hearing Examiner of March 29, 1957. *In the matter of Asheville Tobacco Board of Trade, Inc.*, F. T. C. Docket No. 6490, in which he concluded that a similar new warehouse provision was in restraint of trade, saying:

> "* * * it is basically unfair and arbitrary to limit the competitive opportunity of a new entrant in any market to the average competitive ability of all his established competitors. The very idea of such arbitrary limitation of opportunity is alien to the whole concept of the free-enterprise system." F. T. C. Docket 6490, p. 19.

[*No Restraint of Trade*]

In that decision, the Hearing Examiner declined to follow the precedent of *Day v. Asheville Tobacco Board of Trade,* [1955 TRADE CASES ¶ 68,057], 242 N. C. 136, 87 S. E. 2d 18, and erroneously stated that the Federal Trade Commission had approved the Hearing Examiner's finding that the regulation allocating selling time to new entrants adopted by the Wilson Tobacco Board of Trade was an unreasonable restraint of trade, when, as we have noted, there was no appeal from that part of the Initial Decision in F. T. C. Docket No. 6262. The Hearing Examiner in the *Asheville* case, *supra,* made no suggestion as to how the problem may be solved under the performance system to provide for a new entrant with no performance experience. Without some such solution, the merits of the performance system are largely nullified. We think the solution reached by the Douglas Board of Trade was substantially in accord with that approved by the North Carolina Supreme Court in *Day v. Asheville Tobacco Board of Trade, supra,* and with that suggested by the Hearing Examiner in the *Wilson* case, *supra,* and that it was not an unreasonable restraint of trade. Thus far, that is as to the year 1954, we are in agreement with the district court.

[*Reasonableness of Limitation*]

As to the year 1955, however, the case for the plaintiffs is stronger. We can see no justification for the limitation on increases and decreases in selling time to 3½ per cent, meaning, as construed and applied, not 3½ per cent of the total available selling time but 3½ per cent of the selling time allotted to the particular warehouse. Thus plaintiffs' 1954 allocation of 14.28 per cent was increased by less than one-half per cent (3½% of 14.28%) to 14.77 per cent. Whether a like limitation appearing in the by-law involved in *Day v. Asheville Tobacco Board of Trade, supra,* was construed and applied in the same manner we cannot know, for the opinion does not discuss this 3½ per cent limitation. No such limitation was involved *In the Matter of Wilson Tobacco Board of Trade,* F. T. C. Docket No. 6262, but a similar limitation was held to be in restraint of trade in the Initial Decision *In the Matter of Asheville Tobacco Board of Trade,* F. T. C. Docket No. 6490, the Hearing Examiner stating:

> "Respondents adopted the gain-or-loss proviso, by which they assured themselves, not only that the established warehouses could not lose more than 3½% of their selling time in any one season by reason of business vicissitudes encountered during the preceding year, but that neither the new entrant nor any of the established warehouses could gain more than that amount in any one season. Again in the *Wilson* case, *supra,* the Hearing Examiner approved the performance system because he found that it pos-

[8] There was already a surplus of warehouse floor space on the Douglas market and we think that the newcomer was entitled to no special consideration because of the unusual size of his warehouse.

sessed 'three requisites of competition: opportunities for competitors to grow; opportunities for competitors to appeal for patronage by improving or changing services; no restraint upon the farmer's freedom of election to patronize the competitor of his choice'. The gain-or-loss proviso obviously violates all these requisites of fair competition. In conjunction with the new-warehouse proviso, this limitation would have compelled the new entrant to wait between three and four years, under optimum conditions, before receiving the just porportion of the available selling time which, in a freely competitive system, would have been accorded to him promptly upon his entry into the market. This seems too heavy a competitive handicap for any business to be required to carry." F. T. C. Docket No. 6490, p. 19.

The 3½ per cent limitation, we think, practically froze the seven warehouses in their 1954 competitive positions, eliminated in major part the hope of gain and the risk of failure inherent in a true performance system, and, if further evidence which may be taken upon remand shows that such limitation tends to prejudice the public interest,[9] it may constitute an undue and unreasonable restraint of trade and commerce.

[*Survival of Action*]

The question remains as to whether the action survived against the personal representatives of the estate of one of the defendants, R. E. Holcomb, who died on October 26, 1955, after the commencement of the action and after process had been served on him. The district court, while considering that the personal representatives had become parties to the cause, denied their motion and plea in abatement "in view of the order of this Court dismissing said cause as to all defendants."

Combinations in restraint of trade or tending to create or maintain a monopoly gave rise to causes of action at common law.[10] As we noted in *Kinnear-Weed Corp. v. Humble Oil & Refining Co.* [1954 TRADE CASES ¶ 67,822], 214 F. 2d 891, 893, however, public injury alone justifies the threefold increase in damages.

The policy of the federal statute, we think, requires the survival of the cause of action to the extent that actual damages may be recovered.[11] Trebling of the damages seems to us to be in the nature of a penalty for the public wrong, and we do not think that the personal representatives would be liable for more than actual damages.[12] A different result would not be required even if the question were determined by the law of the State of Georgia.[13]

[*Reversed*]

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

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[9] See *Hudson Sales Corp. v. Waldrip*, 5th Cir. [1954 TRADE CASES ¶ 67,694], 211 F. 2d 268, 272; *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 5th Cir. [1954 TRADE CASES ¶ 67,822], 214 F. 2d 891, 894, and cases cited; *Shotkin v. General Electric Co.*, 10th Cir. [1948-1949 TRADE CASES ¶ 62,341], 171 F. 2d 232 [236], 238.

[10] *Standard Oil Co. v. United States*, 221 U. S. 1, 25, *et seq.;* 36 Am. Jur., Monopolies, Sec. 5; 58 C. J. S., Monopolies, Sections 15 and 16.

[11] *Sullivan v. Associated Billposters & Distributors*, 2nd Cir., 6 F. 2d 1000, 1012; *Barnes Coal Corporation v. Retail Coal Merchants Assn.*, 4th Cir. [1940-1943 TRADE CASES ¶ 56,217], 128 F. 2d 645, 648; compare *Cox v. Roth*, 348 U. S. 207, 209, 210; see however, *Sun Theatre Corp. v. R. K. O. Radio Pictures*, 7th Cir. [1954 TRADE CASES ¶ 67,722], 213 F. 2d 284.

[12] *Haskell v. Perkins*, D. C. N. J., 28 F. 2d 222; compare *Bowles v. Farmers National Bank of Lebanon, Ky.*, 6th Cir., 147 F. 2d 425.

[13] Code of Georgia Annotated:

"3-505 (4421) Action for Tort Not to Abate by Death of Either Party. No action for a tort shall abate by death of either party, where the wrongdoer received any benefit from the tort complained of; nor shall any action, or cause of action, for the recovery of damages for homicide, injury to person, or injury to property abate by the death of either party; but such cause of action, in the case of the death of the plaintiff, shall, in the event there is no right of survivorship in any other person, survive to the personal representative of the deceased plaintiff; and in the case of the death of the defendant, shall survive against said defendant's personal representative. However, in the event of the death of the wrongdoer before suit shall have been brought against him, the personal representative of such wrongdoer in such capacity shall be subject to suit just as the wrongdoer himself would have been durfing his life; providing that there shall be no punitive damages. (Acts 1889, p. 73; 1935 pp. 94, 95; 1952 p. 224.)"

[¶ 68,707] United States v. Magnaflux Corporation.

In the United States District Court for the Northern District of Illinois, Eastern Division. Civil Action No. 51-C-859. Dated May 6, 1957.

Case No. 879 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Dedication of Patents to Public—Conveyance of Patent Rights—Equipment for Detection of Defects in Metals.—A manufacturer of equipment used for the detection of defects in metal parts was required by a consent decree to dedicate to public use specified patents. Also, the manufacturer was required to renounce its exclusive license under a patent and to convey to a specified person its rights under another patent.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.30, 8421.

For the plaintiff: Victor R. Hansen, Assistant Attorney General, and W. D. Kilgore, Jr., Baddia J. Rashid, and Earl A. Jinkinson, Attorneys, Department of Justice.

For the defendant: Richard K. Decker, Theodore C. Diller, and Carlton Hill.

For an opinion of the U. S. District Court, Southern District of New York, transferring the action to the U. S. District Court, Northern District of Illinois, Eastern Division, see 1950-1951 Trade Cases ¶ 62,836.

Final Judgment

WIN G. KNOCH, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on December 11, 1946; the defendant having appeared by its counsel; and the parties hereto, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without any admission by any party hereto with respect to any such issue;

Now, therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein and upon the consent of the parties hereto, it is hereby

Ordered, Adjudged and Decreed, as follows:

I

[*Jurisdiction*]

The Court has jurisdiction of the subject matter of this action and of the parties hereto.

II

[*Dedication of Patents*]

Defendant is directed, within thirty (30) days from the date of entry of this Final Judgment, to:

A. Dedicate to public use the following patents:

U. S. Patent No.	Title	Issued
2,225,179	Magnetic Testing of Turbine Blades	12/17/40
2,236,373	Method of Permanently Recording Defects in Metals	3/25/41
2,257,736	Magnetic Inspection Unit	10/ 7/41

B. Renounce in writing to the licensor or its successor in interest the exclusive right and license of Defendant under U. S. Patent No. 2,267,999 for Magnetic Testing, issued December 30, 1941, retaining only a non-exclusive license thereunder; and

C. Convey and surender to John C. Pruitt all right, title and interest and/or license rights now held by Defendant under U. S. Patent No. 2,428,471 for Magnetic Testing Method and Apparatus, issued on October 7, 1947.

III

[*Compliance*]

Defendant is directed, within forty-five (45) days from the date of entry of this Final Judgment, to file with the Court and to furnish to the Attorney General a statement showing compliance with the provisions of Section II of this Final Judgment.

IV

[*No Other Relief*]

Except as hereinabove provided, no further relief is directed.

[¶ 68,708] United States v. Linen Supply Institute of Greater New York, Inc.; Central Coat, Apron & Linen Service, Inc.; Consolidated Laundries Corporation; General Linen Supply & Laundry Co., Inc.; Modern Silver Linen Supply Co., Inc.; Standard Coat, Apron & Linen Service, Inc.; Louis Gordon; Harry Kessler; Charles Maslow; Fred S. Radnitz; and Sam Spatt.

In the United States District Court for the Southern District of New York. Civil 99-387. Filed May 7, 1957.

Case No. 1222 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Motions—Amended Complaint and Additional Parties Defendant.—Where civil and criminal antitrust conspiracy actions were instituted against New York defendants in the Southern District of New York, civil and criminal conspiracy actions were instituted against New Jersey defendants in the District of New Jersey, and, subsequently, on evidence that there was a single conspiracy encompassing the defendants in New York and New Jersey, instead of two separate conspiracies in the states, a grand jury in New York returned a superseding indictment charging one overall conspiracy in the two states and naming the New York and New Jersey defendants, the Government was granted leave to file an amended complaint in its pending New York action and to add the New Jersey defendants as parties.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8221.675.

For the plaintiff: Richard B. O'Donnell, John D. Swartz, Morris F. Klein, Richard Owen, and Paul D. Sapienza, Attorneys, Department of Justice, New York, N. Y.

For the defendants: LaPorte & Meyers (Jules E. Yarnell, of counsel), New York, N. Y., for Standard Coat, Apron & Linen Service, Inc., and Charles Maslow. Arnold Bauman, New York, N. Y., for General Linen Supply & Laundry Co., Inc., and Fred S. Radnitz. Myron P. Gordon, New York, N. Y., for Linen Supply Institute of Greater New York, Inc., and Harry Kessler. Halperin, Natanson, Shivitz, Scholer & Steingut (Harry J. Halperin and Samuel L. Scholer, of counsel), New York, N. Y., for Modern Silver Linen Supply Co., Inc.

For a prior opinion of the U. S. District Court, Southern District of New York, see 1955 Trade Cases ¶ 68,132.

Memorandum

[*Actions Against Defendants*]

SIDNEY SUGARMAN, District Judge [*In full text*]: On April 6, 1955 plaintiff commenced suit against the defendants in this court, charging violations of the antitrust laws in the New York area. Contemporaneously therewith the plaintiff commenced another suit in the District Court for the District of New Jersey, charging other defendants with similar violations in the New Jersey area. At about the same time a criminal indictment was returned by the Grand Jury for the Southern District of New York against the defendants in the New York civil suit and a criminal information was filed in the District of New Jersey against the defendants in the New Jersey civil suit.

[*Single Conspiracy*]

In the fall of 1956, in preparation for trial of the criminal information in New Jersey, it became evident to the government that instead of two separate conspiracies between more or less interlocking defendants there was but a single conspiracy encompassing the defendants in New York and New Jersey.

[*New Indictment*]

In January of 1957, on that new evidence, the Grand Jury for the Southern District of New York returned a superseding indictment charging the one overall conspiracy in the two states, naming as defendants the New York and New Jersey defendants previously severally named in the two prior proceedings.

[*Amended Complaint*]

The plaintiff now moves pursuant to F. R. Civ. P. 15(a) and 21 and 15 U. S. C. A. § 5 for leave to file an amended complaint in the pending New York civil action and to add parties thereto.

The conservation of money, time, effort and manpower that will inure to both litigants and the court militates in favor of the exercise of the court's discretion that the motion be granted. The measure of prejudice or hardship necessary to preclude the exercise of such discretion is lacking herein.

Accordingly, the motion is granted and the defendants are directed to serve their answers to the amended complaint, leave for the filing of which is hereby granted, within 20 days after the entry of an order herein. Settle order.

[¶ 68,709] Marine Equipment & Supply Co. v. Trojan Boat Company.

In the Pennsylvania Court of Common Pleas of Lancaster County. September Term, 1956. No. 19. Dated January 18, 1957.

Clayton Antitrust Act

Exclusive Dealing—Exclusive Sales Right in Specified Territory—Legality.—An alleged contract giving a plaintiff the exclusive right to sell the defendant's product in a specified territory was not unlawful under Section 3 of the Clayton Act, since the alleged contract did not contain any provision that the plaintiff may not use or deal in the commodities of any competitor. Cases involving exclusive dealing arrangements were not applicable, since the contract did not involve a condition that the plaintiff deal only in the defendant's product. Therefore, it was not necessary to determine whether or not the contract did tend to create a monopoly.

See Exclusive Dealing, Vol. 1, ¶ 4009.100.

For the plaintiff: Windolph, Burkholder & Hartman, Lancaster, Pa.

For the defendant: Theodore L. Brubaker, Lancaster, Pa.

[*Suit on Oral Contract*]

JOHNSTONE, Judge [*In full text except for omissions indicated by asterisks*]: The plaintiff averred in its complaint in assumpsit that the plaintiff and defendant entered into an oral agreement on July 20, 1953, and that the oral agreement was confirmed by an exchange of letters between the parties in December, 1953. The complaint also averred that on September 8, 1955, the agreement was orally modified by the parties and the modification was confirmed by letter dated October 7, 1955. It is further averred in the complaint that the oral contract was further modified by the parties on August 18, 1955, but there is no averment that this modification was confirmed in writing. The defendant has filed preliminary objections to the plaintiff's complaint. * * *.

* * *

[*Legality Under Clayton Act*]

The third objection raised by the defendant is that the contract averred in the plaintiff's complaint is unlawful since it is a contract in restraint of trade and violates the Clayton Act. The particular section of the act complained of is found in 15 U. S. C. A. § 14. This section deals only with the lease, sale or contract for sale of goods, wares, merchandise and other products and embraces no other persons than lessees and purchasers: *Curtis Publishing Company v. Federal Trade Commission*, 260 U. S., 568. The act specifically forbids the sale or lease of commodities on the condition that the lessee or purchaser shall not use or deal in the commodities of a competitor. The contract averred in the plaintiff's complaint provides for the exclusion [exclusive] sale by the plaintiff of the defendant's product in a specified territory but does not contain any provision that the plaintiff may not use or deal in the commodities of any competitor. It is deemed unnecessary to determine whether the agreement between the parties did tend to create a monopoly since the one thing prohibited by the act is absent from the contract between the parties. The cases cited in the defendant's brief relating to

"exclusive dealing arrangements" have no bearing on the contract in question since it involves no condition that the plaintiff deal only in the defendant's product: *Judson L. Thomson Mfg. Co. v. Federal Trade Commission* [1944-1945 TRADE CASES ¶ 57,399], 150 F. 2d 952, 326 U. S. 776.

[*Objections Overruled*]

And now, January 18, 1957, for the reasons herein stated the preliminary objections to the plaintiff's complaint filed by the defendant are overruled, and leave is granted to the defendant to file an answer within twenty (20) days from the date hereof.

[¶ 68,710] Ampex Corporation v. Goody Audio Center, Inc.

In the New York Supreme Court, New York County, Special and Trial Term, Part XIV. 137 N. Y. L. J., No. 90, page 6. Dated May 8, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Advertising Below Fair Trade Prices—Notice of Price—Sufficiency of Notice.—To be entitled to injunctive relief against a nonsigner of a fair trade contract, a fair trader did not have to show that it gave a direct and specific notice to the nonsigner of the existence of fair trade prices on its products before a claimed violation of fair trade prices took place. Under the New York Fair Trade Act, no particular form of notice is required; the Act only requires the existence of knowledge, which need not be acquired in formal fashion. The fair trader was under no obligation to send direct or specific notice as to prices to the nonsigner. From the evidence in the instant case, there could be no inference other than that the nonsigner knew not only that the products were fair traded, but also knew their minimum prices and used them to show customers the extent of the discount available if the products were purchased from the nonsigner.

See Fair Trade, Vol. 1, ¶ 3268.34.

Fair Trade—Fair Trade Contracts—Validity—Attachment of Price Lists to Fair Trade Contracts.—A nonsigner's contention that a manufacturer's fair trade contracts were ineffective for the purpose of fixing minimum prices because price lists were not physically attached to the fair trade contracts was rejected. The fact that a price list may not be physically fastened to the fair trade contract does not affect the enforcibility of the contract. The price lists were given to each dealer as an integral part of and simultaneously with the signing of the fair trade contracts, and the price lists were adequately referred to and connected with the contracts by reference.

See Fair Trade, Vol. 1, ¶ 3130.34.

Fair Trade—Enforcement of Fair Trade Prices—Defenses—Refusal to Sell.—A nonsigner's contention that a fair trader was not entitled to equitable relief because the fair trader refused to sell its products to the nonsigner was rejected. The fair trader was free to choose those persons to whom it wished to sell its products. The New York Fair Trade Act does not require, as a prerequisite to injunctive relief, that a fair trader first give a retailer an opportunity to buy its products before the fair trader can proceed against the retailer. To sustain the nonsigner's contention would be to hold that only signers of fair trade contracts may be held liable under the Act, an interpretation which obviously is contrary to the Act. Also rejected was the nonsigner's contention that the motive of the fair trader was violative of the Act because its main purpose was not the protection of good will but to preserve to the fair trader and its dealers a lucrative market and to protect the dealers' competitive position in that market.

See Fair Trade, Vol. 1, ¶ 3460.

Fair Trade—Enforcement of Fair Trade Prices—Suit for Injunctive Relief—Scope of Injunction.—A fair trader, having established that a nonsigner violated the New York Fair Trade Act, was entitled to injunctive relief not only with respect to the specific products involved in the violation, but also as to all its other products similarly price fixed so as to protect it from any future violations of the same kind.

See Fair Trade, Vol. 1, ¶ 3366.34.

Fair Trade—Enforcement of Fair Trade Prices—Suit for Injunctive Relief—Right to Relief—Prior Compliance of Defendant.—A nonsigner's contention that a fair trader was not entitled to injunctive relief because the nonsigner had not previously advertised, sold, or offered for sale any of the fair trader's products below their fair trade prices was rejected.

See Fair Trade, Vol. 1, ¶ 3350.34.

For the plaintiff: Parker, Duryee, Benjamin, Zunino & Malone (Robert M. Benjamin, Arthur J. Kane, Jr., and Angelo A. Maurino of counsel), New York, N. Y.

For the defendant: Telsey & Lewenthal, New York, N. Y.

[*Action Against Nonsigner*]

MARKOWITZ, Justice [*In full text*]: This is an action brought pursuant to the provisions of the Feld-Crawford Act (General Business Law, sec. 369-a *et seq.*) to enjoin defendants from advertising, offering for sale or selling at retail any of the products manufactured by plaintiff at prices which are lower than the minimum prices fixed for its products in fair trade agreements entered into between plaintiff and its dealers.

A temporary injunction herein was granted by an order of this court dated October 10, 1956, and is still in effect.

Plaintiff concededly relies herein upon the provisions of the General Business Law, section 369-b, which reads as follows:

> "Section 369-b, Unfair competition defined and made actionable. Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. Added L. 1940, c. 195, sec. 3, eff. March 19, 1940."

[*Evidence*]

Plaintiff's evidence which is uncontroverted, since defendants rested upon plaintiff's case and introduced no evidence on their own behalf, established the following: That plaintiff is a large scale manufacturer of electronic equipment including the magnetic tape recorders and reproducers referred to in the complaint as Series 600 and 601. All of its products bear its own registered trade mark and brand and are advertised and sold in fair and open competition with commodities of the same general class produced by several other manufacturers. Plaintiff expends substantial sums to advertise and promote its products and to build up its good will in relation thereto. The method of doing business followed by it is to sell its merchandise only to franchised dealers who enter into a terminable sales agreement on a non-exclusive basis. Whenever such a dealer is located in a fair-traded state such as New York, he is also required to sign a fair trade agreement which requires him to sell at retail at no less than the minimum prices fixed in a price list which is given to him along with the agreement. The plaintiff has followed this practice since 1953 and at this time has approximately 500 of such dealers selling its equipment under such conditions. In support of this testimony, copies of several fair trade agreements involving New York State dealers were introduced into evidence by the plaintiff. The testimony also established that the defendants have never been authorized to sell plaintiff's commodities. Plaintiff has never sold any merchandise to defendants nor given them a copy of its fair trade agreements or price lists.

The price of the plaintiff's 600 Series magnetic tape recorder was fixed by plaintiff's fair trade agreements at a minimum of $545. The price of the 601 Series magnetic tape recorder, which is an improved model of the 600 Series, is also listed by plaintiff at $545 for retail sales. Although manufacture of the 600 Series was discontinued on or about April 27, 1956, neither of the series models has ever been removed from coverage under the fair trade agreements of plaintiff.

[*Defendant*]

The evidence further discloses that defendant Sam Goody is in the retail business of selling phonograph records and related products, and defendant Goody Audio Center, Inc., sells phonographs, tape recorders, audio equipment and related products also at retail. Both operate under a selling policy which calls for a large volume of sales at very small unit markups.

[*Advertisements*]

In this case, the proof shows that on at least two different occasions, during conferences between representatives of plaintiff and defendants, officials of the plaintiff called attention to the fact that all of their products were fair traded, including the Series 600 and 601 tape recorders which were later advertised for sale by defendants, as evidenced by plaintiff's Exhibit 23. In July, 1956, defendants, through one of their representatives, contacted one of plaintiff's officers, then in New York, with a view toward obtaining a franchise for plaintiff's products. On August 1, 1956, during the course of a discussion between the defendants' representatives and plaintiff's officers, the defendants exhibited to representatives of plaintiff and also sent to plaintiff's home office in California a proof of an advertisement (Plaintiff's Exhibit 25B), ostensibly to be placed in the New York Times, which advertised, by name, plaintiff's 600 and 601 Series tape recorders for sale during the week from August 6-11, at a price of "30% and 25% off respectively." As a result thereof, plaintiff caused a telegram to be sent to defendants on August 2, 1956, in substance advising them that plaintiff's products are subject to fair trade agreements and that the proposed advertising thereof at prices below the fair trade list prices constituted unfair competition within the purview of section 369-b of the General Business Law and demanding that defendants refrain from such advertising or selling (Plaintiff's Exhibit 24).

Despite the telegram, receipt of which was not denied, defendants, on August 12, 1956, inserted an advertisement in the New York Times offering plaintiff's Series 600 tape recorder, by name, at a "30% reduction," specifying plaintiff's price therefor specifically at $545 and defendants' price as $381.50. The advertisement further suggested that defendants' further ads be watched for the 601 Series.

[*Separate Price Lists*]

The technical objection urged by defendants, to the effect that the aforesaid fair trade agreements are ineffective for purposes of fixing minimum prices because the price lists covered thereby are not physically annexed thereto, has no validity. The proof shows clearly that the lists are given to each dealer as an integral part of and simultaneously with the signing of the fair trade agreements in question. The circumstance that the price list may not be physically fastened to the agreement at the time does not affect the enforcibility of the agreement. The price lists are adequately referred to and connected with the agreements by reference and constitute minimum prices below which no dealer is permitted to sell at retail within the purview of section 369-b of the General Business Law.

[*Notice to Defendant*]

Defendants rely primarily on legal grounds in resisting the action, the nub of which appears to be that the plaintiff can only prevail if it shows that direct and specific notice was given to defendants of the existence of the fair traded prices before the claimed violation took place. The premise so urged is unsupported by the law prevailing in this jurisdiction. The act under which plaintiff proceeds requires no particular form of notice (*Seagram-Distillers Corporation v. Seyopp Corp'n,* 2 N. Y. S., 2d, 550). It only necessitates the existence of knowledge which need not be acquired in formal fashion and plaintiff was under no obligation to send direct or specific notice as to prices to defendants. As stated in the *Seagram* case, previously referred to, "* * * no notice at all is necessary except as a basis of proof that the defendant 'knowingly' made the sales complained of. * * *" In my view, there can be no inference other than that defendants knew, not only that these particular products were fair traded, but also knew their minimum prices and used them to show prospective purchasers the extent of the discount available to them if such equipment was purchased from defendants. Under all of the circumstances, advertising with such knowledge constitutes unfair competition within the prohibition of the Feld-Crawford Act, whether or not actual sales were proved. It is however, to be noted that plaintiff also introduced evidence, which defendants fail to contradict, to show that it sent a shopper to defendants' place of business to purchase a Series 600 recorder about two days after publication of the advertisement and she was advised that they were sold out.

[*Product Fair Traded*]

The claim made by defendants that the 600 Series recorder was no longer fair traded when they advertised it for sale is

refuted by the uncontradicted proof of plaintiff whose witnesses affirmatively stated that said item was never removed from the fair traded agreements coverage. The circular of plaintiff to its dealers dated April 27, 1956 (Defendants' Exhibit A), while announcing in substance the discontinuance of the 600 series and the manufacture of the 601 series, nowhere implies that the former is no longer to be sold at the prescribed fair trade prices. As a matter of fact, the only reference therein to price seems to negate any such possibility since, referring to the 601 series, the circular states "The price is the same as the Model 600, i. e. $545.00." This language, thus, rather seems to indicate an intent to maintain the 600 series price at its fair trade level.

[*Motive*]

Nor do I see any merit to defendants' contention that the motive for this action is violative of the spirit of the Feld-Crawford Act in that its main purpose is not intended to protect plaintiff's good will, but to preserve to plaintiff and its dealers a lucrative market and to protect such dealers' competitive position in that market. Aside from defendants' complete failure to introduce evidence to support this argument, it is clear that the conduct complained of, as proved, constituted a positive violation of section 369-b and was actionable.

[*Refusal to Sell*]

By the same token, the assertion that plaintiff's right to equitable relief is lost by reason of its refusal to sell its products to defendants is also not valid. Certainly plaintiff is free to choose those persons to whom it sells its products. Nor does the Feld-Crawford Act condition, as a prerequisite to the relief sought, that a manufacturer must first give a retailer an opportunity to buy its products before it can proceed against him thereunder. The language of the statute involved indicates to the contrary, for it clearly contemplates the type of situations existing in the instant action, i.e., that of a violation by a non-signer of a fair trade agreement (*Calvert Distillers Corp'n v. Nussbaum Liquor Store, Inc.*, 166 Misc., 342, 347). To sustain defendants' argument in this connection would be to hold that only signers of fair trade agreements may be held liable under the Feld-Crawford Act, an interpretation obviously contrary to the statute and the prevailing decisions.

[*Prior Compliance*]

The circumstances that defendants may not have advertised, sold or offered for sale any of plaintiff's products below fair traded prices subsequent to the acts complained of, cannot deprive plaintiff of its right to injunctive relief.

[*Scope of Injunction*]

Plaintiff, having established that defendants have violated the pertinent statute, is entitled to injunctive relief not only with respect to the specific items involved, but as to all other of the plaintiff's products similarly price fixed so as to protect it from any future violations of the same kind (*Weisstein v. Freeman's Wines & Liquors, Inc.*, 169 Misc., 391).

[*Damages*]

Plaintiff is therefore entitled to an injunction as prayed for, but not to any damages, as plaintiff, at the trial, withdrew such claim.

Both sides having waived findings of fact and conclusions of law, the foregoing constitutes the decision of the court as required by section 440 of the Civil Practice Act. Settle judgment accordingly.

[¶ 68,711] Cluett, Peabody & Co., Inc. v. J. W. Mays, Inc.

In the New York Supreme Court, Kings County, Special Term, Part III. Dated May 8, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Selling Below Fair Trade Prices—Notice of Price—Receipt of Notice After Acquisition of Fair Traded Products.—A noncontracting retailer was permitted to sell a fair trader's shirts at less than their established prices at a close out sale pursuant to the New York Fair Trade Act, in the event the fair trader did not purchase the shirts, where the retailer had no knowledge that the shirts were fair traded at the time it purchased them, and the retailer stated that it had no intention of thereafter purchasing or selling any of the price-fixed merchandise of the fair trader. A "holding that defendant

[the retailer] could not dispose of this merchandise other than by sale at the prices fixed by plaintiff [the fair trader] would be of doubtful constitutionality." The fair trader had given a general notice that it was fair trading its shirts, but it did not notify the retailer until after it had purchased the shirts. The law should not be used as an instrument to deprive an innocent purchaser of its right to dispose of property acquired before knowledge of the existence of a fair trade agreement. The retailer would not be able to dispose of the shirts if it was required to adhere to the fair trade prices. The fair trader, however, was granted injunctive relief against future sales by the retailer of fair traded shirts other than those acquired prior to the time it received notice.

See Fair Trade, Vol. 1, ¶ 3268.34.

For the plaintiff: Sullivan & Cromwell, by James A. Thomas, Jr., New York, N. Y.

For the defendant: Kaye, Scholer, Fierman & Hays, by Sidney A. Diamond, New York, N. Y.

[*Permanent Injunction Sought*]

The Referee, Honorable MEIER STEINBRINK [*In full text*]: Let the record show that in this action at the conclusion of the trial both counsel, for reasons that are obvious from the evidence, asked for an early and prompt decision. I say that because what I am about to dictate is not in erudite or polished form.

This action was begun by the plaintiff as against the defendant for an alleged violation of the provisions of the Feld-Crawford Act. In it the plaintiff asks for a permanent injunction restraining defendant from advertising, offering for sale or selling certain of plaintiff's products at less than the prices stipulated in its fair trade contract. No damages are asked for.

The action is brought under Section 369a and b of the General Business Law of the State of New York. Except as to one vital issue hereafter referred to there is little dispute as to the facts.

[*Fair Trader*]

Plaintiff is the manufacturer of men's shirts under the trade-mark "Arrow." Under this general trade-mark it manufactures and sells various classes and styles of shirts known by subsidiary trade-marks such as "Dart," "Par," and many others.

On January 28, 1955 it entered into a fair trade agreement with a New York City department store retailer providing for minimum prices for the sale in New York State at retail of some but not all of its men's shirts (Plaintiff's Exhibits 1 and 2). This agreement is still in effect although the schedule has been amended on two occasions.

The proof establishes that plaintiff manufactures and sells many styles and kinds of men's "Arrow" shirts, "perhaps several hundred," but that only a few are price-fixed. These, however, are the most popular and account for approximately 80% of the total sales of all "Arrow" shirts.

[*General Notice*]

Notice of the establishment of a fair trade price maintenance agreement was given by plaintiff to its many New York State customers and a general press release dated July 27, 1956 seems to have resulted in three very short, about 1½" long, news items published about August 1, 1956 to the effect that plaintiff, starting August 1st, would fair trade certain of its varieties of shirts. (Plaintiff's Exhibit 3).

[*Defendant's Acquisition*]

Defendant owns and operates three large cash-and-carry department stores. It had never sold "Arrow" shirts prior to March, 1957, although it did sell other men's shirts, none price fixed. After some negotiations with an exporter, Colamerica Company, it purchased on March 13, 1957 (Defendant's Exhibit C) approximately 200 dozen of "Arrow" men's shirts of which approximately 147 dozen were of the varieties covered by plaintiff's fair trade agreement and approximately 53 dozen were not so covered and are not affected by this action.

The shirts were delivered to defendant on March 15 (Defendant's Exhibit E, 2d page) and paid for on March 19 (Defendant's Exhibit D). They were all put on sale and prominently featured in defendant's advertisements on April 5 and 12 (Plaintiff's Exhibits 4 and 5) at a price considerably less than the fixed price applying to some of them.

[*Notice to Defendant*]

The matter being brought to plaintiff's attention, it promptly notified defendant by registered mail (letter dated April 5 and apparently received by defendant on April 8, Plaintiff's Exhibit 6) that certain of its "Arrow" shirts were subject to a fair trade contract with minimum resale prices specified.

[*Temporary Injunction Denied*]

Defendant continued to advertise and sell the shirts, including those price fixed, at prices below the specified minimums and this action followed. A motion for a temporary injunction was denied and a prompt trial ordered.

[*Timeliness of Notice*]

The disputed issue of fact hereinbefore mentioned is whether or not at the time of its purchase of the shirts in question defendant knew that they were subject to a fair trade agreement. Defendant strenuously maintains that it had no such knowledge and the testimony offered on its behalf through the witness Shulman and the witness Baruchin to that effect was unshaken on cross-examination.

Plaintiff could offer no proof of direct knowledge on the part of defendant prior to the receipt by it of plaintiff's letter of April 5th but argues that defendant must have known of the fair trade agreement and, in any event, has not shown that it did not have such knowledge. I agree that lack of knowledge of the fair trade agreement prior to the purchase of the articles in question is a matter of affirmative defense.

On the proof before me I must find, however, and I do find that defendants had no such knowledge in March of 1957 when it purchased the shirts in question or any time prior thereto and that the first knowledge it had of any fair trade agreement affecting this price was when it received plaintiff's letter dated April 5th.

Plaintiff further contends that knowledge or lack of knowledge on the part of defendant at the time of purchase of the articles is immaterial and that all that is required to be shown to entitle it to an injunction is the fact that after April 8 defendant sold the articles in question below the price fixed in the fair trade agreement.

The issue is one at law and does not appear to have been specifically passed upon in any case that has been brought to my attention or that I have been able, by independent research, to find. Various cases on the subject appear to be similar but, on careful analysis, are distinguishable. No useful purpose will be served by an extended discussion of these cases.

Plaintiff seeks to invoke the equitable jurisdiction of the court to prevent injury to its trade-mark. It would seem to me, however, the law should not be used as an instrument to deprive an innocent purchaser of its right to dispose of property acquired before knowledge of the existence of the fair trade agreement.

[*Close-Out Sale Permitted*]

The proof in this case is to the effect that defendant is and will be unable to dispose of the merchandise if required to adhere to the fair trade prices. In addition, this would be contrary to its general store policy. Under the special circumstances of this case, it would seem to me that defendant should be permitted to invoke paragraph 2 of Section 369a to permit it to close out these price-fixed items and to discontinue the sale thereof.

Defendant has stated that it has no intention of hereafter purchasing or selling any of the price-fixed merchandise of the plaintiff and, under the terms of the contract entered into by plaintiff with its customers, defendant should be permitted to tender back to plaintiff at its cost the balance of the merchandise on hand covered by the fair trade agreement. In the event of a failure of plaintiff so to purchase these items, defendant should be permitted to dispose of the merchandise on hand at whatever price it is able to obtain.

[*Constitutionality*]

It seems to me that in this way substantial justice will be done to both parties. It is my opinion that a holding that defendant could not dispose of this merchandise other than by sale at the prices fixed by plaintiff would be of doubtful constitutionality.

[*Relief*]

There will be judgment for the plaintiff granting an injunction against future sales by the defendant of price fixed articles other than those acquired during the month of March but upon the conditions heretofore stated. And this judgment will be without costs.

[¶ 68,712] Radio Corporation of America, Plaintiff-Counter-Defendant v. The Rauland Corporation and Zenith Radio Corporation, Defendants-Counter-Claimants. Zenith Radio Corporation and The Rauland Corporation, Cross-Claimants v. Radio Corporation of America, General Electric Company, and Western Electric Company, Inc., Cross-Defendants.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 48 C 1818. Dated April 10, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Interrogatories—Conspiracy.—Objections to interrogatories requesting counter-claimants to specify, in precise detail, the exact manner in which an alleged conspiracy is claimed to have operated, to supply the names, dates, and places of the origin of various pooling arrangements, and to detail all of the alleged overt acts were sustained. If the instant action had just been commenced and very broad and vague allegations were involved, the interrogatories might be proper; however, the pleadings in the action had been sustained against various motions to dismiss, and the parties had been through several years of depositions and were on the eve of trial. Also, interrogatories were held to be unduly burdensome in scope because they would require a speculative reconstruction of the business alleged to have been interfered with by the alleged conspiracy. Other interrogatories were held to be burdensome and/or irrelevant, and objections to still other interrogatories were overruled.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.875.

For other decisions of the U. S. District Court, Northern District of Illinois, Eastern Division, see 1956 Trade Cases ¶ 68,475, 68,490, and 68,306, and 1955 Trade Cases ¶ 68,144; and for a decision of the U. S. Court of Appeals, Seventh Circuit, see 1954 Trade Cases ¶ 67,886.

Memorandum Re Objections to Interrogatories

MICHAEL L. IGOE, District Judge [*In full text*]: The Court has before it for decision numerous objections to a comprehensive set of interrogatories filed jointly on December 29, 1956 by plaintiff-counter-defendant, Radio Corporation of America, and cross-defendants, General Electric and Western Electric Company. They have been briefed and the Court has heard extensive argument by counsel. Fortunately, counsel on both sides have made a number of concessions which go a great distance in narrowing the area of dispute, which is now limited to interrogatories 4 through 8, 14, 17(a), 21(a), 25, 36(d), 38, 39, 43, 47, 48, 56, 58 and 60.

[*General Objections*]

Zenith and Rauland, on whom the interrogatories were served, object vigorously to the remainder of them on the principal grounds of undue burden and lack of relevance to any issue in the case. On the question of their burdensome nature, the Court notes that these voluminous interrogatories, sixty-two in number, many with numerous subdivisions, were not served until nearly three months after the first date set for the trial of this action and until after several voluminous subpoenas, a prior set of interrogatories and many months of depositions of Zenith and Rauland officials had been utilized.

[*Rulings on Interrogatories*]

As to interrogatories 4A, 4(b) and 4(c), the Court is of the opinion that they are unduly burdensome in scope, in that they would require a speculative reconstruction of the business alleged to have been interfered with by the conspiracy charged. The Court notes that interrogatory 13, which was not objected to, requires Zenith to set forth the precise nature of its losses in export trade with particular countries, how it was arrived at and the persons partici-

pating in its computation. This would appear sufficient. If it should appear that Zenith does not have a proper basis for damages in the amounts claimed, that can be fully utilized at the trial. In the meantime, there is no point in requiring Zenith to reconstruct its losses on some other formula which was never actually employed.

As to interrogatories 5 and 6, the objections are sustained. Zenith should clearly not be required, at this stage of the litigation, to undertake 78,935 computations shown in the Schroeder affidavit to be necessary to comply with 5, and 6 appears objectionable on the ground of burden and further because it would appear to require Zenith to make a 27-year search of the laws and regulations of eleven different foreign countries "applicable" to the importation of radio and television receivers and tubes.

I will sustain the objections to interrogatories 7 and 8, which appear not only burdensome, but to require a great mass of data which can have little or no relevance. As the Court understands the issue, this information goes to the question of damages —it is sought to ascertain why, instead of exporting merchandise from the United States, Zenith did not instead manufacture locally in various foreign countries. As we understand the issue on which damages is sought, it relates to exclusion from export trade from the United States, rather than damage to a manufacturing business located in a foreign country.

Interrogatory 14 seeks greatly detailed data on the tax rates applicable to Zenith and Rauland going back to 1940. The tax rate applicable in the so-called damage years has no relevance to any issue with which the Court is presently familiar. If it should later develop that this information is necessary, and a proper showing is made, it will be ordered produced.

The objection to interrogatory 17(a) is overruled, on the understanding that it does not require Zenith to acquire or compile information not now in its possession.

The objection to interrogatory 21(a) is overruled. To the extent that license agreements within this category specify the patents licensed, there can be no problem; to the extent such patents are not specified, Zenith should give whatever information is in its possession.

The objection to interrogatory 25 is sustained. The Court sees no relevance to the issue of whether there was coercion in the release between Zenith and RCA in the details of releases between Zenith and complete strangers to the litigation involving other matters.

The objection to interrogatory 36(d) is overruled.

The objections to interrogatories 38, 39, 43, 47 and 48 are sustained. These are very long and involved interrogatories in which Zenith and Rauland are asked to specify in precise detail the exact manner in which the alleged conspiracy is claimed to have operated, supplying the names, dates and places of the origin of the various pooling arrangements, and detailing all of the overt acts. If we were at the threshold of this case and dealing with a very broad and vague allegation, such interrogatories might be proper. Here, however, the pleadings have been sustained against various motions to dismiss, and the parties have been through several years of depositions and are on the eve of trial.

The Court is not impressed with the suggestion that such intimate and detailed knowledge of the inner workings of an alleged conspiracy is necessary to support a claim for damages by one who would have been excluded from its inner councils by the very nature of the conspiracy. Nor does such information appear essential to preparation for the defense, considering the already formidable background and history of this case.

Interrogatories 56 and 58 appear to be highly burdensome, based on the facts stated in the Schroeder affidavit, and I am not satisfied that there has been any clear showing of relevance of the information sought, which relates wholly to any similarity between the structures of Zenith receivers over the years and information published in RCA bulletins.

In the light of the statement by counsel at page 75 of the transcript of the argument the objection to interrogatory 60 is overruled.

The motion to extend the time for answering the interrogatories not objected to until April 30 is granted. The interrogatories as to which the objections are overruled may be answered by May 15, 1957.

[¶ 68,713] United States v. The B. F. Goodrich Company, The Gates Rubber Company, The Dayton Rubber Manufacturing Company, The Goodyear Tire & Rubber Company, United States Rubber Company, and Boston Woven Hose and Rubber Company.

In the United States District Court for the District of Colorado. Criminal Action No. 14929. Dated February 15, 1957.

Case No. 1283 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Indictments—Defendants' Plea of *Nolo Contendere*—Considerations in Acceptance or Rejection of Plea.—In a criminal antitrust action charging that rubber companies conspired to fix the prices of industrial V-belts, the companies were permitted to withdraw their pleas of not guilty and to enter pleas of *nolo contendere* on the condition that the 1955 amendment to the Sherman Act, increasing the maximum fine that can be imposed for a Sherman Act violation, would be applicable in fixing the amount of the fines.

The court ruled that it would not accept the pleas of *nolo contendere* in the absence of an exceptional circumstance which justifies the acceptance of the pleas. The fact that the companies will be subjected to the prima facie evidence provisions of Section 5 of the Clayton Act and faced with possible treble damage actions, if they are not permitted to plead *nolo contendere,* is not an exceptional circumstance justifying the acceptance of the pleas. The acceptance of a *nolo contendere* plea in a federal antitrust prosecution does not violate the Congressional policy expressed in Section 5 of the Clayton Act. Under Section 5 of the Act, the prima facie evidence provisions are not applicable to consent judgments or decrees entered before any testimony has been taken, and Rule 11 of the Federal Rules of Criminal Procedure specifically permits a plea of *nolo contendere* when the consent of the court is obtained. The intent of Congress has been to retain the plea in antitrust cases, and the use of the plea, if permitted by the court, is not contrary to the public interest as declared by Congress. In an antitrust case, there is the traditional basis for a *nolo contendere* plea because of the provisions of Section 5 and the potential treble damage actions. The exceptional circumstance found by the court was the congestion of the court's calendar. The public interest would be best served by the acceptance of the pleas, thereby eliminating a lengthy trial and making available court time for handling other litigation. However, the court rejected the contention that the congestion of a court's calendar should be the controlling reason for the acceptance of the pleas. The court noted that the Government did not show that the present prosecution was different from any other antitrust prosecution, that a *nolo contendere* plea has all the effect of a plea of guilty in the case in which it is made, and that the only penalty that can be imposed in the instant action was a fine and that a fine may be just as heavy under a *nolo contendere* plea as under a guilty plea.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.860; Private Enforcement and Procedure, Vol. 2, ¶ 9012.380.

For the plaintiff: Raymond D. Hunter, Attorney, Department of Justice, Chicago, Ill., and Herbert N. Boyle, Assistant United States Attorney, Denver, Colo.

For the defendants: Dawson, Nagel, Sherman & Howard, by Winston S. Howard, of counsel, Denver, Colo., for The B. F. Goodrich Company. Dayton Denious, Denver, Colo., for The Gates Rubber Company. White and Steele, by Lowell White, of counsel, Denver, Colo., for The Dayton Rubber Manufacturing Company. Grant, Shafroth and Toll, by Morrison Shafroth and John F. Shafroth, of counsel, Denver, Colo., for The Goodyear Tire & Rubber Company. Holland & Hart, by J. G. Holland, of counsel, Denver, Colo., for United States Rubber Company. Lewis, Grant & Davis, by Robert H. Harry, of counsel, Denver, Colo., for Boston Woven Hose and Rubber Company.

Findings of the Court

[*Nolo Contendere Pleas—Government Position*]

The Court, Jean S. Breitenstein, District Judge [*In full text*]: We have set for this time Criminal No. 14929, *The United States v. B. F. Goodrich and others.* That is the matter we had up last week.

Mr. Hunter: Last Friday, Your Honor, the matter of the defendants' motions to withdraw their pleas of Not Guilty and to change them to *nolo contendere* came on for hearing before the Court. During the course of the hearing the Court inquired as to whether or not the attention of Attorney General Brownell had been called to the congestion of the court's docket, and if it had not been so called, would that matter be called to the attention of the Attorney General in connection with the Attorney General's position with respect to whether he should oppose *nolo* pleas in this case.

During this past week, Your Honor, the attention of the Attorney General has been called to the crowded condition and congestion of this court's docket. The Attorney General has expressed a very sympathetic concern for the congestion of this court's docket. The Attorney General has asked me to express to this Court that he is doing and will do all that is within the power of the Attorney General to do so far as alleviating conditions which may give rise to the congestion of this court's docket. The Attorney General, however, is of the opinion that the congestion of the court's docket is not a factor to which he should give consideration as to whether to oppose *nolo* pleas, and in that respect, Your Honor, the Attorney General has considered the matter and is still opposed to *nolo* pleas.

Now, one thing I think which should be called to the Court's attention in that respect, with respect to the Attorney General's policy, is that most anti-trust cases are brought in jurisdictions wherein the court's docket is very congested, and if consideration to the congestion of the court's docket were given in connection with the Attorney General's policy, there would be no policy. The exception would be the rule rather than the policy.

The Court: Anybody else have anything to say?

[*Position of Defendants*]

Mr. John Shafroth: Your Honor, our position is still as it was last week, that the matter of discretion is not for Mr. Brownell or anyone else except you and that what Mr. Brownell thinks of the congestion of the court's docket and whether it is a fact or not doesn't matter a bit. Mr. Brownell is concerned with the court's docket, or at least all of the committees that he forms and gives speeches at all year long on what to do about the congestion of the courts. But when it comes time for a matter of discretion in considering these pleas evidently he doesn't consider it a factor to be considered one way or the other.

As I pointed out last week, the Government doesn't lose anything from the acceptance of this plea. You don't have any problem regarding possible jail terms, as you might in the ordinary criminal case, unless you want to jail some of the United States Attorneys for contempt.

Last spring Mr. Brownell, talking at one of these meetings concerning the problem of congested court calendars, seemed to think it was in the public interest because he said,

> "This problem is of national concern (meaning congested dockets) and affects the rights of litigants in both State and Federal Courts. I am confident that this effort will succeed but it will take the active participation of each of us, not just today and tomorrow but continuously from now on and for many months to come, to correct this deficiency in the administration of justice."

Well, this will take us, as we said, maybe six weeks to try, and after the jury brings in a verdict for the defendants Mr. Brownell may reconsider this policy.

One other point that I would like to make is in connection with that argument in which you didn't agree with me last October but I think maybe that should be considered in exercising your discretion. As I recall, despite denying the motion, which is within your power, of course, you said the problem might give you trouble at the time of the trial. That was the duplicity question, and I think that in exercising your discretion as to the possible factor of evidence showing the conspiracy in two different periods where the penalty provisions would be different might have some bearing on how you

exercise your discretion here. As a result of that problem I think you could have the possibility of having two cases out of this.

In conclusion, I want to say again that the discretion is not Mr. Brownell's or Mr. Hansen's who sit in air-conditioned offices in Washington but it is yours who sits behind the bench in an un-air-conditioned courtroom here. Thank you, sir.

The Court: Mr. Denious?

Mr. Denious: If Your Honor please, maybe I can sum up where we stand without going over the same ground again and make somewhat of a reply to the argument advanced by the Government. One of the things that struck me when I reflected about our argument last Friday was that nobody had ever read Section 5 to the Court. There has been an amendment to Section 5 but it is not material to our consideration. The section, so far as we are concerned, reads exactly the same as it always has since 1914 when it was enacted. The insertion by the amendment of 1955 was in view of a new section, which is codified as Section 15a of the United States Code, giving the Government a right to sue as a treble damage plaintiff or to sue as a private litigant and sue for civil damages because of any damage thought to be suffered by the Government in its proprietary capacity by reason of the violation of the Antitrust Laws.

Now, when they added that Section 15a, as codified, they just inserted in Section 5 these mentions of Section 15a; otherwise they did not change the section and it reads the same and reaffirms the policy which, as was stated before, was decided upon in 1914 when this issue of how much to help a possible private litigant was debated in Congress and the section was enacted in this form.

Now, the section also by the codification of 1955 was broken up into two parts. One part, the second part which is now numbered (b), relates to civil or criminal proceedings and the statute of limitations. It doesn't concern us, either, at this point. Section (a) is the only section we are interested in and it reads:

"A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated such laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws", then the insertion "or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." Then here is the proviso: "Provided, that this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

Now, the addition there was the part relating to judgments or decrees under 15a. The other proviso was identical, they didn't change it at all, they just added on, the proviso in 1914, and today reads:

"Provided, this section shall not apply to consent judgments or decrees entered before any testimony has been taken."

That is the section that we are trying to come within, Your Honor, and of course it is an unusual situation. It isn't an unusual antitrust case but it is an unusual situation where a judgment in a criminal case is to be used as evidence in a civil case between different parties, and it is likewise out of the ordinary where a civil liability is to be three times the actual liability. So it is an unusual case. It doesn't arise in the ordinary criminal case.

Now, there is a way to avoid this unusual circumstance that a judgment in a criminal case shall be prima facie evidence in a civil action for treble damages. It is set forth in the section. The section which creates this prima facie evidence also shows a way where it will not apply. They can't say that there is any policy that we should always be subject to this prima facie evidence. The section which provides for it also says it shall not apply in one circumstance, namely, to judgments or decrees entered by consent before any testimony has been taken. The Lord hath given, the Lord hath taken away—all in Section 5.

Now, the only way that we can come within this proviso is by a plea of *nolo contendere.* That is the only way. I believe it is an accepted principle that when we construe or administer a statute we presume that Congress meant every word to mean something, certainly every clause to mean something, and when it puts in a clause like this proviso it means it shall have some utility and that it shall have some effect on people.

As pointed out in the *Standard Ultramarine* case by Judge Weinfeld, to plead guilty is not a solution to the dilemma because to plead guilty means to make an admission which can be used in treble damage action just the same as the decree can be used or the conviction but for the proviso. The plea of guilty constitutes an admission so you have a prima facie case against you by reason of your plea of guilty just the same, the same practical effect, as if you had been convicted after a trial. So that if the only way to come within this section would be to plead guilty, there wouldn't be any point in coming within it, there wouldn't be any benefit gained in the proviso, and the proviso must mean something. The only way, therefore, that we can come within it, if we are allowed to come within it, is by a plea of *nolo contendere,* and the discussions and the literature surrounding the Federal Rules of Criminal Procedure show that that is why the plea of *nolo contendere* was preserved, so as to abide by this policy that was set by Congress in 1914 and by the amendment of 1955 was reaffirmed since it left the proviso exactly to the same effect.

Now, we have a blanket policy by the Attorney General which repeals the proviso in effect, as far as he is concerned, and that is all we have, is a blanket policy, because I am sure my notes are correct that the state of the docket or the rights of other litigants before this Court, according to the statement just made to Your Honor, were given no consideration by the Attorney General. That was the statement as I took it down, that it was not a factor to be considered. So that as far as the Attorney General is concerned he has a blanket policy, he doesn't care about the state of the docket and it is not a matter of discretion and he hasn't exercised any discretion. The discretion does lie in the Court and we think this is a case where the Court should exercise it.

In the first place, they chose this jurisdiction. They chose to bring most of the rubber industry out here to Denver instead of bringing the case back in Ohio or bringing the case where all these meetings, they allege, were held, with the single exception of one meeting down in Colorado Springs.

It is not an aggravated case. I believe I argued that to Your Honor last week, that there isn't anything in the indictment that shows any aggravation or any case except one of concert of action or conscious parallelism cases where you are right in the most shadowy area of the law and a person can be guilty or not guilty and nobody can tell. And we have the confirmation of the Government on that point, Your Honor, because last week the Government stated to Your Honor:

> "It is not a complicated case, Your Honor. It is an ordinary *per se* violation, ordinary price-fixing case, has been declared so, to be a *per se* violation since 1926 in the *Trenton Potteries* case, again in 1940 by the *Socony-Vacuum* case."

So we have no aggravated case. We have a case where if the guilt exists it is questionable and technical, and in addition to that, the courts have, in every case I can find except one, exercised their discretion and have exercised it to the effect that the plea of *nolo contendere* and the motion to allow should be granted.

Now, we do have the great Judge Weinfeld in December of 1955, in that case in 137 Federal Supplement, *Standard Ultramarine* case [1955 TRADE CASES ¶ 68,237], deciding just the opposite of Judge Sugarman in the case in 136 Federal Supplement. Since that time I can not find the cases the Government points to, I can not find any report where the plea and the motion to make a plea of *nolo contendere* has been denied except in the *Krause* case. The *Krause* case was a case involving brewers' supplies, it was in Ohio, and there were circumstances which were prejudicial to the defendant and robbed him of any circumstance where he was entitled to consideration. But now since that time, by going through COMMERCE CLEARING HOUSE TRADE REGULATION REPORTS and looking for every case I could find I find that in the *National Electrical Contractors* the motion was granted January 21, 1956; in *Memphis Retail Package Stores* it was granted January 31, 1956; in *Retail Liquor Dealers of Chattanooga* it was granted March 23, 1956; in the *Shell Oil* case it was granted March 28, 1956; in the *Akin Denison* case it was granted April 18, 1956, and so on. *National Linen Service, Garden State Retail Gasoline Dealers, Michigan Tool Company, Haverhill Oil Company, Chicago Towel Company, Lyman Gunsight Company* in the District of Columbia, *Buck Sporting Goods, Inc.,* in this Circuit and the *Grinnell* case down in Texas.

It was stated to Your Honor that Judge Weinfeld had placed a judicial construction on this policy and on Section 5 and on Rule 11. I say, Your Honor, that there has been a judicial construction placed on it, and while there may be cases, they say it is fifty-fifty but I can't find the cases, I say the judicial construction which has been placed on these rules and this section, Your Honor, since the decision of Judge Weinfeld, has been to repudiate that construction of his and to follow the construction contended for by us and to grant the defendants in other cases, as we are entitled to the discretion of the Court and the right to avoid this heavy and unusual civil liability and to tender a plea of *nolo contendere* where the Court can do exactly what it can do to us if we are convicted.

Thank you.

[*Indictment*]

The Court: Anybody else want to be heard?

After listening to the arguments last week I was disturbed by the situation that is presented. In order to help me make up my mind I put in a little overtime study and I have a few notes here on it.

In this case a one-count indictment was returned on June 1st, 1956, which charges the defendants with violation of 15 U. S. C., Section 1. The charge is that the defendants have engaged in a conspiracy in unreasonable restraint of interstate commerce in that they fixed and determined prices, terms and other conditions for the sale of V-belts. V-belts are endless belts used in connection with V-grooved pulleys for various domestic and industrial purposes. The indictment avers that in 1954 the combined V-belt sales of defendants amounted to approximately $60,000,000.

[*Change of Pleas*]

On June 29, 1956, each of the defendants entered a plea of Not Guilty. A time was fixed for the presentation of motions attacking the indictment. Motions to dismiss were filed by each defendant and were denied on October 22, 1956. Each of the defendants has now filed a motion for permission to withdraw its plea of Not Guilty and enter a plea of *nolo contendere* to the indictment. The attorneys for the United States oppose the motions.

[*Contentions*]

Defendants urge that they should be permitted to plead *nolo contendere* because of the provisions of 15 U. S. C., Section 16. That is Section 5 of the Clayton Act as amended by the Act of July 7, 1955. The Government resists the motions upon the basis of the 1953 memorandum of the Attorney General relating to *nolo contendere* pleas. Inherent in the position of the Government is the conclusion that the public interest is best served by its opposition to the acceptance of *nolo contendere* pleas except under conditions stated in the memorandum of the Attorney General. While counsel for the Government assert that there is no extraordinary situation here to justify the acceptance of a *nolo contendere* plea, they have not directed the attention of the Court to any peculiar or aggravating circumstance in this case which would distinguish it from an ordinary prosecution under 15 U. S. C., Section 1.

[*Rule 11, Criminal Procedure*]

Rule 11 of the Federal Rules of Criminal Procedure provides that with the consent of the Court a defendant may plead *nolo contendere*. The note of the Advisory Committee on Rules states that Rule 11 is substantially a restatement of existing law and practice and that the plea of *nolo contendere* has always existed in Federal Courts. (See *Hudson v. United States*, 272 U. S. 451; *United States v. Norris*, 281 U. S. 619.) The note of the Advisory Committee as it appears after Rule 11 in 18 U. S. C. concludes with this sentence:

> "While at times criticized as theoretically lacking in logical basis, experience has shown that it (that is, a plea of *nolo contendere*) performs a useful function from a practical standpoint."

Without regard to how I might feel about the philosophy underlying the plea of *nolo contendere*, the fact remains that the use of the plea in Federal Courts is accepted and indeed praised by many. (For example, see 5 Federal Rules Decisions, page 69, and Lenvin and Meyers' article on "*Nolo Contendere*: Its Nature and Implications", appearing in 51 Yale Law Journal, page 1255.) While the position of the Attorney General is not binding upon the Court, it must be given consideration, particularly in view of the contention that the public interest is best served by the rejection of such a plea.

[*Congestion of Court's Calendar*]

In connection with the public interest it is suggested by defense counsel that this case will entail a lengthy trial which will further delay the expeditious disposal of court business within the District of Colorado. The congestion of cases upon the calendar of the United States District Court for the District of Colorado is indeed acute. The median time for the handling of civil jury cases from filing to disposition is, in the District of Colorado, nearly twice the national average. The number of criminal cases filed in this jurisdiction is very substantially higher than the national average per judge. While extreme efforts have been used to keep the criminal docket up to date the fact remains that at the recent conclusion of more than four weeks of criminal jury trials, conducted by three judges, over 40 criminal cases remain on the calendar awaiting trial. The available physical facilities are such that at the moment additional judge power can not be efficiently used for jury trials and the courtrooms cannot be used for jury trials during the summer months. Thus it is apparent that a prolonged trial such as is in prospect in this case will add materially to the problem of congestion and delay. Hence, the problem is posed as to whether public interest is in fact best served by the denial of the motions and the additional calendar congestion which will inevitably follow.

While the problems of congestion are of extreme importance in this district, I firmly believe that the ideal is to attain justice in each individual case rather than to look upon the business of the courts solely from the standpoint of calendar statistics. Although congestion and delay are deplorable, the Court must patiently give full consideration to the rights and claims of the litigants. Matters of additional judge power and adequate court facilities are for the proper consideration of the legislative and executive branches. I am unwilling to accept the position that the congestion of the court's calendar is a controlling reason for the acceptance of a plea of *nolo contendere*. Yet I must recognize that it is a factor which a trial judge may not blithely ignore.

[*Exceptional Circumstance—Acceptance of Plea*]

In the case of *United States v. Colm,* Criminal Action No. 14930, on November 30, 1956, I denied a motion for leave to plead *nolo contendere* and said, in effect, that I would not accept such a plea in the absence of exceptional circumstances. Indeed this has been the established practice in the United States District Court for the District of Colorado for many years. It has existed both before and after the 1953 Memorandum of the Attorney General. The important question to which I will give consideration in this case is whether or not there exists here an exceptional circumstance which justifies the acceptance of the plea. The only circumstance which has been pointed out as exceptional is the potential liability of the defendants under 15 U. S. C., Section 16. This section provides in part as follows:

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

The defendants assert that a *nolo contendere* plea will protect them against the prima facie evidence provision of the above statute. It has been said that the only basic difference between a plea of *nolo contendere* and a plea of guilty is that a *nolo contendere* plea will not be deemed in subsequent proceedings an admission of the charge averred in the indictment. (See *United States v. Jones,* decision of the District Court of the United States for the Southern District of California, found in 119 Federal Supplement 288; see also 5 Federal Rules Decisions, pages 66 to 67, and authorities there cited.) Indeed, the Memorandum of the Attorney General as quoted in the footnote appearing in 119 Federal Supplement 289 recognizes that the plea "may serve a legitimate purpose in a few extraordinary situations and where civil litigation is also pending." I can see no great difference between pending and potential litigation.

In the case at bar the attorneys for the defendants have stated in court that at least some of them face the hazard of treble damage actions under 15 U. S. C., Section 15.

The difficulty with this argument is that if the provision of 15 U. S. C., Section 16, that a final judgment or decree shall be prima facie evidence against a defendant in antitrust actions and the assertions of anticipated litigation are deemed to constitute an exceptional circumstance, then such an exceptional circumstance exists in practically every prosecution under 15 U. S. C., Section 1. Thus we are faced with a basic question as to whether an acceptance of a *nolo contendere* plea in a federal antitrust prosecution would violate the Congressional policy expressed in 15 U. S. C., Section 16.

[*Decisions*]

At least two antitrust prosecutions involving *nolo contendere* pleas have been before the Supreme Court of the United States. They are the *Brotherhood of Carpenters v. United States,* 330 U. S. 395, and *United States v. Frankfort Distilleries* [1944-1945 TRADE CASES ¶ 57,338], 324 U. S., page 293. In neither of those cases did the Supreme Court criticize the acceptance of *nolo contendere* pleas or indicate that it considered the acceptance of such pleas to be contrary to the Congressional intent.

In *United States v. Standard Ultramarine and Color Company,* United States District Court for the Southern District of New York [1955 TRADE CASES ¶ 68,237], 137 Federal Supplement 167, Judge Weinfeld concluded that the acceptance of a *nolo contendere* plea in an antitrust prosecution would fail to carry out the Congressional purpose and would tend to diminish rather than increase respect for law and, accordingly, should not have the sanction of the Court except when special considerations are present.

In *United States v. Cigarette Merchandisers Association,* United States District Court for the Southern District of New York [1955 TRADE CASES ¶ 68,188], 136 Federal Supplement 212, Judge Sugarman accepted a *nolo contendere* plea in an antitrust case where the situation was that the Government had simultaneously filed a companion civil action and hence the preservation of the rights given by Section 16 could be accomplished by the disposition of the civil suit.

In the *Madison Oil* cases *nolo contendere* pleas were accepted and the effect of those pleas in subsequent private litigation was given consideration by district courts. (See *United States v. Socony-Vacuum Oil Company,* District Court for the Western District of Wisconsin, 23 Federal Supplement 531; *Twin Ports Oil Co. v. Pure Oil Co.,* District Court, Minnesota, 26 Federal Supplement 366; *Barnsdall Refining Corporation v. Birnamwood Oil Co.,* District Court for the Eastern District of Wisconsin, 32 Federal Supplement 308.)

In the *Twin Ports Oil Company* case consideration was given to the legislative history of Section 5 of the Clayton Act and similar consideration was given to the same subject in the *Standard Ultramarine* case. I am inclined to agree with a statement of Judge Huxman of the Court of Appeals for the Tenth Circuit in his dissenting opinion in *Ruth v. Eagle-Picher Company,* 255 Federal Second 572, 578, when he said that:

> "When we seek support for our views in the legislative history of an act, it is not too difficult to find what we seek."

[*Intent of Congress*]

I have the utmost respect for the views of the courts who have considered this problem. My approach is perhaps somewhat different. We are confronted with a situation involving the following:

1. The plea of *nolo contendere* has always existed in the Federal Courts. (See *Hudson v. United States* and *United States v. Norris* that I have mentioned.)

2. When Congress passed Section 5 of the Clayton Act in 1914 it did not eliminate the plea of *nolo contendere* in antitrust cases nor did it change the effect of such a plea as then recognized by the courts.

3. Rule 11 of the Federal Rules of Criminal Procedure specifically permits a plea of *nolo contendere* when the consent of the court is obtained. This Rule became effective March 21, 1946, after the Rules of Criminal Procedure had been regularly reported to Congress in accordance with the Act of June 29, 1940, 18 U. S. C., 3771.

4. Pleas of *nolo contendere* have been accepted in a great number of antitrust prosecutions in the period elapsing between the original enactment of the Clayton Act and its amendment by the Act of July 7, 1955. (For example, see 10 Federal Rules Deci-

sions 166; 5 Federal Rules Decisions, page 69.)

5. When Congress amended Section 5 of the Clayton Act in 1955, the provisions of Rule 11 and the records of *nolo contendere* pleas in antitrust prosecutions were within its knowledge.

To me the conclusion is inevitable that the intent of Congress has been to retain the plea of *nolo contendere* in antitrust cases and that the use of such a plea if permitted by the Court is not contrary to the public interest as declared by Congress. From this it follows that in an antitrust case you have the traditional basis for a *nolo contendere* plea because of the provisions of Section 5, as amended, and the potential treble damage actions. If the intent of Congress is that the public interest precludes the acceptance of *nolo contendere* pleas in antitrust cases, it can easily say so in clear and unmistakable language.

[*Court's Discretion*]

In view of my conclusion that Congressional legislation does not declare, even by inference, that the acceptance of *nolo contendere* pleas in antitrust cases is contrary to the public interest, I come to the question of what is the proper exercise of the Court's discretion in this case.

The defendants present what I believe to be an exceptional circumstance within my decision in the *Colm* case. Regrettably the docket in this District is such that public interest requires that everything be done which can properly be done to expedite the trial and disposition of lawsuits. In this case a lengthy trial is prophesied. The elimination of such a trial will make available court time for the handling of other litigation which has been long delayed.

[*Effect of Plea*]

The Government opposes the pleas upon the basis of the 1953 Memorandum of the Attorney General. At the same time the Government has come forward with no statement of aggravation which differentiates this prosecution from any other prosecution under the antitrust statutes. I am not at all in sympathy with the argument of the Government that a *nolo contendere* plea is a gentleman's plea or a whitecollar plea. So far as I am concerned, a *nolo contendere* plea is simply a plea of no contest. For the purposes of the case in which it is made, a plea of *nolo contendere* has all the effect of a plea of guilty. That is what the United States Supreme Court has said in both the *Hudson* and *Norris* cases that I have mentioned. I do not consider a *nolo contendere* plea as either a compromise plea or as an implied appeal for mercy.

The statement in the Memorandum of the Attorney General that "uncontrolled use of the plea has led to shockingly low sentences and insignificant fines which are no deterrent to crime" is a criticism not of the plea itself or of its legal effect but of the penalties imposed after acceptance of the plea. Matters which go in mitigation may properly be considered after a *nolo contendere* plea as well as after a plea of guilty. They should have no greater weight after one plea than after another.

[*Acceptance of Plea in District*]

In my study of this matter I have given concern to the practice of the United States District Court for the District of Colorado, and while my research may not be complete, I find that since 1940 *nolo contendere* pleas have been accepted in at least seven antitrust cases involving a great number of defendants. I have found no antitrust case in the District Court for the District of Colorado in which a tendered *nolo contendere* plea has been rejected.

[*Fines*]

One other matter should be mentioned. The defendants are all corporations. The only penalty which may be imposed is a fine. That fine may be just as heavy under a *nolo contendere* plea as under a guilty plea. From both legal and practical viewpoints, there is, under the circumstances of this case, no reason why the tendered pleas should not be accepted.

[*Increased Maximum Fine*]

One further fact remains to be considered. At the argument of the motions to dismiss it was contended that the indictment was duplicitous in that it charges a conspiracy which allegedly existed "for many years past, and continuing up to and including the date of the return of this indictment." The defendants pointed out that by the Act of July 7, 1955, 15 U. S. C., Section 1, was amended to increase the penalty from \$5,000 to \$50,000. Their argument in effect

was that since the indictment covered acts both before and after the 1955 amendment, the indictment either charges two offenses or the Court could apply only the penalty existing before the 1955 amendment. The motions to dismiss were overruled. If *nolo contendere* pleas are accepted in this case it will stand admitted that the alleged conspiracy continued until the date of the indictment. If the defendants remain willing to plead *nolo contendere* with the knowledge that in imposing the sentence the Court will be governed by the provisions of the 1955 amendment pertaining to penalty, then I will accept such pleas.

Mr. Denious: Gates wishes to still persist in the motion, Your Honor. It wishes to plead *nolo contendere.*

The Court: All right. It is accepted as to Gates. How about Goodrich?

Mr. Holland: Your Honor, I didn't anticipate, as far as the U. S. Rubber Company, this would come up, and I wonder if Your Honor could defer it until I could call—I assume that we will go along with it.

The Court: If one of you is going to defer, I think all of you had better. I am just saying this, I am not deciding your legal rights; you all know what rights you have after a plea of *nolo contendere.* But I am just saying that as far as I am concerned, in imposing penalty I will consider that I am not governed by the law as it existed prior to the 1955 amendment.

Mr. Holland: On that basis I think U. S. Rubber will accept.

I think everyone feels we should have time to check with our head counsel, Your Honor.

The Court: I am willing to give you that because I don't want you local lawyers here in Denver to perhaps get in any hazard.

Mr. Holland: I think I stuck my neck out and I would like to pull it back in.

The Court: All right. How much time do you want on that?

Mr. John Shafroth: Tuesday. Early next week.

Mr. Holland: Monday is all right.

The Court: Let's set it up for 9:30 Tuesday morning.

Now, I want you to understand what I am saying. I am not saying what penalty I will impose. All I am saying is that so far as I am concerned, the limit is the fifty thousand dollars rather than the five. I hope you understand that.

Mr. Morrison Shafroth: You are reserving the legal rights of the parties?

[*Statement of Participation*]

The Court: Oh, yes. If you want to argue that that is an illegal sentence, you know the authorities which I would suppose would permit you to go to the Court of Appeals.

There is one other thing I might as well mention now. One trouble with these pleas is that you don't have the advantage of a trial and get the participation of the various defendants. I can't see any good purpose, if these pleas are accepted, in referring the matter to the already overburdened Probation Department, and I was going to suggest to counsel on both sides if the pleas are accepted I would like the Government, on each of the individual defendants, to supply me with a short—and I emphasize short—statement as to their ideas as to participation, relative participation, or whatever you wish to call it. Would the Government be willing to do that?

Mr. Hunter: Yes, we would, Your Honor.

The Court: All right. That is another matter which you might mention when you talk to your principals. That is the reason I mention it now.

This matter will go over until 9:30 next Tuesday morning. That is February 19. Court will be in recess.

[¶ 68,714] Vincent W. Kosuga v. Jack H. Kelly.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 56 C 1502. Dated April 24, 1957.

Illinois and Sherman Antitrust Acts

Combinations and Conspiracies Under Federal and State Antitrust Laws—Contract of Sale—Agreement Not To Sell Product on Futures Market—Legality.—A provision of a contract under which a seller of onions agreed, as a condition of the sale, to merchandise

the remainder of his onions in normal trade channels and not to deliver them on the futures market during the remainder of the current onion season did not constitute an illegal restraint of trade proscribed by the Sherman Antitrust Act or the Illinois antitrust law. Deliveries on the futures market may have temporary price upsetting consequences which may interfere with the purchaser's efficient and profitable disposition of the onions which he had purchased. The condition imposed by the purchaser and agreed to by the seller was a reasonable restriction to assure the purchaser the enjoyment of the legitimate fruits of his contract of purchase and to protect him from a possible derogation in the value of the property bought.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.760, 2339.15.

Private Enforcement and Procedure—Antitrust Law Violations as Defenses—Suit on Contract—Where Alleged Violation of Antitrust Laws Is Collateral to Right Sued Upon. —In an action by a seller to recover from the purchaser the balance due on a contract for the sale of 50 carloads of onions, the purchaser's affirmative defense that the seller could not recover because he had agreed not to deliver the remainder of his onions on the futures market in violation of the Sherman Antitrust Act and the Illinois antitrust law was stricken on the ground that the defense, even if established, would not bar the seller's suit to recover the unpaid balance of the purchase price. The contract of purchase was complete in itself and contained reciprocal considerations moving between the parties. The seller's agreement not to sell on the futures market was not an inherent part of the sale which was sought to be enforced. A judgment, if rendered for the seller, would not afford judicial aid to the enforcement of an allegedly illegal condition. The contract of sale was not inherently illegal so as to bring it within the rule that the courts will not exert their powers to enforce illegal contracts. Furthermore, the federal law invoked provides various sanctions in the event of violation, and it does not make uncollectibility of the purchase price for goods sold one of those sanctions. Also, the seller's agreement, even if regarded as illegal, would not insulate the purchaser from the obligation of paying the contract price. The claimed illegal agreement could be separated from the lawful promise for a lawful consideration and the latter agreement enforced.

See Combinations and Conspiracies, Vol. 1, ¶ 2407.15; Private Enforcement and Procedure, Vol. 2, ¶ 9042.650.

For the plaintiff: Lee A. Freeman and A. Bradley Eben, Chicago, Ill.

For the defendant: Joseph W. Louisell, of Porritt, Freud, Toppin & Louisell, Detroit, Mich.; and Richard E. Gorman, Chicago, Ill.

Memorandum Opinion on Motion to Strike Affirmative Defenses

[*Defenses*]

MICHAEL L. IGOE, District Judge [*In full text*]: Complaint was filed September 11, 1956 under Section 1332, Title 28 of the United States Code to recover the balance of $37,342.80 due on a contract for the sale of 50 carloads of onions. Defendant answered, setting up as Affirmative Defenses, alleged violation of the Illinois Antitrust Law, (Jones *Ill. Stats. Ann.* Secs. 15.62, 15.66 and 15.67), the Federal Antitrust Act, (15 USC Sec. 1) and the Commodity Exchange Act (7 USC Sec. 13), on the ground that in consideration for the purchase of these 50 cars of onions, plaintiff had agreed not to deliver the remainder of his onions on the futures market. This condition it is asserted had as its object the manipulation, stabilization and if possible increase in onion market prices.

[*Violations of Contract*]

Defendant further alleges that if the agreement is legal, then plaintiff was guilty of a breach by delivering onions on the futures market, by selling futures contracts and selling actual onions below established prices. Defendant, for these alleged breaches, counterclaims for $75,000.00.

[*Motion To Strike*]

Plaintiff filed a motion to strike the Affirmative Defenses based upon alleged violations of the antitrust laws and the Commodity Exchange Act, and a reply denying the alleged breaches asserted in the counterclaim.

[*Contract of Sale*]

Presented for our decision is the motion to strike the defendant's Affirmative Defenses. The facts as admitted by the pleadings are:

Plaintiff owned actual onions in Chicago and in the country. On December 17, 1955 defendant, as one of several individuals, purchased 50 carloads of such onions for $960.00 per car or a total of $48,000.00, plus storage charges. The purchase agreement provided for an initial payment of $300.00 per car, a second payment of $200.00 per car due January 10, 1956 and the balance of $460.00 per car plus storage due when defendant ordered the cars out of storage. As a condition to this purchase, plaintiff agreed not to deliver any of his remaining onions on the futures market for the remainder of the season, but instead to merchandise such onions in normal commercial trade channels.

Defendant paid $12,500.00 on account of his purchase, and from time to time withdrew from storage and utilized 13 carloads of onions, but failed to make payment therefor as required. Significantly, subsequent to the purchases, the market price of onions progressively declined.

Onions are a perishable commodity which can be stored only for a reasonable period. On February 16, 1956, plaintiff advised that the onions purchased were showing deterioration, and requested defendant to take the onions and make full payment thereon. Defendant refused to accept the onions at that time, but acknowledged the validity and enforceability of his purchase agreement.

[*Repudiation of Contract*]

On March 9, 1956 defendant repudiated the agreement claiming it was illegal in violation of antitrust laws and the Commodity Exchange Act. Plaintiff, after notice, sold the 37 cars of onions remaining from defendant's purchase, and credited defendant with the amount realized in mitigation of damages.

[*Instant Action*]

This is an action to enforce payment for onions sold to and received by defendant, at a price that is not objected to an unreasonable or excessive. The contract of purchase was complete in itself and contains reciprocal considerations moving between the parties. The condition of non-delivery which is asserted as a violation of the antitrust laws and the Commodity Exchange Act is not an inherent part of the sale which is here sought to be enforced. Plaintiff does not seek to enforce that provision. A judgment, if rendered for the plaintiff, would not afford judicial aid to the enforcement of an allegedly illegal condition. In the present posture, our decision on the motion to strike is governed by the principles announced in *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540, 551; *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.,* 236 U. S. 165 172-3, *Small Co. v. Lamborn Co.,* 267 U. S. 238; and *Bruce's Juices, Inc. v. American Can Co.* [1946-1947 TRADE CASES ¶ 57,553], 330 U. S. 743.

[*Controlling Rule*]

In the *Wilder* case the Supreme Court upheld the rejection of a defense of alleged violation of the antitrust laws when asserted in an action to recover the price of goods sold. There the purchase agreement contained conditions allegedly restrictive of competition. The court expressed the rule controlling in this proceeding on pages 172 and 173 as follows:

> "* * * the sale and the obligations which arose from it depended upon a distinct contract, with reciprocal considerations moving between the parties,—the receipt of the goods on the one hand, and the payment of the price on the other. And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so, or some remote aid to the accomplishment of a wrong which might possibly result * * *"
>
> "The case therefore reduces itself to the question whether the contract of sale was inherently illegal so as to bring it within the also elementary rule that courts will not exert their powers to enforce illegal contracts or to compel wrongdoing. The only suggestion as to the intrinsic illegality of the sale results from the averments of the answer as to the offer of a percentage of profits upon the condition of dealing exclusively with the refining company for the following year, and the clause to the effect that the goods were bought by the manufacturing company for its own use, and not for resale. But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions."

[*Antitrust Enforcement*]

We are further impelled to our conclusion by the fact that the federal laws in-

voked provide various sanctions in the event of violation, but do not make uncollectibility of the purchase price for goods sold one of those sanctions. The remedies provided by the Federal Antitrust Acts or the Commodity Exchange Act are exclusive, and do not afford defendant the affirmative defense here asserted: *D. R. Wilder Mfg. Co. v. Corn Products Ref. Co. supra, Bruce's Juices, Inc. v. American Can Co. supra.*

[*Provisions Separable*]

Furthermore, the non-delivery condition if regarded as illegal, would not insulate defendant from the obligation of paying the agreed price for goods purchased and received. The illegal condition or covenant in such circumstances would be separated from the lawful promise for a lawful consideration and the latter agreement enforced: *Cincinnati etc. Packet Co. v. Bay,* 200 U. S. 179, *U. S. Hoffman Machinery Corp. v. Valeteria Cleaners, Inc.* [1956 TRADE CASES ¶ 68,452], 143 F. Supp. 797 (D. C. Minn.).

[*Illinois Act*]

What we have said concerning the defense based on alleged violation of the Federal Antitrust Acts serves also to dispose of the defense of alleged violations of the Illinois Antitrust Law—if that state act could be said to be applicable. Defendant asserts that the transactions involved are in interstate commerce and therefore the question naturally arises whether the state antitrust law is even applicable.

[*No Illegal Restraint of Trade*]

Plaintiff also seeks to strike the Affirmative Defenses as insufficient in law by asserting that the non-delivery condition is not an unlawful restraint of trade or manipulative device. Plaintiff agreed, as a condition to this sale of onions, to merchandise the remainder of his onions in normal trade channels and not to deliver them on the futures market during the remainder of the current onion season. Deliveries on futures market may have temporary price upsetting consequences which may interfere with defendant's efficient and profitable disposition of the onions he had purchased. The condition imposed by defendant and agreed to by plaintiff was a reasonable restriction to assure defendant the enjoyment of the legitimate fruits of his contract of purchase, and to protect him from a possible derogation in the value of the property bought. This condition does not constitute an illegal restraint of trade proscribed in the Federal or Illinois antitrust laws: *U. S. v. Addyston Pipe & Steel Co.,* 85 Fed. 271 (CA 6) *Cincinnati etc. Packet Co. v. Bay, supra, D. R. Wilder Mfg. Co. v. Corn Products Ref. Co. supra.*

[*No Violation of Commodity Act*]

Nor is the non-delivery condition violative of the provisions in the Commodity Exchange Act against manipulation of markets and commodity prices. Manipulation as contemplated under that act may be defined as the creation of an artificial price by planned and deliberate action. The devices commonly employed to achieve manipulation are deceit, trickery through the spread of false market and economic rumors, concealment of market position, the violation of express anti-manipulative controls set forth in the Commodity Exchange Act, or other forms of fraud: *General Foods Corp. v. Brannan,* 170 F (2d) 220, 224, 231.

Defendant does not allege that the non-delivery condition was intended to achieve an artificial price or that plaintiff utilized or agreed to any manipulative device in the sale or merchandising of his onions. The Affirmative Defenses do not allege a manipulation as contemplated by and in violation of the Commodity Exchange Act.

[*Position of Defendant*]

Fifty carloads of onions were sold on December 17, 1955 on terms and conditions admitted by the pleadings. Defendant, however, seeks to avoid payment by the drastic step of asserting that he was a participant with the plaintiff in a market rigging operation. He is placed in a peculiar position by also asserting that plaintiff did not comply with the illegal conditions involved.

It is obvious that this position was in no small part conceived after declines in market prices, made the purchase of onions unattractive and unprofitable. We will not lend our aid to the creation of windfall profits as thus contemplated.

[*Motion Granted*]

We find the agreement of purchase and sale of fifty carloads of onions to be valid and binding, and the Affirmative Defenses asserted to be insufficient in law. The plaintiff's motion to strike is granted. An appropriate order will be entered.

[¶ 68,715] General Electric Company v. Masters Mail Order Company of Washington, D. C., Inc.

In the United States Court of Appeals for the Second Circuit. No. 198—October Term, 1956. Docket No. 24370. Argued December 4, 1956. Decided May 15, 1957.

Appeal from the United States District Court for the Southern District of New York, ALEXANDER BICKS, Judge.

McGuire Act and New York Fair Trade Act

Fair Trade—Advertising, Offering for Sale, and Selling Below Fair Trade Prices—Noncontracting Dealer—Sales from Non-Fair Trade Jurisdiction to Fair Trade Jurisdiction—Applicability of Federal and State Fair Trade Acts.—A mail order house located in the District of Columbia cannot be enjoined from advertising, offering for sale, or selling a fair trader's products in New York below fair trade prices established under the New York Fair Trade Act. Neither the McGuire Act nor the New York Fair Trade Act authorizes the enforcement of fair trade prices against a retailer making resales or located in a non-fair trade jurisdiction. The fact that the retailer's owner was located in New York was irrelevant, and the retailer will not be treated as a mere dummy corporation for its New York parent. Also, New York contracts of the retailer were irrelevant.

In this 2 to 1 decision, one majority judge ruled that the McGuire Act and the New York act were inapplicable since the resales of the fair traded products took place in the District of Columbia, a non-fair trade jurisdiction. The place of resale was considered to be the place where the title to the products passed. The other majority judge ruled that the retailer was located in the District of Columbia and therefore beyond the reach of the New York Fair Trade Act. The exemption provided in the McGuire Act can be availed of only by the state that the McGuire Act designated as the state of resale, that is, the state where the retailer is located.

See Fair Trade, Vol. 1, ¶ 3258.34, 3258.80, 3262.34, 3262.80, 3350.34.

For the defendant-appellant: Norman Diamond of Arnold, Fortas & Porter (William D. Rogers, of Arnold, Fortas & Porter, Washington, D. C., and Joseph F. Ruggieri, of Ruggieri & Ruggieri, Brooklyn, N. Y., on the brief), Washington, D. C.

For the plaintiff-appellee: Edgar E. Barton of White & Case (Howard J. Aibel, of White & Case, on the brief), New York, N. Y.

Reversing a decision of the U. S. District Court, Southern District of New York, 1956 Trade Cases ¶ 68,503; for a prior decision of the Court, see 1954 Trade Cases ¶ 67,827.

Before: CLARK, Chief Judge, and LUMBARD and WATERMAN,[1] Circuit Judges.

Masters Mail Order Company of Washington, D. C., Inc., appeals from an order, D. C. S. D. N. Y. [1956 TRADE CASES ¶ 68,503], 145 F. Supp. 57, under the New York Fair Trade (Feld-Crawford) Act, N. Y. General Business Law §§ 369-a to 369-e, enjoining it from selling, offering to sell, or advertising in New York certain trademarked appliances manufactured by General Electric Company at prices below those specified in the latter's resale price maintenance agreements with New York retailers. Reversed and action dismissed.

[*Fair Trade Injunction*]

CLARK, Chief Judge [*In full text*]: This is an appeal from a decision, D. C. S. D. N. Y. [1956 TRADE CASES ¶ 68,503], 145 F. Supp. 57, enjoining a mail order discount house in the District of Columbia from advertising, offering for sale, or selling plaintiff-manufacturer's products in New York below New York "fair trade" prices.[2] The action was brought under the New York Fair Trade (Feld-Crawford) Act, N. Y. General Business Law §§ 369-a to 369-e, and our jurisdiction rests on the diversity of citizenship of

[1] Judge Frank heard arguments on this appeal and wrote a memorandum supporting his tentative vote for reversal, but died before he could prepare an opinion. Judge Waterman was then invited to, and consented to, serve as the third member of the panel.

[2] We use the terms which seem to be current, viz., "fair trade," as opposed to "free trade."

the parties. All the facts were stipulated in advance of trial.

[*Parties*]

Since the passage of the McGuire Act, 66 Stat. 632, 15 U. S. C. § 45(a)(1)-(5), the plaintiff, General Electric Company, has entered into numerous fair trade agreements with retailers in New York and other states and has systematically given notice of the agreements and the uniform minimum resale prices in effect to the 175,000 known retailers of its products. It has vigorously enforced the agreements, by lawsuits when necessary. The defendant is a retail store in the District of Columbia which sells General Electric appliances both over the counter and by mail order. Two-thirds of its sales are over the counter. It is a wholly owned subsidiary of Masters, Inc., a New York retail corporation, and has been controlled and closely supervised by the parent corporation at all relevant times. The parent is not a party here. In 1952 the parent was enjoined from violating the plaintiff's fair trade contracts and the following year it was twice fined for violating the injunction. That year the defendant was organized in Maryland and the following year its place of business was moved to the District of Columbia, where there are no fair trade laws. The last move was intended to permit the defendant to sell General Electric appliances to customers in fair trade states below fair trade prices by direct mail order, the defendant having been advised that such sales would be legal.

[*Mail Order Sales*]

Defendant has shipped General Electric appliances from its store to consumers in New York at prices below those set by the plaintiff with its signatory retailers. These sales were pursuant to orders received in the District of Columbia on order forms marked, "THIS ORDER IS SUBJECT TO ACCEPTANCE BY MASTERS MAIL ORDER COMPANY IN WASHINGTON, D. C." and "NO CHARGE FOR SHIPPING." Some of the orders were filled on a C.O.D. basis, but the great majority were filled pursuant to orders which were accompanied by prepayment of the purchase price. Each order blank bore the notation "SOLD TO" immediately preceding the purchaser's name, and as one of the terms it announced that the purchaser could return the article purchased for refund or exchange within thirty days of receipt by returning the article in its original condition and carton. In approximately five cases defendant refunded the purchase price upon the customer's return of the merchandise.

The order blanks were distributed by both the defendant in Washington and its parent, which kept them behind the appliance counter at its place of business in New York for distribution to New York customers who sought them or tried to buy General Electric appliances for less than fair trade prices. To mail requests for appliances below fair trade prices the New York parent store replied that the items could be purchased from the Washington subsidiary, and it enclosed copies of the mail order form of the defendant. Copies of the defendant's catalogue were printed by the parent in New York and sent to the defendant in the District of Columbia, whence they were mailed to prospective customers in fair trade states. And the parent distributed other advertising material concerning the defendant's bargains directly to New York consumers in New York. The appliances sold by the defendant were acquired in part from the parent in New York and in part through purchase from distributors located in the District of Columbia, including a division of General Electric Supply Company, a wholly-owned subsidiary of the plaintiff, which is one of seven franchised General Electric distributors in the District of Columbia.

[*Trial Court Ruling*]

The district court, relying heavily on the circumstances surrounding the formation of the defendant and its close supervision by the New York parent, held that the defendant advertised, offered for sale, and sold GE appliances in New York below the fair trade prices; that this violated New York's Feld-Crawford Act; and that the Feld-Crawford Act was sanctioned by the McGuire Act. Judge Bicks' reasoned opinion, reported at [1956 TRADE CASES ¶ 68,503] 145 F. Supp. 57-64, is a full exposition of the arguments available for plaintiff's position and for the rather far-reaching injunction he issued. He distinguished two earlier district court cases upholding the legality of the defendant's operations in another fair trade jurisdiction on the ground that there no sales had been made within a fair trade state. *Bissell Carpet Sweeper Co. v. Masters Mail Order Co. of Washington, D. C.*, D. C. D. Md. [1956 TRADE CASES ¶ 68,326], 140 F. Supp. 165, subse-

quently affirmed, 4 Cir. [1957 TRADE CASES ¶ 68,603], 240 F. 2d 684; *Revere Camera Co. v. Masters Mail Order Co. of Washington, D. C.*, D. C. D. Md. [1955 TRADE CASES ¶ 67,981], 128 F. Supp. 457. But we are constrained to agree with these decisions, which we think are not properly to be distinguished.

[*McGuire Act*]

Our first question is whether the Feld-Crawford Act, so applied, conflicts with the Sherman Antitrust Law's ban on enforcement of resale price maintenance agreements as to goods moving in interstate commerce. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373. Although the McGuire Act carves some exceptions to this long-standing national policy against restraints on trade, we are "bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy." *United States v. McKesson & Robbins, Inc.* [1956 TRADE CASES ¶ 68,368], 351 U. S. 305, 316.

Subsections (a)(2) and (3) of § 2 of the McGuire Act, 15 U. S. C. § 45(a)(2) and (3), are printed in the margin.[3] The last part of subsection (a)(2) restricts the exception for resale maintenance contracts to contracts governing resales in jurisdictions that have adopted "fair trade" as a policy. A contract made in a fair trade state, but governing a resale in a non-fair trade state, would be illegal by the terms of the subsection. Subsection (a)(3) creates an exception for enforcement actions only when the price-cutter is undercutting "prices prescribed in such contracts"—that is, the contracts described in the previous subsection. Therefore no enforcement action lies unless the resales in question occur in a fair trade state.

This was the construction given the statute by Judge Chesnut in *Revere Camera Co. v. Masters Mail Order Co. of Washington, D. C., supra*, D. C. D. Md. [1955 TRADE CASES ¶ 67,981], 128 F. Supp. 457, 462, and by Judge R. Dorsey Watkins in *Bissell Carpet Sweeper Co. v. Masters Mail Order Co. of Washington, D. C., supra*, D. C. D. Md. [1956 TRADE CASES ¶ 68,326], 140 F. Supp. 165, 178; and see also the opinion of Judge Soper affirming the latter decision, 4 Cir. [1957 TRADE CASES ¶ 68,603], 240 F. 2d 684. This construction is supported by the legislative history of the McGuire Act, carefully detailed in these opinions.

Plaintiff protests that our reading of the statute will allow the District of Columbia to impose its policies on economic activities in New York. But the opposite construction will simply allow New York to dominate the economic activities of the District of Columbia (and other like free trade areas). Since Congress has left the regulation of this part of interstate commerce to the option of the individual states, it is inevitable that when a single transaction affects states with conflicting policies one state or the other must see its policies slighted. We have no clearer guide in choosing the dominant state than the language of the statute itself. The trial judge attempted to weigh the defendant's contacts in New York against its contacts in the District, but this approach has no warrant in the congressional language or legislative history.[4]

[3] "§ 45. *Unfair methods of competition unlawful; prevention by Commission*

"(a)(1) * * *

"(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

"(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby."

[4] Its weakness from a realistic point of view is highlighted by the fact that here more than two-thirds of defendant's sales were made over the counter in its extensive three-story store in the District, while the remaining or mail-order sales were by no means limited to New York customers; witness the two federal cases in Maryland that we have cited which also involve this defendant.

From all that appears Congress was concerned with the place where resales occurred, rather than the place where the retailer's owner resided and exercised supervision over operations.

Nor do we think that advertisements and offers to sell are to be treated differently from sales themselves. The critical question is still the place of resale, and no enforcement action may be brought for advertising or offering goods for sale below the fair trade prices unless the ad or offer contemplated resales in a fair trade jurisdiction. There is a practical advantage to having all three stages of the seamless process of merchandising governed by the same law, and the wording of the McGuire Act suggests that the three are to be handled together. This was the conclusion of Judge Watkins in *Bissell Carpet Sweeper Co. v. Masters Mail Order Co. of Washington, D. C., supra,* D. C. D. Md. [1956 TRADE CASES ¶ 68,326], 140 F. Supp. 165, affirmed 4 Cir. [1957 TRADE CASES ¶ 68,603], 240 F. 2d 684, noted in 57 Col. L. Rev. 292; and we are in entire agreement with his comprehensive opinion. Hence an enforcement action under the New York statute is valid only if the resales occurred in New York.

[*Place of Resale*]

The parties disagree as to whether the defendant's order blanks were offers or only advertisements soliciting offers. Plaintiff views them as offers which were accepted when consumers in New York signed them and put them in the mail. Defendant contends that the consumers' actions were the real offers which the defendant accepted in the District. We need not resolve the dispute, since Judge Waterman and I are agreed that the place where the contract was made is not controlling. In my view the place where title passed is critical.

The intent of the parties governs the passage of title between them, although statutes and case law provide guides for ascertaining such intent. Here the predominant interest of both the seller and buyers was to take advantage of the absence of resale price maintenance legislation in the District of Columbia. The defendant's history and operations testify to its concern, and its various pieces of advertising brought home the same desire to New York consumers. For example, one of its order blanks announced "discounts on all the 'fair-traded' brands of merchandise that are being sold only at list price in 45 states." Since the parties had the power to determine for themselves where title would pass, they indubitably selected the District of Columbia, where their agreements would be enforceable, rather than New York, where they would not.

Where there is no contrary evidence, the fact that the seller pays the carrier suggests that title is intended to pass when the carrier delivers the goods to the buyer, Uniform Sales Act § 19, Rule 5; but only slight evidence of a contrary intent rebuts the presumption of this rule. Williston, Sales § 279b (Rev. Ed. 1948). Here the cost of transportation was being passed on to the mail order consumer in any event, so that little is to be inferred from the fact that the seller's catalogue price included the cost of transportation, instead of treating it as a separate item which the customer must also prepay. The customer's prepayment of the price is more evidence that title passed before the buyer received the goods, *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.,* 2 Cir., 147 F. 2d 399, 402, certiorari denied 325 U. S. 861, and the vast bulk of mail order sales were thus prepaid.

But even the C.O.D. sales were made in the District of Columbia, we feel. C.O.D. customers, as well as customers who prepaid, placed their orders on blanks which proclaimed the advantages of sales in the District of Columbia; and they, too, if asked, would have expressed a desire to pass title in a place where it was legal. Nor would the defendant be prejudiced by passing title before payment, for it could retain a seller's lien, entitling it to keep possession of the goods until paid. See *Ponder v. Beeler Motor Co.,* 186 Okla. 88, 96 P. 2d 65. Defendant's failure to pay the District of Columbia sales tax is irrelevant to the intent of the parties, since this fact was never communicated to purchasers. Under the defendant's arrangement for doing business, title passed in the District of Columbia. *Revere Camera Co. v. Masters Mail Order Co. of Washington, D. C., supra,* D. C. D. Md. [1955 TRADE CASES ¶ 67,981], 128 F. Supp. 457, 462; *Bissell Carpet Sweeper Co. v. Masters Mail Order Co. of Washington, D. C., supra,* D. C. D. Md. [1956 TRADE CASES ¶ 68,326], 140 F. Supp. 165, 174, affirmed 4 Cir. [1957 TRADE CASES ¶ 68,603], 240 F. 2d 684.

[*New York Act*]

Quite apart from the McGuire Act, the same result is compelled by New York law. Sec. 369-b of New York's Feld-Crawford Act, N. Y. General Business Law,[5] cannot be distinguished from the Maryland Fair Trade Act, which the Court of Appeals for the Fourth Circuit recently construed. *Bissell Carpet Sweeper Co. v. Masters Mail Order Co. of Washington, D. C., supra,* 4 Cir. [1957 TRADE CASES ¶ 68,603], 240 F. 2d 684. A unanimous court of appeals agreed with the two district judges earlier construing the Act that it covered only those advertisements and offers which referred to resales in Maryland. This narrow construction was adopted because the statute was in derogation of the common law and imposed a burden on interstate commerce—considerations which would weigh heavily with New York courts, as well, *e.g., General Electric Co. v. R. H. Macy & Co.* [1950-1951 TRADE CASES ¶ 62,764], 199 Misc. 87, 95-96, 103 N. Y. S. 2d 440, 449, appeal dismissed 278 App. Div. 939, 105 N. Y. S. 2d 1003.

Moreover, it seems apparent that New York would apply the substantive law of the District of Columbia to the facts of this case. Whether it regarded the place where title passes as critical (to keep the Feld-Crawford Act consistent with the McGuire Act) or saw the retailer's location as controlling, the result would be the same here. In an action for unfair competition by a manufacturer against a New York retailer engaged in direct mail sales of fair trade items to out-of-state consumers the New York courts have applied New York law without discussing our present problem. *Raxor Corp. v. Goody,* Sup. [1953 TRADE CASES ¶ 67,462], 121 N. Y. S. 2d 882, affirmed 282 App. Div. 921, 125 N. Y. S 2d 643, affirmed [1954 TRADE CASES ¶ 67,776] 307 N. Y. 229, 120 N. E. 2d 802, certiorari denied *Goody v. Raxor Corp.,* 348 U. S. 863. The instant case is almost identical except that the retail store is located in the District of Columbia; and there is no reason to suspect that the New York courts, which have been scrupulous to apply principles of comity, would adopt a different conflicts rule here merely in order to govern all multi-state transactions by New York law, *e.g., People ex rel. Kirkman v. Van Amringe,* 266 N. Y. 277, 194 N. E. 754; *Van Voorhis v. Brintnall,* 86 N. Y. 18, 40 Am. Rep. 505. The fact that the defendant's owner is located in New York is as irrelevant under the Feld-Crawford Act as under the McGuire Act; the state judges will not distinguish between two mail order houses located in the District of Columbia solely because the owner of one resided in New York and the owner of the other lived in Florida.[6] That construction would invite serious enforcement problems, since service of process on the Florida owner cannot be made in New York on the mere fact of advertisement in New York; and the courts of Florida might refuse to entertain actions for unfair competition under the Feld-Crawford Act on grounds of public policy. See Note, 57 Col. L. Rev. 292, 296.

[*Title Approach*]

My brother Waterman criticizes use of the concept of title in determining the place of "resale" and suggests that we look instead to the situs of the retailer. The title approach seems required by the congressional language and the case law; in reality it adds precision to the statutory term by drawing upon precedents from the law of sales, *e.g., Bissell Carpet Sweeper Co. v. Masters Mail Order Co. v. Washington, D. C., supra,* D. C. D. Md. [1956 TRADE CASES ¶ 68,326], 140 F. Supp. 165, 172, note 12, where Judge Watkins relied on a state case involving passage of title in finding that the defendant's resales are made in the District of Columbia. I see no difficulty with this construction, but am convinced that the novel retailer-situs rule would introduce much uncertainty into the law. For example, it would be difficult to know how much paraphernalia a seller must have in a state to be "located" there. Similarly, it would be hard to fix the "location" of a large mail order house which has numerous warehouses

[5] "§ 369-b. *Unfair competition defined and made actionable*

"Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

[6] Florida is one of the twelve states where resale price maintenance legislation has been declared invalid either in whole or in part by the state courts. See 1 CCH TRADE REGULATION REPORTS ¶ 3,003; Sievert, " 'Fair Trade' Tottering, But Hope Still Lingers," N. Y. World-Telegram and Sun, Feb. 22, 1957.

and retail outlets in both free trade and fair trade states.

The criticisms of the construction here employed are two: that it facilitates evasion of fair trade regulation and that it may create inconsistencies between the McGuire Act and the state fair trade laws. Obviously some manipulation is possible under both approaches. The one here adopted would permit no more latitude than the familiar doctrine that parties to a multi-state contract can agree as to which state's law will govern, provided the state selected has a direct and substantial relation to the transaction. *Seeman v. Philadelphia Warehouse Co.,* 274 U. S. 403; 6 *Corbin on Contracts* § 1509 (1951). Of course the parties, under well recognized principles set forth in more detail in the footnote, are limited in their choice of law as to the passage of title, and cannot elect to be governed by the law of some jurisdiction with which they have no connection.[7] Consequently any fear that New York retailers and consumers can subject local sales to foreign fair trade laws is groundless. Inasmuch as Judge Watkins has already read the title concept into the federal and Maryland statutes in *Bissell Carpet Sweeper Co. v. Masters Mail Order Co. of Washington, D. C., supra,* D. C. D. Md. [1956 TRADE CASES ¶ 68,326], 140 F. Supp. 165, and the only possibly contrary authority is *Raxor Corp. v. Goody, supra,* where the law of the forum was applied without discussion, it seems most likely that uniformity will come about as the state courts read the title concept into their statutes to make them agree with the federal act from which their validity is derived. Congressional disapproval of *Sunbeam Corp. v. Wentling,* 3 Cir. [1950-1951 TRADE CASES ¶ 62,739], 185 F. 2d 903, vacated [1950-1951 TRADE CASES ¶ 62,840] 341 U. S. 944, does not bear on the present controversy nor does it lend support to the retailer-situs construction.

[*Reversed*]

Because Judge Frank died before casting his final vote, his views on this case are not official; but it is reassuring that his memorandum and tentative vote agreed so closely with the views I have expressed in calling for reversal on both state and federal grounds and in suggesting that we might reverse on the "persuasive and exhaustive" district court opinions in *Bissell Carpet Sweeper Co. v. Masters Mail Order Co. of Washington, D. C., supra,* D. C. D. Md. [1956 TRADE CASES ¶ 68,326], 140 F. Supp. 165, and *Revere Camera Co. v. Masters Mail Order Co. of Washington, D. C., supra,* D. C. D. Md. [1955 TRADE CASES ¶ 67,981], 128 F. Supp. 457. In accordance with these views the order of injunction must be reversed and the action must be dismissed on the merits.

[Concurring Opinion]

[*Agree on Reversal*]

WATERMAN, Circuit Judge (concurring): I concur in the result reached by Judge Clark. With him I hold that New York's Feld-Crawford Act is unenforceable against Masters Mail Order Company of Washington, D. C., Inc., the defendant here. Masters is located in the District of Columbia where there is no resale price maintenance statute, law, or public policy. The prices Masters receives for goods sold by it to New York purchasers, being goods shipped in interstate commerce, are, I believe, governed by the public policy of the District of Columbia, the state where Masters is located. That policy permits free-pricing. The public policy of New York that restrains free-pricing in favor of agreements of resale price maintenance I hold is inapplicable to retail transactions of sale made in interstate commerce by this District of Columbia retailer; for I believe that for the purpose of the McGuire Act, 15 U. S. C. A. § 45(a) (1952), all such

[7] "[T]he parties may elect between the different systems of law, which the law would construe as competing systems; but they cannot elect the law of any other jurisdiction." 6 Page, *Law of Contracts* § 3571. "The courts have * * * generally confined the parties in their choice of law either to the law of the place of making or to the law of the place of performance." 2 Beale, *Conflict of Laws* 1081. "It is almost universally held that the parties, in exercising the power to select the jurisdiction whose law they intend to have control the obligations, rights, and duties under their contract, must act in good faith and with no purpose of evasion or of avoiding some provision of the law of the place of making." *Owens v. Hagenbeck-Wallace Shows Co.,* 58 R. I. 162, 192 A. 158, 164. See also *E. Gerli & Co. v. Cunard S. S. Co.,* 2 Cir., 48 F. 2d 115; *Brierley v. Commercial Credit Co.,* 3 Cir., 43 F. 2d 730, certiorari denied 282 U. S. 897; *Palmer v. Chamberlin,* 5 Cir., 191 F. 2d 532, 536, 27 A. L. R. 2d 416; *Duskin v. Pennsylvania-Central Airlines Corp.,* 6 Cir., 167 F. 2d 727, 730, certiorari denied *Pennsylvania-Central Airlines v. Duskin,* 335 U. S. 829; *In re Sik's Estate,* 205 Misc. 715, 129 N. Y. S. 2d 134; Annotation, Validity and effect of stipulation in contract to the effect that it shall be governed by the law of a particular state which is neither the place where the contract is made nor the place where it is to be performed, 112 A. L. R. 124.

sales take place in the District of Columbia. I reach this conclusion from my reading of the McGuire Act and my understanding of the intent of Congress in passing that legislation. Hence, although Judge Clark and I agree in reversing the lower court, I differ somewhat from him in reaching that decision.

[*McGuire Act*]

In enacting the McGuire Act, 15 U. S. C. A. § 45(a) (1952), the Congress indicated its intention to leave the adoption or rejection of resale price maintenance to the individual states. The states' rights basis of this legislation clearly appears in the preamble of the Act:

> "That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce."

To carry out this purpose, the McGuire Act provides that the applicable state law shall be that "* * * in effect in any State, Territory, or the District of Columbia in which such resale is to be made * * *" I think we must interpret this language in a way that will most effectively implement the intent of Congress to permit the individual states to adopt or reject "fair-trade" laws and then to enforce those laws in the event of their adoption. We should not interpret the language to permit the policy of more than one state to affect the transaction of sale; or to permit parties to the sale to "contract out" of the applicable state law or to "pick a state law" to suit their convenience. Since the place of resale is not defined by the Act, if we construe that phrase to mean the place where the seller of the goods is located, we obtain the certainty we seek consistent with the intent of Congress to preserve the rights of individual states to regulate in this field, and we do so by an interpretation clearly reasonable from the language of the Act.

[*Proposed Amendment*]

I find support for my position in the legislative history of the McGuire Act. During the debates in Congress preceding its enactment, Congressman Cole of Kansas offered an amendment allegedly designed to protect retailers located in fair-trade states from competition from outside those states, and to prevent "raids on the part of mail order houses and cut rate retailers and wholesalers in non-fair-trade states." 98 Cong. Rec. 4952 (1952). That amendment, insofar as here relevant, provided:

> "Whenever by contract or agreement described in subsection (2) a stipulated or minimum resale price may be established for a commodity in any State, Territory, or the District of Columbia, where such a contract or agreement is lawful, it shall be an act of unfair competition, actionable at the suit of any person damaged thereby, to wilfully and knowingly, in interstate commerce (1) sell or (2) have transported for sale or resale or (3) *deliver pursuant to a sale,* or *otherwise deliver,* such commodity in any such State, Territory, or the District of Columbia, where such a contract or agreement is lawful, at less than the price or prices so established in such contract or agreement." 98 Cong. Rec. 4952 (1952) (Emphasis added.)

This amendment was vigorously opposed by Congressman Patman of Texas, who pointed out that a retailer located in a free-pricing jurisdiction like Texas would be prevented from selling to nearby customers who resided in a fair-trade state at less than the fair-trade prices maintained in the latter jurisdiction. 98 Cong. Rec. 4953 (1952). Such interference with the pricing policy of a retailer located in a free-pricing jurisdiction would be "entirely contrary to the [States' right] concept we have in advocating the McGuire bill." The Cole Amendment, he pointed out, would place "a burden upon the merchants in those States where they have no fair-trade law."

The Cole Amendment was rejected by the House of Representatives, which passed the McGuire Act in its present form. 98 Cong. Rec. 4956 (1952). However, in addition to criticism such as that of Congressman Patman, many Congressmen apparently opposed the Cole Amendment because it created a federal cause of action. See, *e.g.,* remarks of Congressman Harris, of Arkansas, 98 Cong. Rec. 4954 (1952). Hence the defeat of that Amendment can be ex-

plained on several grounds. Nevertheless, the absence of the controversial phrase, "(3) *deliver pursuant to a sale, or otherwise deliver*," quoted above, is support for my belief that the Congress intended that a retailer should be governed only by the fair-trade law of the jurisdiction in which he is located.[1]

[*Supporting Court Decisions*]

I also find authority for my position in court decisions. Prior to the passage of the McGuire Act, the Third Circuit had held that a resale by a retail mail order house located in Pennsylvania was not exempt from the Sherman Act, and therefore not within the reach of the Pennsylvania fair-trade law, if the resale was to a customer residing outside Pennsylvania. *Sunbeam Corp. v. Wentling* [1950-1951 TRADE CASES ¶ 62,739], 185 F. 2d 903 (3rd Cir. 1950). When Congress created the McGuire Act, it indicated that one of its express purposes was to "overrule" the *Wentling* decision, and to permit the individual states to apply their fair-trade laws to interstate shipments such as those involved in *Wentling*. See H. R. Rep. 1437, 82d Cong., 2d Sess. 6 (1952). And subsequent to the passage of the McGuire Act several courts have held that interstate shipments are within the reach of the fair-trade law of the state where the seller is located, thereby implying that the resale contemplated by the McGuire Act takes place in that state. See, *e.g., General Electric Co. v. Masters, Inc. (Raxor Corp. v. Goody)* [1954 TRADE CASES ¶ 67,776], 307 N. Y. 229, 120 N. E. 2d 802 (1954); *cert. denied,* 348 U. S. 863; *Sunbeam Corp. v. MacMillan* [1953 TRADE CASES ¶ 67,451], 110 F. Supp. 836 (D. Md. 1953).

To also permit the state of ultimate destination where the consumer resides to apply its fair-trade law to such interstate transactions as those now before us would logically require a holding that under the McGuire Act a resale can take place in *two* jurisdictions. It is my belief that the Congress did not intend that New York State can enforce its Feld-Crawford Act both against resident sellers, as has been done in *Raxor Corp. v. Goody,* and also against a nonresident seller as by the decision below. For such an anomalous result I find no authority in the language or history of the McGuire Act. In fact, its somewhat equivocal legislative history tends to support the opposite conclusion, that the seller is subject to the applicable law of but one state. See 98 Cong. Rec. 4952-54 (1952); *Revere Camera Co. v. Masters Mail Order Co.* [1955 TRADE CASES ¶ 67,981], 128 F. Supp. 457, 463 (D. Md. 1955); *Bissell Carpet Sweeper Co. v. Masters Mail Order Co.* [1956 TRADE CASES ¶ 68,326], 140 F. Supp. 165, 170-78 (D. Md. 1956), *aff'd* [1957 TRADE CASES ¶ 68,603], 240 F. 2d 684 (4th Cir. 1957).

[*State Fair Trade Act*]

In view of my understanding of the McGuire Act, I do not find that the New York Feld-Crawford Act has any applicability to the situation before us here. Congress, in passing the McGuire Act, exempted resale price maintenance agreements from the coverage of the federal antitrust laws by permitting the individual states to enact fair-trade legislation. But that exemption can be availed of only by the state that the McGuire Act designates as the state of resale, *i.e.,* the state where the retailer is located. Hence the New York Feld-Crawford Act, in my judgment, cannot be enforced against this defendant, located in the District of Columbia, on the facts in this case; and, as pointed out by Judge Clark, the fact that the defendant is owned by a resident of New York State does not make that Act any more applicable to it than if the defendant were owned by a resident of some other state.

[*Summary of Views*]

And I agree with Judge Clark that the New York contacts of the defendant stressed by the trial court also are irrelevant to our problem of construing the McGuire Act. Nor do I see any reason for treating the defendant as a mere dummy corporation for its New York parent. The defendant conducts an extensive retail business in Washington and must be regarded as a separate corporate entity selling the plaintiff's merchandise in that jurisdiction.

[1] This phrase was separable from the provisions of the Cole Amendment providing for a federal cause of action. Being so separable, it could easily have been inserted in the McGuire Act which leaves enforcement to the several states. It is a fair conclusion, therefore, that in situations where the transaction is in interstate commerce Congress did not intend to permit the state in which the goods are delivered to be able to enforce its local resale price maintenance statute.

Judge Clark interprets the language of the McGuire Act to make the resale price maintenance statute, if any, of the state where the title passes to goods sold in interstate commerce the only state statute applicable to the transaction. Such an interpretation of that Act permits sellers and buyers to "pick their own law," despite the law of the state where one or both of them may be located.

Clearly a sale or contract of sale can be made in one place and passage of title to the goods being sold may occur elsewhere. Moreover, the place where, or the time when, the title passes can be arranged at the will of the parties. Thus under the approach adopted by Judge Clark it would be possible, despite *Raxor v. Goody, supra,* for a seller located in a fair-trade jurisdiction to avoid the application of the fair-trade law of that state by arranging for title to pass in a non-fair-trade jurisdiction where the buyer was located. Or by agreement of the parties, even though both seller and buyer reside in the same or in different fair-trade jurisdictions, title to the goods being sold can be arranged to pass in a free pricing jurisdiction if the jurisdiction chosen has a direct and substantial relation to the transaction.

Judge Clark would point out that if my interpretation of the McGuire Act is adopted it will be difficult in future cases "to know how much paraphernalia a seller must have in a state to be 'located' there." Surely, realistic criteria for determining the location of a retailer will logically develop as the future cases may require that development. I would here hold only that *this* defendant-retailer is located within the District of Columbia and therefore beyond the reach of the fair trade law of New York. That is the issue before us to decide.

[Dissenting Opinion]

[*Injunction Proper*]

LUMBARD, Circuit Judge (dissenting):

I dissent for the reasons so well stated by Judge Bicks below, [1956 TRADE CASES ¶ 68,503] 145 F. Supp. 57 (S. D. N. Y. 1956). The sales complained of took place in New York and New York may prohibit them. Accordingly the district court had the power and the duty to enjoin these New York sales, offers to sell and advertising.

[*Evasion of State Law*]

Masters, Inc. of New York has frequently been before the New York courts for violation of the Feld-Crawford Act. In 1952, Masters, Inc. was enjoined from selling General Electric appliances below fair-traded prices [1952 TRADE CASES ¶ 67,382], 122 N. Y. S. 2d 14 (Sup. Ct. N. Y. 1952), and in 1953 was fined twice for violating the injunction. Not long thereafter, it set up in the District of Columbia (the nearest Metropolitan area without Fair Trade laws) a store which was separately incorporated, although wholly owned and controlled by Masters, Inc.

Despite the formal corporate separation, Masters, Inc. used the facilities of both the New York and Washington stores to exploit the New York market.[1] Thus, Masters, Inc. widely advertised that although it could not sell General Electric appliances at its New York store, it could and would sell them by mail order from Washington, D. C. When customers sought to buy the appliance at the New York store, they were again informed that the appliances could be obtained at the Washington store and order blanks were provided in New York; moreover the advertising mailed by Masters Mail Order of Washington, D. C., although posted in Washington, was prepared in New York from the mailing lists and other facilities of the New York office.

It seems to me that it would be difficult to imagine a clearer case of evasion of the New York law. Regardless of how we ought to treat the wholly independent out-of-state mail order house, it seems to me, with all due deference to my brethren, that that is not the case before us. Insofar as the sales in question are concerned, the many contacts with New York establish that for all practical purposes the Masters organization is in the same position as a New York seller with an out-of-state warehouse and office staff. If we ignore that, and look only to such easily arranged formalities as separate incorporation, title passage and where the article is mailed, we merely facilitate the emasculation of fair trade by any discount house large enough to be able to afford such

[1] Masters Mail Order of Washington, D. C. did most of its business in across the counter sales, but I think that that is immaterial to the issues before us since our concern is only with the substantial mail-order sales to the New York market.

arrangements.[2] These formalities may be material in other contexts, but they should not be given controlling significance here.

[*Congressional Policy*]

We must not forget that Congress has twice indicated—the second time despite strong opposition—that the states are to be allowed to prevent price-competition among those selling branded products in the home market. See H. R. Rep. No. 1516, 82d Cong. 2d Sess. (1952). This was to avoid damage to the good will of the manufacturer in the eyes of local consumers and to protect local small businessmen against the price-cutting powers of the large firms. See *id.* at 12, 10. The defendant's activities have frustrated and will continue to frustrate both purposes in the New York market unless they are enjoined.[3]

[¶ 68,716] United States v. McKesson & Robbins, Incorporated.

In the United States District Court for the Southern District of New York. Civil Action No. 76-50. Filed May 15, 1957.

Case No. 1130 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Resale Price Fixing and Fair Trade—Consent Decree—Practices Enjoined—Resale Price Agreements Between Competitors—Dual Functioning Company—Refusal To Sell—Manufacturer-Wholesaler of Drugstore Merchandise.—A manufacturer-wholesaler of drugstore merchandise was prohibited by a consent decree from (1) entering into any understanding with any wholesaler of drugstore merchandise whereby it is agreed that the wholesaler will maintain minimum prices fixed by the manufacturer-wholesaler for sales to retailers of the brand products of the manufacturer-wholesaler, or whereby it is agreed that the wholesaler will sell such brand products only to retailers who agree to maintain minimum resale prices, (2) inducing any wholesaler to maintain minimum wholesale prices fixed by the manufacturer-wholesaler for its brand products or to require retailers to whom the wholesaler resells such brand products to enter into agreements fixing minimum retail prices, or (3) refusing to sell such brand products to any wholesaler because the wholesaler has not agreed to maintain or has failed to maintain minimum wholesale prices for such brand products or because the wholesaler has not required retailers to enter into agreements fixing minimum resale prices.

See Resale Price Fixing—Fair Trade, Vol. 1, ¶ 3015.70, 3015.80, 3100; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8421.

For the plaintiff: Victor R. Hansen, Assistant Attorney General, Department of Justice, and Homer W. Hanscom, Attorney, Department of Justice.

For the defendant: Hodges, Reavis, McGrath & Downey, by Denis B. Sullivan, New York, N. Y.

For a prior decision of the U. S. Supreme Court, see 1956 Trade Cases ¶ 68,368, reversing a decision of the U. S. District Court, Southern District of New York, 1955 Trade Cases ¶ 68,066; for an earlier decision of the District Court, see 1954 Trade Cases ¶ 67,805.

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[2] Stress on title passage seems to me to be particularly unfortunate, for that would allow even a wholly in-state retailer to evade his state's fair trade law when selling to an out-of-state consumer by merely arranging that title pass in a free-trade state with some relevant contacts.

[3] *Bissell Carpet Sweeper Co. v. Masters Mail Order Co. of Washington, D. C.* [1956 TRADE CASES ¶ 68,326], 140 F. Supp. 165 (D. C. Md. 1956), aff'd [1957 TRADE CASES ¶ 68,603] 240 F. 2d 684 (4 Cir. 1957) does not seem to me to be persuasive authority for a contrary result as to the McGuire Act since that dealt primarily with the Maryland statute. Nor is the decision of much assistance in construing the Feld-Crawford Act, for despite the similarity of language between the Maryland and New York acts, the New York legislature and the New York courts have already firmly indicated an intent to protect the home market as much as possible. See *Raxor Corp. v. Goody* [1954 TRADE CASES ¶ 67,776], 307 N. Y. 229 (1954), cert. denied, 348 U. S. 863 (1954) and *Eastman Kodak Co. v. Masters, Inc.* [1956 TRADE CASES ¶ 68,351], 153 N. Y. S. 2d 433 (Sup. Ct. N. Y. 1956). Moreover, in *Bissell* we do not have the many contacts by the seller with the fair trade state which make the transactions before us sales in New York for all practical purposes.

Final Judgment

WILLIAM B. HERLANDS, District Judge [*In full text*]: The judgment of this Court entered June 6, 1955 dismissing the complaint in this action having been reversed by the United States Supreme Court on June 11, 1956, and that Court having remanded the action to this Court for further proceedings not inconsistent with its opinion; and the defendant without waiting for a further order of this Court having cancelled and terminated the resale price maintenance contracts covering its brand products which it had heretofore entered into with wholesalers;

Now, on the subjoined consent of counsel for the respective parties hereto, it is hereby Ordered, Adjudged and Decreed:

I.

[*Resale Price Fixing*]

The defendant is perpetually enjoined from entering into any combination, contract, agreement or understanding, express or implied, with any wholesaler of drugstore merchandise whereby it is agreed or understood that the wholesaler will maintain or adhere to prices or minimum prices fixed by defendant, or agreed upon between defendant and said wholesaler, for sales to retailers or other purchasers of defendant's brand products, or whereby it is agreed or understood that the said wholesaler will sell defendant's brand products only to retailers who agree to maintain fixed or minimum resale prices.

II.

[*Inducements*]

The defendant is perpetually enjoined from inducing, persuading, or causing any wholesaler to maintain minimum wholesale prices fixed or suggested by defendant for its brand products, or to require retailers to whom said wholesaler resells defendant's brand products to enter into agreements or understandings with the defendant or with such wholesaler fixing minimum retail prices for the sale of defendant's brand products.

III.

[*Refusal To Sell*]

The defendant is perpetually enjoined from refusing to sell its brand products to any wholesaler because said wholesaler has not agreed to maintain, or has failed to maintain minimum wholesale prices fixed or suggested by defendant for its brand products or because said wholesaler has not required or attempted to require retailers to whom it resells said products to enter into agreements or understandings with it, or with the defendant, fixing minimum resale prices.

IV.

[*Costs*]

Judgment is entered against the defendant for all taxable costs in this proceeding.

V.

[*Inspection and Compliance*]

For the purpose of securing compliance with this Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant, made to the principal office of the defendant, be permitted (1) access during the office hours of the defendant to books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the defendant relating to any matter contained in this Judgment and (2) subject to the reasonable convenience of the defendant and without restraint or interference from it to interview officers and employees of the defendant, who may have counsel present, regarding any such matters. No information obtained by the means provided in this Section V shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment or as otherwise required by law.

VI.

[*Jurisdiction Retained*]

Jurisdiction of this cause is retained for the purpose of enabling the plaintiff and the defendant to apply to the Court at any time for such further orders and directions

as may be necessary or appropriate for the construction or carrying out of this judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

[¶ 68,717] Bissell Carpet Sweeper Company v. Shane Company, Inc.

In the Supreme Court of Indiana. November Term, 1956. No. 29,327. Filed May 22, 1957.

Appeal from the Superior Court of Marion County. Honorable HEZZIE B. PIKE, Judge.

Indiana Fair Trade Act

Fair Trade—Constitutionality of Indiana Fair Trade Act—Nonsigner Provision—Delegation of Legislative Power—Legislative Power To Fix Prices—Indiana Constitution. —The nonsigner provision of the Indiana Fair Trade Act was held unconstitutional on the ground that private persons are delegated the power to fix prices binding upon persons who have not signed fair trade contracts. The Indiana Constitution provides that the legislative authority of the State shall be vested in the Indiana General Assembly.

According to the majority opinion, in this 4 to 1 decision, "The General Assembly has no right to abdicate its legislative power to private persons, nor could it even delegate to a governmental agency the power to find what might be a reasonable price without proper safeguards and procedural due process."

However, according to a concurring opinion, in which two of the majority justices concurred, the legislature does not have the power to fix the prices at which general commodities of trade may be sold in Indiana, and, therefore, the legislature cannot lawfully delegate such authority to a governmental agency, even with proper "safeguards and procedural due process."

Also, it was stated in the majority opinion that "By the Fair Trade Act, the General Assembly has removed the ban of the common law, as well as the acts concerning restraints of trade and monopolies which prohibited vertical price fixing by agreements or contract[s] between buyers and sellers, but he who seeks to take advantage of the Fair Trade Act will have to base his action on a breach of his contract, or a breach of contract made for his benefit, or on a tortious inducement of a breach of such a contract."

See Fair Trade, Vol. 1, ¶ 3085.16, 3258.

For the appellant: Bernard Landman, Jr., and Charles B. Feibleman (Bamberger & Feibleman, of counsel), Indianapolis, Ind.

For the appellee: Paul T. Rochford, Paul E. Blackwell, and John J. Rochford (Rochford, Blackwell & Rochford, of counsel), Indianapolis, Ind.

For *Amicus Curiae:* R. Stanley Lawton, Wesley A. Dierberger, and Alan H. Lobley (Ross, McCord, Ice & Miller, of counsel), Indianapolis, Ind., for General Electric Company. Richard S. Melvin, Gary, Ind. (Thomas A. Rothwell, Chicago, Ill., of counsel), for American Fair Trade Council, Inc., Hamilton Manufacturing Corp., Indiana Retail Hardware Assn., South Bend Bait Company, The Anderson Company, The Magnavox Company, and The Pinex Company, Inc.

EMMERT, Justice [*In full text*]: This is an appeal from a judgment entered for failure of appellant to amend and plead over after a demurrer had been sustained to its complaint.

Appellant, a Michigan corporation, alleged by its complaint it manufactured carpet sweepers, which had thereon its trade-mark "Bissell Carpet Sweeper Company," which were sold in open competition in Indiana "with merchandise in the same general class produced by others"; that appellee was engaged in the retail business in the city of Indianapolis; that appellant had entered into voluntary contracts with certain retailers including H. P. Wasson & Co., pur-

suant to the Indiana Fair Trade Act which established minimum prices for its carpet sweepers throughout the state; that the appellee did not execute any "such contract to establish such minimum resale prices," but that prior to the filing of the complaint appellant gave written notice to the appellee that such contracts were in existence, but that appellee wilfully and knowingly offered for sale and did sell the carpet sweepers at less than the minimum prices established by appellant's contract, and that the sale did not come within any of the exceptions provided for in § 5 of the Fair Trade Act. The demurrer for want of facts questioned the constitutional powers of the General Assembly to prohibit the appellee from selling Bissel Carpet Sweepers at less than the price established by the appellant with its contract retailers.

[*Indiana Fair Trade Act*]

The Fair Trade Act, Ch. 17 of the 1937 Acts (§ 66-301 to 66-309, Burns' 1951 Replacement), is limited to commodities using a trade-mark, brand or name, of a producer or distributor, and sold in free and open competition with commodities of the same general class produced or distributed by others. Section 66-302, Burns' 1951 Replacement, declares valid contracts between a seller and a buyer, or a series of contracts between successive sellers and buyers for sale at wholesale or retail, requiring the ultimate retailers to contract not to sell the commodities at less than the fair trade price established by the original seller. A could sell to B with B contracting he would not sell at retail below the price fixed by A, or with B contracting that if he sold to retailer C he would require of C a contract not to sell at retail below the price fixed by A, or if C sold to D for resale, he would require of D a similar provision for the benefit of A, who would fix the minimum retail price. Thus, the fair trade price required of the ultimate retailer could be established by contract, or a series of subsequent contracts for the benefit of the first seller establishing the fair trade price. The ultimate retailer would be bound because of his contract, and not because a statute said he should be bound when he did not consent.

[*Sherman Act*]

The price fixing authorized by this section is somewhat similar to the factual situation in *Dr. Miles Medical Co. v. Park & Sons Co.* (1911), 220 U. S. 373, 31 S. Ct. 376, 55 L. Ed. 502. The Court, in an opinion by Mr. Justice Hughes, summarized the contracts by saying they provided "a system of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or sub-purchasers, and thus to fix the amount which the consumer shall pay, eliminating all competition." (220 U. S. at 399.) The Court held the contracts were an invalid restraint of trade both at common law and under the Sherman Anti-Trust Act of July 2, 1890.

[*State Power*]

It is within the power of the General Assembly to change the common law rule in Indiana, and to except fair trade price fixing by contracts between buyers and sellers from the various provisions of the restraint of trade acts of this state.

[*Schwegmann Decision*]

The Miller-Tydings Act of 1937 (15 U. S. C. A. § 1) amended the Sherman Anti-Trust Act and the Federal Trade Commission Act to make lawful price fixing contracts in interstate commerce if they were lawful in intrastate commerce. In *Schwegmann Bros. v. Calvert Distillers Corp.* (1951) [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384, 71 S. Ct. 745, 95 L. Ed. 1035, it was held price fixing by compulsion was not validated by the Act. The Court clearly noted the distinction by the following language:

> "* * * If a distributor and one or more retailers want to agree, combine, or conspire to fix a minimum price, they can do so if state law permits. Their contract, combination, or conspiracy—hitherto illegal—is made lawful. They can fix minimum prices pursuant to their contract or agreement with impunity. When they seek, however, to impose price fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different. That is not price fixing by contract or agreement; that is price fixing by compulsion. That is not following the path of consensual agreement; that is re-

sort to coercion." (341 U. S. at 388, 95 L. Ed. at 1045.) [1]

[*Nonsigner Provision*]

The appellant Bissell bases its cause of action on § 6 of the Fair Trade Act, which states:

> "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this act [§§ 66-301—66-309], whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." Section 66-306, Burns' 1951 Replacement [Acts 1937, ch. 17, § 6, p. 53].

The complaint specifically alleges the appellee Shane was not a party to any contract to fix the retail price. It fails to allege from whom Shane purchased the sweepers or when they were purchased. For all that was alleged, Shane could have purchased them in Michigan where fair trade price fixing is illegal. *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.* (1952) [1952 TRADE CASES ¶ 67,303], 334 Mich. 109, 54 N. W. 2d 268; *Argus Cameras v. Distributors* (1955) [1955 TRADE CASES ¶ 68,151], 343 Mich. 54, 72 N. W. 2d 152. Appellant's position is that wilfully and knowingly selling and offering for sale Bissell's sweepers at prices less than fixed by Bissel after notice of the contracts to which Shane was not a party entitled Bissel to relief.[2]

[*Legislative Policy*]

We are not at liberty to substitute our judgment for that of the General Assembly as to whether price fixing is good or bad for the economic life of the state. Conceivably, in a time of depression the benefits might outweigh the disadvantages, while the converse may be true in a time of prosperity or inflation. But the Indiana Constitution on separation of powers and the vesting of the right to enact laws in the General Assembly have the same meaning whatever may be the business or economic conditions of the State.

[*Utility Rates*]

The right to fix a utility rate, which is price fixing for the service, is a legislative act. *State ex rel. Evansville etc. Lines v. Rawlings* (1951), 229 Ind. 552, 99 N. E. 2d 597, and authorities therein cited. After the Legislature has enacted that the rates be just and reasonable, it can delegate to an administartive commission the duty of finding as a fact what charge would be just and reasonable, but the commission does not make a law. The law operates on the facts found by the commission under proper standards and after a hearing. The rate is legislative in character because it makes a rule for the future, and binds both the utility and the users of its services whether they consent or not. *Prentis v. Atlantic Coast Line Co.* (1908), 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150; *Chicago, etc. R. Co. v. Railroad Comm.* (1911), 175 Ind. 630, 643, 95 N. E. 364; *In re Northwestern Indiana Tel. Co.* (1930), 201 Ind. 667, 684, 171 N. E. 65. Both the Legislature and the commission exercise a sovereign power of government.

[*Delegation of Legislative Authority*]

A fortiori, § 66-306, Burns' 1951 Replacement, is broad enough to vest a legislative power to fix prices in private persons. But the Constitution says "The Legislative authority of the State shall be vested in the General Assembly . . ." Article 4, Section 1. The power to legislate or to exercise a legislative function cannot be delegated to a non-governmental agency or person. *Tucker v. State* (1941), 218 Ind. 614, 697, 698, 35 N. E. 2d 270.[3] Nor can

[1] The McGuire Act of 1952 (15 U. S. C. A. § 45, 1956 Supp.) made lawful in interstate commerce state fair trade price fixing imposed by state law on persons not parties to a contract if the restriction be valid under state law. See Resale Price Maintenance by Carl H. Fulda (1954), 21 U. of Chicago Law Rev. 175-211. For review of state decisions see Bates, Constitutionality of State Fair Trade Acts (1957), 32 Ind. L. J1.127-149.

[2] The contract signed by H. P. Wasson & Co., provided:

"We will not sell sweepers bearing Bissell's trade-marked model names at less than the applicable Fair Trade minimum retail prices at the time of such sales. (See other side for present price list. Such Fair Trade minimum retail prices are subject to change by Bissell at its election). (This paragraph does not apply any place where Fair Trade agreements are not permitted by law.)

[3] ". . . but it is unthinkable that the Legislature may have discretion to vest a part of the sovereign power in some agency outside the government, as set up and established by the Constitution." *Tucker v. State* (1941), 218 Ind. 614, 697, 35 N. E. 2d 270.

the Legislature delegate its law making power to a governmental officer, board, bureau or commission. *Langenberg v. Decker* (1892), 131 Ind. 471, 479, 31 N. E. 190, 16 L. R. A. 108; *Blue v. Beach* (1900), 155 Ind. 121, 133, 56 N. E. 89, 50 L. R. A. 64; *Sarlls, Clerk v. State ex rel. Trimble* (1929), 201 Ind. 88, 110, 166 N. E. 270, 67 A. L. R. 718; *Edwards v. Housing Authority of City of Muncie* (1939), 215 Ind. 330, 339, 19 N. E. 2d 741; *Financial Aid Corp. v. Wallace* (1939), 216 Ind. 114, 120, 33 N. E. 2d 472; *Hollingsworth v. State Board of Barber Examiners* (1940), 217 Ind. 373, 377, 28 N. E. 2d 64; *Town of Kirklin v. Everman* (1940), 217 Ind. 683, 693, 29 N. E. 2d 206. We are not concerned with a statute which places upon an official a duty to execute a law made by the Legislature, or where the law fixes a reasonable and fair rate, price or charge and delegates to a governmental agency the power to find as a fact what is reasonable and fair under proper standards. See *Albert v. Milk Control Board of Ind.* (1936), 210 Ind. 283, 300, 200 N. E. 688.

Section 66-306, Burns' 1951 Replacement, goes far beyond the codes of fair competition authorized by the National Industrial Act of 1933 (15 U. S. C. 703). In *Schechter Corp. v. United States* (1935) [1932-1939 TRADE CASES ¶ 55,072], 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947, a Code of Fair Competition for the Live Poultry Industry in the Metropolitan Area of New York was held unconstitutional because Congress could not abdicate its law making power to a trade association or to the President. No standards were prescribed for any trade, industry or activity. It laid down no rules for administrative fact finding. Mr. Justice Cardozo noted this was "delegation running riot." Section 6 of the Fair Trade Act has no requirement for any governmental action by any public officer to establish a coercive price binding on any seller covered by the act.

The decision in *Old Dearborn Co. v. Seagram Corp.* (1936) [1932-1939 TRADE CASES ¶ 55,141], 299 U. S. 183, 57 S. Ct. 139, 81 L. Ed. 109, 106 A. L. R. 1476, has been cited in other states for the proposition that fair trade acts do not attempt legislative price fixing by private persons. Section 1 of the Illinois Act was similar to § 2 of the Indiana Act and authorized parties to contract for vertical price fixing from the original seller to the ultimate retailer. Concerning this part of the Illinois Act the court said:

> "* * * It is clear that this section does not attempt to fix prices, nor does it delegate such power to private persons. It *permits* the designated private persons to contract with respect thereto. It contains no element of compulsion but simply legalizes their acts, leaving them free to enter into the authorized contract or not as they may see fit. Thus far, the act plainly is not open to objection; and none seems to be made." (299 U. S. at 192.)[4]

In the *Dearborn* Case, *supra*, the court carefully excluded any determination of the validity of the Illinois statute under the Fourteenth Amendment in a case where the retailer purchased the goods in ignorance of the fair trade contract.[5] From an examination of the facts as stated in this opinion, and the opinion by the Supreme Court of Illinois in *Seagram Corp. v. Old Dearborn Co.* (1936), 363 Ill. 610, 2 N. E. 2d 940, the retailer, the Old Dearborn Co., purchased

[4] The court recognized the general rule the owner of property has the right to sell it at a price he will accept.

"*First*. In respect of the due process of law clause, it is contended that the statute is a price-fixing law, which has the effect of denying to the owner of property the right to determine for himself the price at which he will sell. Appellants invoke the well-settled general principle that the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth and Fourteenth Amendments. *Tyson & Brother v. Banton*, 273 U. S. 418, 429; *Wolff Co. v. Industrial Court*, 262 U. S. 522, 537; *Ribnik v. McBride*, 277 U. S. 350; *Williams v. Standard Oil Co.*, 278 U. S. 235; *New State Ice Co. v. Liebmann*, 285 U. S. 262. These cases hold that, with certain exceptions, which need not now be set forth, this right of the owner cannot be denied by legislative enactment fixing prices and compelling such owner to adhere to them. But the decisions referred to deal only with legislative price fixing. They constitute no authority for holding that prices in respect of 'identified' goods may not be fixed under legislative leave by contract between the parties. The Illinois Fair Trade Act does not infringe the doctrine of these cases." *Old Dearborn Co. v. Seagram Corp.* (1936) [1932-1939 TRADE CASES ¶ 55,141], 299 U. S. 183, 191, 192, 57 S. Ct. 139, 81 L. Ed. 109, 106 A. L. R. 1476.

[5] "We are not called upon to determine the case of one who has made his purchase in ignorance of the contractual restriction upon the selling price . . ." *Old Dearborn Co. v. Seagram Corp.* (1936) [1932-1939 TRADE CASES ¶ 55,141], 299 U. S. 183, 193, 57 S. Ct. 139, 81 L. Ed. 109, 106 A. L. R. 1476.

the whiskey from a wholesaler knowing the wholesaler was required to obtain fair trade contracts for its sales to retailers.[6] The Supreme Court said, "Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it." (299 U. S. at 194.) Although the opinion did not take note of it, the Old Dearborn Co., in fact was committing a tort by inducing a breach of a distributor's contract to Seagram Corp.[7] 4 *Restatement, Torts* § 766. See also Prosser, *Handbook of the Law of Torts* (1941), Ch. 20, § 104.

[*Inducement To Breach Contract*]

It is within the power of the Legislature to declare such inducement to breach a contract unfair competition and actionable. In so far as § 66-306, Burns' 1951 Replacement, authorizes this, it is constitutional. The duty breached was not one created by the legislative act of two parties to a contract fixing a price binding upon every retailer of the goods whether or not he knew he was inducing a breach of the contract, or whether or not he purchased the goods from one under no contract obligation to require a fair trade contract from the retailer. Under the particular facts in the *Old Dearborn Co.* case the court held the Old Dearborn Co. could not complain that the Fourteenth Amendment prohibited the injunction against it.

[*Abdication of Power*]

But in the appeal at bar the complaint and the contracts fail to show anything more than attempted legislative price fixing by a contract between the manufacturer and various retailers in the State of Indiana, with no allegation that the appellee Shane ever entered into a contract to sell the sweepers at fair trade prices, or that it induced the breach of contract between Bissell and another party, or that Shane did not acquire the goods in some state, such as Michigan, where such fair trade contracts are held in restraint of trade and void. The complaint rests upon the naked proposition that private parties by contract can make a law binding upon everyone who retails the goods manufactured by Bissell. It is urged that the Fair Trade Act does no more than give an additional property right in a trade-mark. But if this is to be done, it must be accomplished pursuant to the Indiana Constitution. The General Assembly has no right to abdicate its legislative power to private persons, nor could it even delegate to a governmental agency the power to find what might be a reasonable price without proper safeguards and procedural due process.[8]

[*Title of Act*]

It is not necessary here to decide what might be proper subjects for legislative price fixing under the Indiana Constitution. And in view of the reasoning of this opinion, it becomes unnecessary to determine whether the construction of § 6 of the Fair Trade Act (§ 66-306, Burns' 1951 Replacement) urged by Bissell would be without the title of the Act,[9] and therefore void under § 19 of Article 4 of the Indiana Constitution.[10]

[6] The contracts between Seagram and its distributors provided: "Third. Distributor will require from each Retailer to whom he may sell any such beverages a written agreement, upon forms furnished by the Owner [Seagram], that such Retailer in turn will not resell, advertise, or offer for sale the said beverages below minimum prices stipulated from time to time by Owner for resale thereof to Consumers." Printed Record, Sup. Ct. of U. S. pp. 18-19.

[7] "Appellant was also a party to breaches of other fair trade contracts between appellee and certain distributors . . ." *Ibid*, 299 U. S. 187.

[8] "The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'" Chief Justice Hughes in *Morgan v. United States* (1938), 304 U. S. 1, 14, 15, 58 S. Ct. 773, 775, 82 L. Ed. 1129, 1130, 1131.

[9] The title is: "An act to protect trade-mark owners, producers, distributors and the general public against injurious and uneconomic practices in the distribution of competitive commodities bearing a distinguishing trade-mark, brand or name, through the use of voluntary contracts establishing minimum resale prices and providing for refusal to sell unless such minimum resale prices are observed."

[10] "* * * But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." Section 19, Art. 4, Constitution of Indiana.

[*Right to Relief*]

By the Fair Trade Act, the General Assembly has removed the ban of the common law, as well as the acts concerning restraints of trade and monopolies which prohibited vertical price fixing by agreements or contract between buyers and sellers, but he who seeks to take advantage of the Fair Trade Act will have to base his action on a breach of his contract, or a breach of contract made for his benefit, or on a tortious inducement of a breach of such a contract. This the complaint did not do, and the demurrer was properly sustained.

Judgment affirmed.

BOBBITT, J. concurs specially with separate opinion in which ACHOR, C. J., and ARTERBURN, J., concur.

LANDIS, J., dissents with opinion.

Opinion Concurring in Part

[*Delegation of Power—Right To Fix Prices*]

BOBBITT, Justice.

I concur in the result of Judge Emmert's opinion and with his reasoning as it pertains to the fixing of prices by contract between buyers and sellers who are parties to such contracts.

However, I do not concur in his reasoning pertaining to certain provisions of Section 6 of the Fair Trade Act.

The following statement appears in Judge Emmert's opinion:

> "The General Assembly has no right to abdicate its legislative power to private persons, nor could it even delegate to a governmental agency the power to find what might be a reasonable price without proper safeguards and procedural due process."

I do not want to be understood as concurring in, or lending any support to, the inference which must, in my opinion, necessarily be drawn from this language, that the Legislature has the power to delegate to a State Agency, Board or Commission, the authority to fix the price of carpet sweepers or any other commodity of trade or commerce on the open market.

In my opinion the Legislature does not have the power to fix the price at which carpet sweepers may be sold in Indiana, and it must follow that it cannot lawfully delegate such authority to a governmental agency, even with proper "safeguards and procedural due process." *Dept. of Financial Institutions v. Holt, etc.* (1952), 231 Ind. 293, 303-304, 108 N. E. 2d 629.

It is, of course, true, as stated in the opinion, that the fixing of a utility rate is a legislative act; and that the Legislature can, and does, delegate to an administrative commission the authority to fix public utility rates within the bounds of certain standards set by the Legislature. However, it does not follow that the source of such power also furnishes the authority to fix standards for, and delegate to, an administrative commission the authority to fix prices for general commodities of trade and commerce.

The Legislature derives its power to fix and regulate utility rates from the fact that such businesses are affected with a public interest and their property is devoted to public use. Such power is inherent in the State and is an attribute of sovereignty, having its origin in the police power.

The supervision and regulation of public utilities by the Legislature is designed to supply the missing element of competition which protects the public from excessive charges in competitive businesses. *Public Service Commission v. Indiana Bell Telephone Co.* (1955), 235 Ind. 1, 130 N. E. 2d 467, 481. Such reason for supervision and regulation (price fixing) is not present where there is open competition in a business such as the manufacture and sale of carpet sweepers.

The right of an individual to engage in a lawful business and to fix the price at which he disposes of his own property is a part of his inalienable right to "liberty and the pursuit of happiness", and is guaranteed by both our State and Federal Constitution.[1]

[*Public Policy*]

The lack of constitutional power of the Legislature to fix prices by law or delegate such power must be, in this case, distinguished from the right of the Legislature to broaden the contracting powers of individuals and corporations thus permitting them

[1] See Vol. 32, No. 2, p. 127, Ind. L. J. (1957), for a comprehensive discussion of the Constitutionality of State Fair Trade Acts.

to enter into multiple agreements to fix prices. At common law such contracts were against public policy because they were considered monopolistic and in restraint of trade. The Legislature determines the public policy of the State, and in the exercise of this power it may, by statute, modify or change the rule at common law and enlarge the scope of contractual powers of individuals and corporations.

I would affirm the judgment of the trial court.

ACHOR, C. J. and ARTERBURN, J. CONCUR.

Dissenting Opinion

LANDIS, Justice.

I cannot agree with the opinion of the court written by Emmert, J., which holds the Fair Trade Law of Indiana is an unconstitutional delegation of legislative power and an infringement of due process in violation of Article 4, § 1 and Article 1, § 12 of the Indiana Constitution.

[*Federal and State Constitutions*]

The opinion, in my view, means that we have one theory of separation of powers and due process under the Federal Constitution and a different and distinct doctrine of separation of powers and due process under the Indiana Constitution.

The language employed in the two constitutional documents is identical for our purposes, the Constitution of the United States and of Indiana providing respectively as to the separation of legislative powers: "All legislative *powers* * * * shall be vested in a congress,"[1] and "The Legislative *authority* * * * shall be vested in the General Assembly."[2, 3] (Italics added.) Similarly, the expressions "due process of law" under the U. S. Constitution[4] and "due course of law" under the Indiana Constitution[5] have been considered of like import and used interchangeably.[6]

[*Dr. Miles Case*]

To consider the authorities cited in the opinion of the court, we note the court first places reliance on the 1911 decision of *Dr. Miles Medical Co. v. Park & Sons Co.* (1911), 220 U. S. 373, 31 S. Ct. 376, 55 L. Ed. 502, which held the restrictive contracts there involved to be an illegal restraint of trade under the common law and the Sherman Anti-Trust Act of 1890. Everyone concedes the early conflict between Fair Trade and restraint of trade, and similarly everyone now concedes that such conflict was removed by the Miller-Tydings Act of 1937[7] (at least as to contract-signers) as to matters in inter-state commerce. The Indiana Fair Trade Act of 1937[8] similarly amended the Indiana Anti-Trust Act of 1897[9] so as to remove the conflict with restraint of trade within the state.

Any application of the *Dr. Miles* case, *supra*, to the case before us has therefore been removed by statute.

[*Schwegmann Case*]

The next case relied upon in the opinion of the court has similarly been rendered ineffective and inapplicable by a subsequent statute. It is *Schwegmann Bros. v. Calvert Corp.* (1951) [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384, 71 S. Ct. 745, 95 L. Ed. 1035, (hereinafter referred to as the first *Schwegmann* case) which decided that Fair Trade contracts with non-signer provisions were in violation of federal anti-trust laws, since the Miller-Tydings Act of 1937 providing exemption from anti-trust laws did not apply to non-signer contract provisions. This statutory deficiency of the Miller-Tydings Act was shortly afterwards remedied by the McGuire Act of 1952[10] specifically exempting Fair Trade agreements from federal anti-trust laws as to both signers and non-signers, and the opinion of the court in the case at bar concedes this in

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[1] Article 1, § 1 of Constitution of the United States.

[2] Article 4, § 1 of Constitution of Indiana.

[3] There is no distinction between the words "power" and "authority", and the two constitutional provisions for our purposes here are entirely synonymous. Webster's New International Dictionary (Second Edition) Unabridged, p. 1936, defines "power" as follows: "*Law.* In general, authority, capacity, or right; * * * esp., authority or right to do or forbear derived by one person from another * * *."

[4] Fifth and Fourteenth Amendments, Constitution of the United States.

[5] Article 1, § 12, Constitution of Indiana.

[6] See: *Albert v. Milk Control Board of Ind.* (1936), 210 Ind. 283, 200 N. E. 688.

[7] 15 U. S. C. A. § 1.

[8] Burns' Indiana Statutes, § 66-301 and *seq.*, 1951 Replacement, being Acts 1937, ch. 17, §§ 1-10.

[9] Burns' Indiana Statutes, § 23-101, 1950 Replacement, being Acts of 1897, ch. 104, § 1, p. 159, *et seq.*

[10] 15 U. S. C. A. § 45, 1956 Supplement.

a footnote.[11] In considering the first *Schwegmann* case, *supra,* it should also be noted that such case did not specifically discuss any constitutional questions.[12]

[*Old Dearborn Case*]

The unquestioned landmark case in the federal courts on the constitutionality of the Fair Trade is *Old Dearborn Co. v. Seagram Corp.* (1936) [1932-1939 TRADE CASES ¶ 55,141], 299 U. S. 183, 57 S. Ct. 139, 81 L. Ed. 109, 106 A. L. R. 1476, which involved the Fair Trade Act of Illinois.

In that case appellee Seagram, a Delaware corporation, was a wholesale dealer in alcoholic beverages in Illinois. Appellant operated four retail liquor stores in Chicago, *but did not purchase any of the whiskey in controversy from appellee.* Appellant's charter powers included sales at both wholesale and retail.

In the *Old Dearborn* case the challenge was directed against § 2 of the Illinois act which provided that wilfully and knowingly advertising, offering for sale, and selling any commodity at less than stipulated in any contract made under the act, *whether the person doing so is or is not a party to the contract,* shall constitute unfair competition, giving rise to a right of action in favor of anyone damaged thereby. In *Old Dearborn* there was no contractual liability shown on the part of appellant, and the U. S. Supreme Court in a unanimous opinion by Mr. Justice Sutherland upheld the constitutionality of the Illinois Fair Trade Act, as against the contentions that the act violated due process and was an unlawful delegation of legislative power.

The majority opinion in the case before us attempts to distinguish the facts of *Old Dearborn* from the case at bar.

The evidence in *Old Dearborn* indicated the Old Dearborn Company purchased some of the whiskey in controversy from persons under Fair Trade contract with others, and also purchased whiskey from persons not signatories to such contracts.[13] Any attempted distinction from the case at bar on this point is inconclusive as it did not appear in the case before us, where appellee Shane obtained the merchandise in question.

The observation of the majority in the case before us that, although the U. S. Supreme Court "did not take note of it" *Old Dearborn* in fact "was committing a tort by inducing a breach of a distributor's contract to Seagram Corporation" is an attempted limitation of *Old Dearborn* upon a basis that did not sufficiently impress the U. S. Supreme Court for it to express itself on the subject. Not only did *Old Dearborn* procure whiskey from contract signers and non-signers, so as to preclude any possibility of an induced breach of contract as to the latter, but even as to the former we cannot arbitrarily say there was a tort committed by *Old Dearborn.* Before we can conclude *ex parte* that *Old Dearborn* committed torts in inducing breaches of contract not at issue in that case, we should note that there are many situations where a defendant may be legally privileged to induce a breach of contract and thus not be answerable in tort.[14]

The majority's attempted limitation of *Old Dearborn* to cases of contractual liability or inducing a tort is a strained con-

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[11] See footnote 1 of opinion of the court in case at bar.

[12] See: Circuit Court of Appeals opinion to this effect in:

Schwegmann Bros. Giant Super Mkts. v. Eli Lilly & Co. (1953), C. A. 5th Cir. [1953 TRADE CASES ¶ 67,516] 205 F. 2d 788, (cert. den.) 346 U. S. 856, 74 S. Ct. 71, 98 L. Ed. 369, (reh. den.) 346 U. S. 905, 74 S. Ct. 217, 98 L. Ed. 404, (hereinafter referred to as the second *Schwegmann* case.)

[13] See: Printed Abstract of Record, U. S. Supreme Court, Vol. 7, Part 1, pp. 51, 52.

[14] For example, if a defendant has a present, existing economic interest to protect, such as the ownership or condition of property, or a prior contract of his own, or a financial interest in the affairs of the person persuaded, he is privileged to prevent performance of the contract of another which threatens it.

See: *Diver v. Miller* (1929), 4 W. W. Harr., Del., 207, 148 A. 291; *O'Brien v. Western Union Telegraph Co.,* (1911), 62 Wash. 598, 114 P. 441; *Winters v. University Dist. Bldg. & Loan Ass'n* (1932), 268 Ill. App. 147; *Meason v. Ralston Purina Co.,* (1940), 56 Ariz. 291, 107 P. 2d 224; *W. T. B. & T, Soc., Aplnt. v. Dougherty et al.* (1940), 337 Pa. 286, 11 A. 2d 147; *Owen v. Williams* (1948), 322 Mass. 356, 77 N. E. 2d 318, 9 A. L. R. 2d 223; *Tidal Western Oil Corporation v. Shackelford* (1927), Tex. Civ. App., 297 S. W. 279; *Williams v. Adams,* (1937), 250 App. Div. 603, 295 N. Y. S. 86, 275 N. Y. 653; *Quinlivan v. Brown Oil Co. et al.* (1934), 96 Mont. 147, 29 P. 2d 374; *Millers Mut. Cas. Co. v. Ins. Ex. Bldg. Corp. et al.* (1920), 218 Ill. App. 12; *White Marble Lime Co. v. Lumber Co.* (1919), 205 Mich. 634, 172 N. W. 603; *Ford v. C. E. Wilson & Co.,* (1942), C. A. 2d Cir., 129 F. 2d 614; *Knapp v. Penfield* (1932), 143 Misc. 132, 256 N. Y. S. 41; *Aalfo Co. v. Kinney* (1929), 105 N. J. L. 345, 144 A. 715; *Petit v. Cuneo* (1937), 290 Ill. App. 16, 7 N. E. 2d 774; *Morgan v. Andrews* (1896), 107 Mich. 33, 64 N. W. 869.

struction of the case and entirely unwarranted.

[*Schechter Case*]

The N. R. A. *Schechter* case[15] relied on in the majority opinion, and decided by the U. S. Supreme Court prior to the *Old Dearborn,* did not involve Fair Trade and is inapplicable to the question of delegation of powers under the facts before us in this case.

[*Second Schwegmann Case*]

The next case in the federal courts involving Fair Trade after *Old Dearborn* is *Schwegmann Bros. v. Calvert Corp., supra,* (the first *Schwegmann* case) which has been previously treated. It was superseded by the McGuire Act passed in 1952 (excepting Fair Trade agreements from federal antitrust laws as to both signers and non-signers), and thereafter the second *Schwegmann* case[16] upheld the validity of the McGuire Act and the Fair Trade Act with non-signer provisions as against the contentions that they violated due process and unlawfully delegated legislative power to private individuals.

As stated in the second *Schwegmann* case at pp. 791, 792 of 205 F. 2d:

> "Whatever weakening effect on *Old Dearborn* may have been caused by *Schwegmann's* [the first *Schwegmann* case's] frank characterization of State fair trade statutes as involving price fixing against non-signers is more than off-set, it seems to us, by the weakening also of the broad concept against the validity of legislative price fixing assumed in *Old Dearborn.* For 'the well-settled general principle that the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth and Fourteenth Amendment'. [Citing *Old Dearborn* and other U. S. Supreme Court cases.]"

In connection with the test of whether an illegal fixing of prices had occurred, the court cited the case of *Nebbia v. New York* (1934), 291 U. S. 502, at p. 539, 54 S. Ct. 505, at p. 517, 78 L. Ed. 940, at p. 958, 89 A. L. R. 1469, at p. 1484, where the court said:

> "* * * Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

In determining whether there was an arbitrary, discriminatory, and unlawful price fixing or price control under the Fair Trade Act in question, the court in the second *Schwegmann* case concluded at p. 792 of 205 F. 2d:

> "The * * * legislature has defined with particularity the type of commodity with respect to which fair trade prices may be established and enforced; namely, 'a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer of the commodity and which is in fair and open competition with commodities of the same general class produced by others'. It was, we think, within the province of the legislature to assume that economic laws constitute a sufficient restraint against capricious or arbitrary price fixing by the producer. As pointed out long ago by Louis D. (later Mr. Justice) Brandeis, the producer 'establishes his price at his peril—the peril that if he sets it too high, either the consumer will not buy or, if the article is, nevertheless, popular, the high profits will invite even more competition'. We agree with the learned District Judge that *Old Dearborn* still controls and, further, that, if it is to be overruled, that can be done only by the Supreme Court."

[*Fair Trade Policy*]

I do not believe this is the place for a prolonged discussion of whether Fair Trade appears to us to be good or bad for the economic or social life of the state.

Briefly stated, however, the proponents of Fair Trade contend that although it might appear at first blush that price cutting by a retailer is not harmful to a manufacturer, there is respectable opinion to the contrary—that the maintenance of a fair margin of profit encourages the retailer to offer a standard product of good quality to the public rather than to endeavor to substitute a sub-standard, or inferior product in an effort to meet price-cutting competition; that this, in time, affects the public.

The opponents of Fair Trade say that while in the bleak days of the 1930's there

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[15] *Schechter v. United States* (1935) [1932-1939 TRADE CASES ¶ 55,072], 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570.

[16] *Schwegmann Bros. Giant Super. Mkts. v. Eli Lilly & Co.* (1953), *supra.*

might have been some justification for Fair Trade, it is totally unnecessary in the prosperous inflation of the later 1940's and 1950's, and that unrestrained price-cutting by competing retailers is to the benefit of the general public. The two schools of thought on the subject have thus developed into keen controversy through the years. A sharp cleavage of views, in fact, has developed within departments of the U. S. government. The Federal Trade Commission, for example, has allegedly opposed resale price maintenance, while the Department of Commerce has apparently favored it, concluding "the case against Fair Trade is more theoretical than real." Committees of Congress have submitted divergent reports pro and con on the matter, and the debate appears still to be going on.

The opponents of Fair Trade, including some text writers and law journal contributors, ask, however, that we enter the argument of economics and decide in the light of present day conditions against the wisdom of Fair Trade legislation, and thus hold it unconstitutional. However, I do not believe we can have one constitution in fair weather and an entirely different constitution in foul. The court does not sit as a super-legislature to weigh the propriety of legislation, nor to decide whether it expressly offends the public welfare. The legislative power has limits, but state legislatures have power to experiment with new techniques and use their own standard of the public welfare so long as specific constitutional prohibitions are not violated.[17]

And as to legislative policy, we should note that while numerous changes have been made in Congressional legislation in recent years affecting Fair Trade, in Indiana, however, no single amendment to the Fair Trade Act has been made since it was enacted some twenty years ago, but the legislation remains in exactly the form in which it was passed at that time. As stated in a recent case [18] at p. 211 of 106 A. 2d:

> "The question before us is not the wisdom of this legislation; it is whether the situation presents a reasonable necessity for the protection of the public welfare, and whether the means bear a reasonable relation to the end sought. * * * And if these questions are fairly debatable, the legislative judgment must control."

[*Decision of Federal Court*]

Before concluding this opinion I think we should also observe that the U. S. District Court for the Southern District of Indiana has recently held the Fair Trade Act of Indiana with non-signer provisions is valid and constitutional as against the contentions that it violates due process and is an unlawful delegation of legislative powers,[19] and under the Indiana decisions that determination is highly persuasive upon this court.[20]

[*State Rulings*]

And not only is it the law in the federal courts that the Fair Trade Acts are not invalid as violating due process or being an unlawful delegation of legislative power in restricting prices, but the rule is followed in a majority of state courts.[21]

[*Conclusion*]

If we are to have any certainty in the law, I do not believe constitutional principles should bend according to the winds of prosperity or adversity, nor should we attempt to engraft into the Indiana Constitution a different concept of due process and separation of powers from what those identical principles have been interpreted to mean under the Constitution of the United States.

I would reverse the judgment.

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[17] See: *Day-Brite Lighting v. Missouri* (1952), 342 U. S. 421, 72 S. Ct. 405, 96 L. Ed. 469, (reh. den.) 343 U. S. 921, 72 S. Ct. 674, 96 L. Ed. 1334.

[18] *General Electric Co. v. Klein* (1954) [1954 TRADE CASES ¶ 67,774], — Del. —, 106 A. 2d 206.

[19] *Sherwin Williams v. Bargain Barn, Inc.* (1954), 1954 CCH TRADE CASES ¶ 67,697.

[20] *Midwestern Pet. Corp. v. State Board of Tax Com.* (1934), 206 Ind. 688, 187 N. E. 882, 191 N. E. 153.

[21] *Scovill Mfg. Co. v. Skaggs etc. Drug Stores,* (1955) [1955 TRADE CASES ¶ 68,234], 45 Cal. 2d 881, 291 P. 2d 936; *Burche Co., Applnt. v. General Elec. Co.* (1955) [1955 TRADE CASES ¶ 68,078], 382 Pa. 370, 115 A. 2d 361; *General Elec. Co. v. Masters, Inc.* (1954) [1954 TRADE CASES ¶ 67,776], 307 N. Y. 229, 120 N. E. 2d 802; *Lionel Corp. v. Grayson-Robinson Stores* (1954) [1954 TRADE CASES ¶ 67,717], 15 N. J. 191, 104 A. 2d 304; *Lilly & Co. v. Saunders* (1939) [1932-1939 TRADE CASES ¶ 55,243], 216 N. C. 163, 4 S. E. 2d 528, 125 A. L. R. 1308; *Triner Corporation v. McNeil* (1936), 363 Ill. 559, 2 N. E. 2d 929, 104 A. L. R. 1435.

[¶ 68,718] General Electric Company v. Morris Samuel Wender, doing business as Moders Industries, Inc., Modern Industries and Wender's Credit Jewelry.

In the United States District Court for the Southern District of West Virginia. Civil Action No. 1868. Filed May 6, 1957.

West Virginia Fair Trade Act

Fair Trade—Constitutionality of West Virginia Fair Trade Act—Nonsigner Provision—Title of Fair Trade Act—West Virginia Constitution.—Section 6 of the West Virginia Fair Trade Act, insofar as it applies sanctions to persons who have not signed fair trade contracts, is void since it brings an object into the Act which is not only not expressed in the title, but which is the plain antithesis of the title in violation of the West Virginia Constitution, which requires that every act of the legislature must bear a title expressive of its objects. The purpose expressed in the title of the Act is restrictive within itself because the title describes and limits the method whereby the purpose of the Act is to be attained. The legislature having described that method in the title as one which is to be employed "through the use of voluntary contracts establishing minimum resale prices and providing for refusal to sell unless such minimum resale prices are observed," a provision in the body of the Act which authorizes the employment of means exactly opposite to those described in the title cannot be said to be within the scope of the title or even germane to the title. However, the court rejected contentions that the West Virginia Fair Trade Act is void because it was not reenacted after the passage of the Miller-Tydings or McGuire Act, and that the Act, as applied to nonsigners, is not a proper or legitimate exercise of the police power of the state, and hence an invasion of property rights without due process of law.

See Fair Trade, Vol. 1, ¶ 3085, 3258.

For the plaintiff: Paul Chambers (Jackson, Kelly, Holt & O'Farrell on the brief), Charleston, W. Va.

For the defendant: William R. Laird, III, and Pat R. Hamilton.

Opinion

[*Fair Trade Action*]

BEN MOORE, District Judge [*In full text*]: This is a civil action instituted by plaintiff for the purpose of obtaining an injunction against defendant to prevent retail sales by defendant of plaintiff's trade-marked products at less than the resale prices fixed by plaintiff in contracts with other retailers.

Plaintiff must prevail if at all by reason of the provisions of West Virginia's so-called "Fair Trade Act."

[*Defenses*]

Defendant's answer raises the question of whether or not the West Virginia Statute is constitutional. It is further alleged that defendant [plaintiff] has no standing in a court of equity because of its having in various ways allegedly permitted to be made, and connived with other dealers in making other sales of its products in West Virginia at cut rates. This defense is of course factual and needs to be inquired into only if the vital constitutional issue is decided adversely to defendant.

[*West Virginia Act*]

The title of the West Virginia Fair Trade Act which the legislature had before it when the act was passed is as follows:

> "An Act to protect trade-mark owners, producers, distributors and the general public against injurious and uneconomic practices in the distribution of competitive commodities bearing a distinguishing trade-mark, brand or name, through the use of voluntary contracts establishing minimum resale prices and providing for refusal to sell unless such minimum resale prices are observed." W. Va. Laws 1937, c. 123.

This title is followed by the text of the act, which reads:

> "Section 1. The following terms, as used in this act, are hereby defined as follows:
>
> "(a) 'Commodity' means any subject of commerce.
>
> "(b) 'Producer' means any grower, baker, maker, manufacturer, bottler, packer, converter or processor.
>
> "(c) 'Wholesaler' means any person selling a commodity other than a producer or retailer.

"(d) 'Retailer' means any person selling a commodity to consumers for use.

"(e) 'Person' means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust or any unincorporated organization.

"Sec. 2. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the state of West Virginia by reason of any of the following provisions which may be contained in such contract:

"(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

"(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

"(c) That the seller will not sell such commodity:

"(1) to any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

"(2) to any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

"Sec. 3. For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this act (except to the extent authorized by the said contract):

"(a) The offering or giving of any article of value in connection with the sale of such commodity;

"(b) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

"(c) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by section six of this act shall be available.

"Sec. 4. No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this act, by any person other than the owner of the trade-mark, brand or name used in connection with such commodity or by a distributor specifically authorized to establish said price by the owner of such trade-mark, brand or name.

"Sec. 5. No contract containing any of the provisions enumerated in section two of this act shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

"(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price, plus any transportation, storage or other legitimate or regular costs.

"(b) When the trade-mark, brand or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof;

"(c) When the goods are altered, second-hand, damaged, defaced, or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

"(d) But nothing contained in this article shall apply to sales by executors, administrators, receivers or assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy or by any one acting under judicial process.

"Sec. 6. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

"Sec. 7. This act shall not apply to any contract or agreement between or among producers, except as provided in subdivision (c) of section two of this act, or between or among wholesalers or between or among retailers as to sale or resale prices.

"Sec. 8. If any provision of this act, or the application thereof to any person or circumstance, is held invalid, the remainder of the act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

"Sec. 9. All acts or parts of acts inconsistent herewith are hereby repealed to the extent of such inconsistency.

"Sec. 10. This act may be known and cited as the 'Fair Trade Act.'" W. Va. Laws 1937, c. 123, §§ 1-10.

[*Nonsigner*]

Defendant was not a party to any contract with plaintiff establishing fair trade prices for plaintiff's products. It is not disputed that defendant has engaged in the sale of plaintiff's products at prices below the so-called "fair trade" prices stipulated in contracts made by plaintiff with one or more retailers of its products in West Virginia.

[*Constitutionality—Grounds*]

Defendant takes the position that the provision of section 6 of the act making actionable sales of fair trade merchandise at less than the prices stipulated in certain contracts, insofar as it is made applicable to a person not a party to such contract, is unconstitutional. He asserts three grounds in support of this contention.

(1) That to make fair trade acts applicable to non-signers of contracts is not a proper or legitimate exercise of the police power of the state, and hence an invasion of property rights without due process of law.

(2) That the West Virginia Fair Trade Act, being enacted in 1937, was void at the time of its enactment because contrary to the federal statute known as the Sherman Anti-Trust Act. Defendant concedes that had the West Virginia Fair Trade Act been reenacted after the passage of the Miller-Tydings Act and the McGuire Act, legalizing in their federal aspects the making of such contracts as are described in the West Virginia Fair Trade Act, the objection here asserted would be without force; but contends that such reenactment was necessary to give it scope after the federal barrier was removed, and that without such reenactment the act is still void because of unconstitutionality in its inception.

(3) That the form of the act violates a mandatory provision of the Constitution of West Virginia which requires that every act of the legislature must bear a title expressive of its objects; the exact language being as follows:

"No act hereafter passed, shall embrace more than one object, and that shall be expressed in the title. But if any object shall be embraced in an act which is not so expressed, the act shall be void only as to so much thereof, as shall not be so expressed. . . ." W. Va. Const. Art. VI, § 30.

[*State Police Power*]

Defendant's first contention is effectively answered by reference to the case of *Old Dearborn Distributing Co. v. Seagram Distillers Corp.* [1932-1939 TRADE CASES ¶ 55,141], 299 U. S. 183 (1936). This case dealt specifically with a non-signer provision of a state fair trade law, and it was held there that such a law does not infringe the doctrine of the previous decisions of the Supreme Court dealing with legislative price fixing; does not violate due process of law as an unlawful delegation of power to private persons to control the disposition of property of others; is not arbitrary, unfair, or unreasonable; and does not deny equal protection of the law. No argument is advanced which would take this case out of the orbit of the *Dearborn* case. I therefore reject this contention of defendant.

[*Reenactment*]

As to the second ground, it may be noted that courts are not unanimous in their conclusion as to the necessity for reenactment of a statute, ineffective when passed because in conflict with federal law, but subsequently made effective by federal legislation. There is language in the case of *State v. Miller*, 66 W. Va. 436, 66 S. E. 522 (1909), which supports defendant's argument; and this case has been cited as authority for a point of view similar to defendant's in the case of *Graden Robinson Stores v. Oneida Limited*, 209 Ga. 613, 75 S. E. 2d 161 (1953). However, the language in the *Miller* case was obviously dictum, and has moreover been criticized and rejected by the Fourth Circuit Court of Appeals in *State of West*

Virginia v. Adams Express Co., 219 F. 794 (4th Cir. 1915). I conclude that the weight of authority, as well as the better reasoning, supports the view that it was unnecessary that the West Virginia Legislature reenact the state's fair trade act after its provisions had been legalized in their interstate aspect by the Miller-Tydings Act and the McGuire Act.

[*Title of Act*]

Defendant's third contention is much more serious.

The question of whether the title to the West Virginia Fair Trade Act is broad enough to support inclusion in the act of the non-signer provision has not been passed on by the Supreme Court of Appeals of West Virginia; nor have I been able to find an instance in which a federal court has spoken as to a similar act so titled.

[*Titles of Other Fair Trade Laws*]

I have caused a search to be made in the library of the Supreme Court of Appeals of West Virginia to determine the extent and character of fair trade legislation nationally. From the data there available it has been ascertained that all the states but three have enacted Fair Trade Laws. These three states are, Missouri, Texas and Vermont. The laws enacted have all contained the non-signer provision. Sixteen other states have titles either exactly the same or similar in effect to the title of the West Virginia Act; that is, the titles speak of providing fair trade protection "through the use of voluntary contracts." These are Alabama, Delaware, Idaho, Indiana, Kansas, Maryland, Minnesota, Montana, Nebraska, North Caroline, Oklahoma, Oregon, Rhode Island, South Dakota, Utah and Wyoming. Florida's Fair Trade Act was originally so entitled, but after it was held by the Supreme Court of that state to be unconstitutional because of the restrictive title, it was reenacted with a broader title. It has since been held unconstitutional on other grounds.

Four states have fair trade acts with titles similar to the title of West Virginia's Fair Trade Act, except that the title concludes with the phrase, "and for other purposes," or words of like effect. These are, Arizona, Arkansas, Georgia and Nevada.

Twenty states (and now Florida also) have fair trade acts which do not specify in the title that the protection of fair trade practices is to be accomplished "through the use of voluntary contracts." These are, Colorado, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia and Washington. One of these states (New York), has since reenacted the statute without any title.

Two states, Connecticut and Wisconsin, provide no titles whatever for their fair trade acts, and it is therefore assumed that the constitutions of those states do not so require.

Information relative to the California Fair Trade Act was not available at the library.

[*Decisions*]

In only five instances has it been found that the constitutionality of a fair trade act has been challenged because of failure of its title to conform to constitutional requirements. Three cases are cited by plaintiff in support of constitutionality, and two by defendant against constitutionality.

One of the cases cited by plaintiff is that of *Goldsmith v. Meade Johnson & Co.* [1932-1939 TRADE CASES ¶ 55,232], 176 Md. 682, 7 A. 2d 176 (1939). The original fair trade act of the state of Maryland (1935) contained no restrictive words in its title limiting its application to "voluntary contracts." However, the original act included the standard non-signer provisions. In 1937 the Maryland legislature passed a new fair trade act entitled as follows:

> "An Act to repeal Chapter 212 of the Acts of 1935, codified as Sections 105, 106, 107, 108, 109 and 110, respectively, of Article 83 of Flack's 1935 Supplement of the Annotated Code of Public General Laws of Maryland, title 'Sales and Notices,' sub-title 'Fair Trade Act', and to substitute therefor, for the purpose of correcting, clarifying and amplifying the Act so repealed, ten (10) sections, to be added to said Article and bear the same sub-title, to follow immediately after Section 104, and to be known as Sections 105, 106, 107, 108, 109, 110, 111, 112, 113 and 114, respectively, to protect trade-mark owners, producers, distributors and the general public against injurious and uneconomic practices in the distribution of competitive commodities bearing a distinguishing trade-mark, brand or name, through the use of voluntary contracts establishing minimum resale prices and providing for

refusal to sell unless such minimum resale prices are observed." Md. Laws 1937, C. 239.

In deciding the *Goldsmith* case the Court pointed out that the later act made reference to the sections of the code containing the original act, and concluded that the later act disclosed as its purpose the "correcting, clarifying, and amplifying" of the Act of 1935. These considerations were given some weight in sustaining the constitutionality of the act.

The other case cited by plaintiff from a state the title of whose fair trade act contains the restrictive phrase "through the use of voluntary contracts" is that of *Klein v. National Pressure Cooker Co.,* [1948-1949 TRADE CASES ¶ 62,378], 31 Del. Ch. 459, 64 A. 2d 529 (1949). Unquestionably this case fully supports plaintiff's argument. However, very little is said by the court in explanation of its conclusion that "the words 'through the use of voluntary contracts' merely described the method by which the protection of the price cutting is to be obtained" is reached.

A third case cited by plaintiff, *Weco Products Co. v. Sam's Cut-Rate* [1940-1943 TRADE CASES ¶ 56,080], 296 Mich. 190, 295 N. W. 611 (1941), is not applicable, since the Michigan Fair Trade Act has a title which does not contain the restrictive words, "through the use of voluntary contracts."

The case of *McGraw Electric Company v. Lewis and Smith Drug Company* [1955 TRADE CASES ¶ 67,954], 159 Neb. 703, 68 N. W. 2d 608 (1955), cited by defendant dealt with a fair trade act bearing the same title as the West Virginia Fair Trade Act. Here again the court, though reaching a conclusion exactly opposite to that of the Delaware court, gave no substantial reasons for such a conclusion. The court merely said that "it is to be observed that the title to the Act refers to fixation of minimum prices 'through the use of voluntary contracts'. It does not express or carry a suggestion of a purpose to subject third parties to such contracts. Other reasons for this conclusion need not be discussed."

Only the Supreme Court of the state of Florida, in the case of *Bristol-Myers Company v. Webb's Cut-Rate Drug Co., Inc.* [1932-1939 TRADE CASES ¶ 55,217], 137 Fla. 508, 188 So. 91 (1939), has exhaustively discussed reasons for holding unconstitutional a fair trade act containing a non-signer provision, but restrictively titled as is West Virginia's Fair Trade Act. That court reasoned as follows:

"The first part of the title states that it is for the purpose of protecting trade-mark owners, producers, distributors and the public. The next portion states that these persons are thereby protected against injurious and uneconomic practices in the distribution of competitive commodities bearing a distinguishing trade-mark, brand or name. Then it proceeds to say how this protection is to be enforced, and the method is stated thus: 'Through the use of voluntary contracts establishing minimum resale prices and providing for refusal to sell unless such minimum prices are observed.' Appellant contends that the clause just quoted means that resale prices which shall be binding on all retailers, those who do not contract as well as those who do, are to be thus established by the resale prices set forth in the contracts which may be voluntarily entered into by those retailers who see fit to execute such contracts. But this is not, to our minds, the plain and obvious meaning of the language used; quite the contrary. The meaning contended for by the appellant may have been that which was in the mind of the draftsman of the Act, but the actual language used would convey an entirely different meaning to the ordinary mind. The significance of the word 'voluntary' is well understood by the average man, be he legislator or plain citizen. Such a person, reading the title to this act, would conclude that it applied only to those retailers who entered into voluntary contracts with trade-mark owners."

[*West Virginia Rulings*]

It has been held many times by the Supreme Court of Appeals of West Virginia that "the language of the title" of an act of the legislature "should be construed in its most comprehensive and liberal sense favorable to the validity of the act;" that only where it is "manifest that the contents of the act are not within the title" should the act be declared invalid; and that "all doubt will be resolved in favor of the constitutionality of the statute." It has been said that the test of sufficiency is whether the title "will convey to persons interested in the actual subject matter enough information to provoke the reading of the act," and that "so long as the title fairly reflects the purpose of the act, it is not necessary to descend to particulars in the title." See *State v. Mines,* 38 W. Va. 125, 18 S. E. 470

(1893); *City of Wheeling ex rel. Carter v. American Casualty Co.,* 131 W. Va. 584, 48 S. E. 2d 404 (1948); *Sypolt v. Shaffer,* 130 W. Va. 310, 43 S. E. 2d 235 (1947); *State v. Thompson,* 80 W. Va. 698, 93 S. E. 810 (1917).

On the other hand, it has been made equally clear by decisions of the same court that in cases where the act itself flatly contradicts what its title imports it must be stricken down under the constitutional mandate. In the case of *Stewart v. Tennant,* 52 W. Va. 559, 44 S. E. 223 (1903), at page 569, one of the greatest of West Virginia Judges, Brannon, in discussing the constitutional provision concerning clear titling of acts of the legislature says:

"The purpose of this provision, as declared by the courts, is to prevent the enactment of laws, in a clandestine and stealthy manner, by compelling a statement in the title of the act, of its aim and purpose, to the end that the public, as well as members of the legislature may conveniently and certainly know the character of pending legislation. But for this provision, omnibus bills could be put through the legislature, carrying all kinds of measures, concealed in all forms, and neither legislator nor the public could, with any degree of certainty, fully know their contents. . . ."

"although the courts construe this provision, in cases not within the mischiefs sought to be remedied by it, so as to sustain legislation, they rigidly enforce it in all cases falling within those mischiefs, and it makes no difference how meritorious the act may be. If the constitutional provision has been disregarded in the passage of it, it cannot be sustained."

In *State v. Cordi,* 103 W. Va. 23, 136 S. E. 505 (1927), the title to the act under question was: "An Act for the protection of sheep, lambs, goats, kids and other property and providing compensation to the owner for the destruction, loss or injury by dogs for any sheep, lambs, goats, kids and other property and providing for damages to persons by dogs and also providing for taxation and protection and making dogs property and fixing punishment for any violation of this act." The part of the statute attacked declared it to be unlawful for any "unnaturalized foreign-born resident of this state to own, keep or permit to remain upon any premises under his control a dog of any kind within this state . . ." . It was held that the challenged portion was void because it could not be considered by any fair intendment as having "a necessary and proper connection with the title."

The case of *Bedford Corporation v. Price,* 112 W. Va. 674, 166 S. E. 380 (1932), dealt with a statute titled as follows:

"AN ACT to amend and re-enact sections six, seven, and ten of article nine of chapter eleven and section eighteen of article six of chapter eleven of the official code of West Virginia, one thousand nine hundred and thirty-one, relating to tax levies and collections."

One section of the act provided for the collection and payment of *municipal* taxes, and allowed a discount for payment on or before a certain date. In an opinion holding this section of the act unconstitutional Judge Maxwell, speaking for the court, said:

"No person, whether public official or private citizen, upon reading the said title would have received the slightest intimation that the pending bill proposed to make drastic changes with reference to the collection of municipal taxes. . . . The constitutional provision that an act shall not embrace more than one object and that shall be expressed in the title (Constitution, Article VI, section 30) does not render it necessary that the title shall descend to particulars, but it does require that the title shall be broad enough to give a fair and reasonable index to all purposes of the act."

Plaintiff cites the case of *Lemon v. Rumsey,* 108 W. Va. 242, 150 S. E. 725 (1925) as authority for the proposition that Section 6 of the West Virginia Fair Trade Act is within the scope of the act's title. This case involved an act of the legislature bearing the following title: "An act providing for the control and eradication of the plant disease commonly known as 'apple rust' in the several counties of the State." The act itself provided among other measures for the eradication of "apple rust," for the destruction of diseased red cedar trees, which were declared to be a public nuisance. Suit was brought to enjoin destruction of plaintiff's red cedar trees. The court held that the part of the act challenged by the plaintiff was valid, since it was merely one of the means selected to attain the end set forth in the title.

The distinction between the constitutional question posed in *Lemon v. Rumsey* and that in the case we are now considering is sharply apparent. There the title expressed a broad purpose; and the act provided for

the means through which that purpose as expressed in the title was to be accomplished. Here the purpose expressed in the act is restrictive within itself, in that the title describes and limits the method whereby the purpose is to be attained. The legislature having described that method in the title as one which is to be employed "through the use of voluntary contracts establishing minimum resale prices and providing for refusal to sell unless such minimum resale prices are observed," a provision in the body of the act which authorizes the employment of means exactly opposite to those described in the title can hardly be said to be within the scope of the title, or even germane to it. Certainly no person reading the title would expect to find on reading the act that instead of the protection to trade-mark owners being secured through the use of voluntary contracts it is accomplished instead by establishing sanctions applicable also to merchants who have not signed contracts. This is a perfect instance for the application of the well known maxim that *"expressio unius est exclusio alterius."*

[*Nonsigner Provision Void*]

I am sensible of the seriousness of any court's action in declaring an act of a state legislature unconstitutional. This is all the more apparent when the court which speaks is a federal rather than a state court. However, as I have said there has been no determination of the question here presented by the Supreme Court of Appeals of West Virginia, which would otherwise serve as a guide. In such a situation, I find no other course open than to follow what I believe to be the plain mandate of the West Virginia Constitution. In my opinion Section 6 of the West Virginia Fair Trade Act, insofar as it applies sanctions to nonsigners of contracts, brings an object into the act which is not only not expressed in the title, but which is the plain antithesis of the title.

The nonsigner provision of the act is therefore, in my opinion, void. Plaintiff's action must be dismissed.

Counsel for the defendant will submit an appropriate order for entry.

[¶ 68,719] Seagram-Distillers Corporation v. New Cut Rate Liquors, Inc., et al.

In the United States Court of Appeals for the Seventh Circuit. September Term, 1956; April Session, 1957. No. 11685. Dated May 23, 1957.

Appeal from the United States District Court for the Northern District of Illinois. Eastern Division. HOFFMAN, District Judge.

Illinois Fair Trade Act

Fair Trade—Enforcement of Fair Trade Prices—Injunctive Relief—Federal Court Actions—Proof of Jurisdictional Amount.—A United States District Court did not have jurisdiction of a fair trade enforcement action for injunctive relief since the fair trader failed to prove, in this diversity of citizenship case, that the matter in controversy exceeded the sum or value of $3,000. There was no evidence that the monetary value of the damage or injury to the fair trader's good will, sustained or threatened by the defendants' acts, exceeded this amount. In the instant type of action, it is improper, in the absence of evidence of the amount of damage sustained or threatened, to look at evidence of what was spent in building good will and then, if the amount be substantial, to surmise that the amount of loss is $3,000 or more. The defendants' acts did not prevent the fair trader from using its good will in the conduct of its business. The damage to the fair trader's good will caused or threatened by the defendants' acts was the subject of controversy; therefore, the fair trader had to prove facts showing what, if any, curtailment of business and consequent loss have been or are likely to result from the defendants' acts.

See Fair Trade, Vol. 1, ¶ 3040.40, 3085.15, 3366.15, 3410.15, 3440.15.

For the plaintiff-appellee: Louis A. Kohn and Patrick W. O'Brien, Chicago, Ill.

For the defendants-appellants: Allen H. Schultz and Louis L. Biro, Chicago, Ill.

Reversing a judgment of the U. S. District Court, Northern District of Illinois, Eastern Division, 1955 Trade Cases ¶ 68,213; for a prior opinion of the U. S. Court of Appeals, Seventh Circuit, see 1955 Trade Cases ¶ 68,004.

Before MAJOR, FINNEGAN and SCHNACKENBERG, Circuit Judges.

[*Fair Trade Injunction*]

SCHNACKENBERG, Circuit Judge [*In full text*]: Defendants appeal from a judgment of the district court, entered December 5, 1955, which permanently enjoined them from offering for sale or selling Seagram products at less than the prices stipulated by plaintiff from time to time under the Illinois Fair Trade Act[1] and in accordance with contracts made pursuant thereto.

[*Trial Court Proceedings*]

Based upon plaintiff's amended complaint, which defendants answered, the district court, after hearing evidence, on July 2, 1954 granted a preliminary injunction, having found that action necessary to preserve the *status quo.* We affirmed. [1955 TRADE CASES ¶ 68,004] 221 F. 2d 815; certiorari denied, 350 U. S. 828.

On final hearing of the case, the district court heard additional evidence and, by stipulation, also considered the evidence heard on the motion for preliminary injunction.

[*Amended Complaint*]

The amended complaint alleges that plaintiff is a Delaware corporation and a citizen of that state, and defendants are citizens and residents of the state of Illinois. It expressly alleges that this is a suit between citizens of different states, and the matter in controversy herein, exclusive of interest and costs, exceeds the sum of $3,000.

It further appears therefrom that plaintiff is the sole authorized Illinois distributor of Seagram beverages, which it sells under the trademarks, brands and names of the producers thereof, and that defendants are engaged in the retail liquor business in Illinois. Plaintiff has expended in Illinois over $500,000 in advertising Seagram products, having sold large quantities thereof in that state.

It is also charged that plaintiff executed fair trade contracts, in accordance with the Illinois Fair Trade Act, with large numbers of retailers in Illinois, and announced stipulated retail prices of Seagram products, that notice thereof was given to defendants and that they continued advertising, offering for sale or selling of Seagram products at less than the stipulated prices, to the irreparable damage of the good will and business of the plaintiff, that, unless defendants are enjoined, plaintiff will suffer further irreparable damage in a decrease in its sales and others dealing in said products will fail to comply with its fair trade contracts, all to the great damage and financial loss of plaintiff.

[*Federal Jurisdiction*]

Federal jurisdiction was challenged by defendants, both in their answer and by a motion made at the time of the final hearing on the merits. They now argue that plaintiff failed to establish federal jurisdiction in that no competent evidence was introduced to prove that the matter in controversy, exclusive of interest and costs, exceeded the sum of $3,000.

1. Plaintiff in such a case must carry throughout the litigation the burden of showthat it is properly in court. *KVOS, Inc. v. Associated Press,* 299 U. S. 269. If its allegations of jurisdictional facts are challenged by its adversary in any appropriate manner, it must support them by competent proof. *McNutt v. General Motors Corp.,* 298 U. S. 178, 189.

[*Evidence*]

In an attempt to sustain its burden, plaintiff succeeded in introducing, over the objection of defendants as to its competency, evidence which, plaintiff contends, tended to prove the value of its good will in the Seagram products. Its witness Teece testified that "for the past two or three years, in excess of $3,000,000 was spent by plaintiff in Illinois advertising, as well as promotion, and outdoor signs." Thereon the district court made a finding of fact that the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000. It thereupon concluded that it had jurisdiction.

[*Old Dearborn Co. Case*]

In *Old Dearborn Co. v. Seagram Corp.* [1932-1939 TRADE CASES ¶ 55,141], 299 U. S. 183, which upheld the constitutionality of

[1] Ch. 121½, Illinois Revised Statutes, 1955, Sec. 188 *et seq.*

the Illinois Fair Trade Act, the court, at 195, referred to section 2 of the act which reads:

"Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

It said that section 2 "interferes only when he [purchaser of the commodity] sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury". At 198, it added:

"* * * the sole purpose of the present law is to afford a legitimate remedy for an *injury* to the good will which results from the use of trade-marks, brands or names, * * *." (Italics supplied.)

The district court did not note that, when the $3,000 requisite for jurisdiction[2] is challenged in an action brought in a federal court for the protection of a right belonging to plaintiff, there is an important distinction between two classes of diversity cases.

[*Classes of Diversity Cases*]

In one class (which we shall call class A), a plaintiff charges wrongful acts by a defendant, or by several defendants acting jointly, which have, or will, injure or damage a right for which plaintiff seeks protection. In such a case, if plaintiff shows that the alleged *injury or damage* caused or threatened by a defendant, or by several defendants acting jointly, amounts to at least $3,000, the federal court has jurisdiction.

In the other class of diversity cases (which we shall call class B), a plaintiff charges wrongful acts by a defendant, or by several defendants acting jointly, which, if not prevented, will completely deny or destroy the right for which plaintiff seeks protection. In such a case, if plaintiff shows that the right is worth at least $3,000, the federal court has jurisdiction.

This distinction is made apparent by cases to which we now refer.

Class A.

In *McNutt v. General Motors Corp.*, 298 U. S. 178, General Motors sued in a federal district court to restrain the enforcement of an Indiana act providing for the regulation of the business of purchasing contracts arising out of retail installment sales, on the ground that the act was invalid. Although the complaint, to show federal jurisdiction, set forth the net worth of General Motors' business in Indiana covered by the act and other facts tending to prove the value of its right to carry on that business in that state, the court, at 181, said:

"Respondent [General Motors] invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference. * * * But in the instant case, the statute does not attempt to prevent respondent from conducting its business. There is no showing that it cannot obtain a license and proceed with its operations. The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

In *KVOS, Inc. v. Associated Press*, 299 U. S. 269, Associated Press sued in a federal district court to enjoin the proprietor of a radio station from pirating news gathered by Associated Press for use of its members. The district court held that the jurisdictional requirement now under consideration had not been met, and dismissed the suit. The Court of Appeals disagreed and held that Associated Press had shown the requisite fact of jurisdiction. The Supreme Court reversed the Court of Appeals, pointing out, at 278, that the only attempt by Associated Press to show jurisdiction by competent proof was an affidavit to the effect that payments made by newspaper members for

[2] 28 U. S. C. A. § 1332.

news sold to them by Associated Press were upwards of $8,000 per month, "* * * 'which is being imperiled and jeopardized by the acts of defendant * * * and said sum greatly exceeds the sum of Three Thousand Dollars, exclusive of interest and costs, and complainant is in danger of losing said memberships and payments if defendant's practices in respect to pirating said news is not enjoined.'" The Supreme Court, at 279, in rejecting this attempt to show jurisdiction, said "no intimation is given of the character or extent of the damage they [the members] would suffer by such withdrawal. The respondent having failed to support the allegations as to amount in controversy the District Court should have dismissed the bill."

Class B.

In *Gibbs v. Buck,* 307 U. S. 66, a class suit was filed by and on behalf of the members of a society against the Florida attorney general and others charged with the enforcement of a state act directed at organizations like the society. The complaint charged that the act was unconstitutional and deprived complainants of rights without due process of law and without equal protection of the laws, etc. By a motion to dismiss, the defendants urged that the complaint affirmatively showed that the jurisdictional amount of $3,000 was not involved. The court, at 74, said:

"The essential matter in controversy here is the right of the members, in association through the Society, to conduct the business of licensing the public performance for profit of their copyrights. This method of combining for contracts is *interdicted* by the Florida statute. It is not a question of taxation or regulation but *prohibition.* Under such circumstances, the issue on jurisdiction is the value of this *right* to conduct the business free of the *prohibition* of the statute. * * *" (Italics supplied.)

After pointing out the facts in the complaint relating to the value of this right, the court, at 75, said:

"* * * From these facts, the finding of the District Court that the matter in controversy—the value of the aggregate *rights* of all members to conduct their business through the Society—exceeds $3,000 in value is fully supported." (Italics supplied.)

The court pointed out that the test was different in the *McNutt* and *Associated Press* cases, *supra,* stating, at 75:

"*McNutt v. General Motors Acceptance Corp.* differs. There the State of Indiana had passed an act regulating, not prohibiting, the business of the Acceptance Corporation. The right for which protection was sought was the right to be free of regulation. It was to be measured by the loss, if any, following enforcement of regulation. This was not alleged or proved. In *KVOS, Inc. v. Associated Press,* relief was sought to enjoin alleged pirating, by radio, of news furnished by the Associated Press to its members. The right for which protection was sought was 'the right to conduct those enterprises free of' interference. On the issue of the value of this right, it was deposed only that the Associated Press received more than $8,000 per month for news in the territory served by the broadcasting station and was in danger of losing the payments. The Associated Press was a nonprofit corporation, operated without the purpose of profiting from its services to members and equitably dividing the expenses among them. The damage in the *Associated Press* case was to its members and this was not shown. Neither was it alleged or proved that any member threatened to withdraw or to reduce its payments."

In *Brotherhood v. Pinkston,* 293 U. S. 96, a widow, for the purpose of protecting her right to future participation in a fund from which she was entitled to receive a pension in monthly payments during her lifetime as long as she remained unmarried, brought a suit in a federal district court which dismissed the suit on the ground that the requisite amount of $3,000 was not involved. The Supreme Court, at 99, treated the value of the widow's interest in the fund as the test of jurisdiction. It pointed out that her life expectancy was shown to bring the value of the future pension installments to a sum in excess of $3,000 despite the contingency of her remarriage. The court held that federal jurisdiction existed.

In *Berryman v. Board of Trustees of Whitman College,* 222 U. S. 334, a college sued in a federal circuit court to enjoin the collection of taxes on its property on the ground that a perpetual contract of exemption from taxation involved the amount essential to sustain federal jurisdiction, where the contract right exceeded in value that

amount, although the current taxes assessed and levied were less than that sum. The defendants challenged jurisdiction. The Supreme Court held that the lower court had jurisdiction because the value of the thing at issue, the contract right, exceeded in value the then jurisdictional requirement of $2,000. It pointed out that the claimed exemption covered, not only a current tax of $946.32, but extended to all future taxes.

[*Record—Instant Action*]

In the record before us there is no evidence that the monetary value of the damage or injury to plaintiff's good will, sustained or threatened by defendants' acts, exceeds $3,000. It appears that its witness Lind was about to furnish evidence which might have been relevant on that point. He was general counsel for plaintiff and he was permitted, over objection, to testify that in a price war in the liquor market "our product is subject to loss, and our business has been injured, *because we can measure it,* because we can see what happens to us in every jurisdiction where there is a price break." (Italics supplied.) The measure to which he referred was not otherwise identified or produced in court. Whether the measure was accurate we do not know. Lind's reference to it indicates that he, a lawyer and business man acquainted with plaintiff's affairs, recognized that the injury claimed to result to plaintiff's business in a price break was susceptible of pecuniary measurement which could be adduced in an effort to prove jurisdiction. On that issue competent evidence of the character and extent of the damage to good will would have been relevant.

Defendants' acts did not prevent plaintiff from using its good will in the conduct of its business. The damage to plaintiff's good will caused or threatened by defendants' acts is the subject of controversy in this case. Plaintiff has failed to prove any facts showing what, if any, curtailment of business and consequent loss have been or are likely to result from defendants' acts. *McNutt v. General Motors Corp.,* 298 U. S. 178, 181.

[*Cost of Good Will*]

It is improper, in the absence of evidence of the amount of damage sustained or threatened, to look at the evidence of what was spent in building good will and then, if the amount be substantial, to surmise that the amount of the loss is $3,000 or more. Yet this is, in effect, the method by which the district court, in stating its theory of this action, reached the conclusion that it had jurisdiction.[3] A similar method of reasoning was disapproved by the Supreme Court in *KVOS v. Associated Press,* 299 U. S. 269, at 276:

> "* * * Dealing with the petitioner's insistence that the amount in controversy was not shown to exceed three thousand dollars the court [Court of Appeals] held * * * that 'The several millions of dollars here alleged to be invested in the Association's business * * * may well be damaged to the extent of $3,000 by the pirating practices described.' After referring to the character and scope of the respondent's activities the court states:
>
> 'It is obvious that the business of gathering and distributing to members, *before* profitable publication, *could conceivably be damaged* to the extent of $3,000 by the misappropriation and premature publication of the news material. To hold otherwise would warrant the inference that no corporation could be damaged by a wrongful attack on its business, when that business happened to be run at no profit or at a loss. Also, we are unable to hold irrational the claim that the piracy caused a $3,000 damage to the Association's quasi property right in the news.' "

(Italics supplied except word "before".) and at 277:

> "* * * The complaint contains nothing to the purpose save the general statement that the damage to which the respondent is being subjected is in excess of three thousand dollars and the amount involved is in excess of that sum. * * * But where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof. * * *"

and at 279:

> "* * * the allegation of possible damage * * * is wholly inadequate, because

[3] The following colloquy occurred.

"The Court: The theory of this action—I am not deciding the motion, but in this practice of the defendant here, as alleged in the complaint, a loss will result, and a loss probably has resulted because of the advertisement, and because of the cut in prices, that is substantially the position of the plaintiff, is it?

"Mr. Kohn [plaintiff's attorney] Yes.

"Mr. Schultz [defendants' attorney] This Court has no jurisdiction unless they can prove damage of $3,000 or more."

* * * no intimation is given of the character or extent of the damage * * *. The respondent having failed to support the allegations as to amount in controversy the District Court should have dismissed the bill."

[*Lack of Jurisdiction*]

It is apparent that the district court erred in holding that the matter in controversy herein exceeds the sum of $3,000. The district court had no jurisdiction of this case. Illinois' courts are open to plaintiff.

[*Prior Adjudication*]

2. On the record before us, we are not concerned with the principle of *res judicata.* Neither in this court nor in the district court did plaintiff urge that principle applied to the district court's finding in favor of its jurisdiction, as contained in its order for the issuance of a preliminary injunction.

In *Murrell v. Stock Growers' Nat. Bank of Cheyenne,* 74 F. 2d 827, at 832, the court said:

"A party may waive his right to assert the conclusiveness or bar of a judgment under the doctrine of res judicata."

To the same effect, see 50 C. J. S. 15 and 398.

Not only was the rule of res judicata not relied on by plaintiff in the district court, but that court proceeded to determine anew that it had jurisdiction, when it conducted the hearing which culminated in the judgment from which the present appeal was taken. Several circumstances make this clear. It was stipulated by counsel that all the testimony taken on the hearing for a preliminary injunction should be used on the final hearing of the case. This included testimony of Lind and Teece, which in large part was offered to establish jurisdiction. The remarks of the district judge indicate that he felt that his ruling on jurisdiction at the preliminary hearing was correct and that he was ruling the same way upon the final hearing. He thereupon made a finding of fact that the matter in controversy herein, exclusive of interest and costs, exceeds the sum of $3,000 and he entered a conclusion of law that the court had jurisdiction of the subject matter of the action.

In plaintiff's brief it is frankly stated:

"Upon defendants' appeal from the preliminary injunction entered in this cause, this Court held that the District Court's finding of fact that federal jurisdiction existed was supported by the evidence (221 F. 2d 815, 819). *After the trial on the merits the same finding was made upon the same evidence.* * * *" (Italics supplied.)

These circumstances show that no one contended in the final hearing that the court's order for a preliminary injunction barred it from making, nor that it did not make, an independent adjudication on the matter of jurisdiction at the time of the final hearing.[4] We, therefore, have a right on this appeal to review the correctness of the latter decision.

For the reasons hereinabove set forth the judgment of the district court is reversed.

Judgment Reversed.

[Dissenting Opinion]

[*Stipulation*]

FINNEGAN, Circuit Judge, Dissenting. Actually this is an action by Seagram Distillers Corp. to enjoin the multiple defendants from advertising, offering for sale or selling Seagram products at less than the prices stipulated from time to time in accordance with the Fair Trade contracts entered into by Seagram-Distillers Corporation in the State of Illinois. A preliminary injunction was granted below and we affirmed that restraining order. [1955 TRADE CASES ¶ 68,004] 221 F. 2d 815. After our remand the parties stipulated in the district court:

"Plaintiff is, and at all times mentioned in the complaint has been engaged throughout the United States and Illinois, in the business of dealing in, selling and distributing alcoholic beverages of standard quality produced by Joseph E. Seagram & Sons, Ltd., Joheph E. Seagram & Sons, Inc., and corporations affiliated with said corporations. Said bevarages (sometimes hereinafter referred to as 'Seagram products') include Seagram's V. O., Seagram's Seven Crown Blended Whiskey and Seagram Ancient Bottle Gin, and are sold in various sized bottles, the labels or containers of which bear the trade-marks, brands or names of Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons,

[4] On the prior appeal [1955 TRADE CASES ¶ 68,004] 221 F. 2d 815, 819, we said:
"While considerable evidence was received by the district court, a final hearing upon the issues did not take place. The evidence was received so that the court might have an opportunity to exercise its discretion upon the motion for temporary injunction. * * *"

Inc. or of corporations affiliated with said corporation, which are the producers thereof. Each of the beverages is, and during all of the times mentioned in the complaint was, in free, fair and open competition with commodities of the same general class, produced by others, and sold and distributed throughout Illinois. Plaintiff herein has for several years prior to the dates mentioned in the complaint expended large sums of money in advertising Seagram products and during the past several years plaintiff expended for such purpose an amount in excess of Five Hundred Thousand Dollars ($500,000.00) in Illinois alone, and the trade-marks, brands or names under which Seagram products are sold have become widely and favorably known to the trade and public generally in Illinois and plaintiff has sold large quantities of each of said products in Chicago and throughout Illinois.

"Plaintiff is and continuously, since long prior to the dates mentioned in the complaint, has been the sole person authorized by the producers of Seagram products to sell and distribute said products in Illinois, and has during all of said time made sales of said products to various wholesale distributors throughout Illinois.

"Plaintiff has executed so-called Fair Trade contracts with large numbers of retailers of alcoholic bevarages in Illinois. A copy of the form of said executed contracts is attached hereto as Exhibit A."

That, in my judgment, is not merely an ineffectual stipulation to confer jurisdiction on the district court, but rather a stipulation of the matter in controversy. Plaintiff's vice-president, Teece, in charge of Central Division of Seagram-Distillers Corporation testified in substance during the preliminary injunction hearings that his company spent in excess of $300,000 for advertising promotion and outdoor signs in Illinois, all in connection with Seagram products. Use of that first record was authorized by order of this court based on the parties' agreement.

Plaintiff brought this action to protect good will manifested under paragraph 3 of the stipulation, quoted above. But I refrain, for the purposes of this dissent from reaching other points raised by defendant's appeal which incidently are far more serious than the short treatment accorded them by the majority.

[*Value of Right Protected*]

Under 28 U. S. C. § 1332 "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between: (1) Citizens of different States . . ." "By matter in dispute," Mr. Justice Field wrote in *Smith v. Adams,* 130 U. S. 167, 175 (1889) "is meant the subject of litigation, the matter upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken. It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed . . ." Starting with *Glenwood Light Co. v. Mutual Light Co.,* 239 U. S. 117 (1915) there is a line of decisions in various federal courts, permitting "the jurisdictional amount to be calculated on the basis of the property right which is being injured." *John B. Kelly v. Lehigh Nav. Coal Co.,* 151 F. 2d 743, 746 (8th Cir. 1945); *First English L. Church v. Evangelical L. Synod,* 135 F. 2d 701 (10th Cir. 1953); *Purcell v. Summers,* 126 F. 2d 390 (4th Cir. 1942). And several of the district judges in our own circuit have thought that in Fair Trade cases the jurisdictional amount is measured by the value of the right to be protected. See *e. g. Calvert Distillers Corp. v. Rosen* [1953 TRADE CASES ¶ 67,547], 115 F. Supp. 146 (D. C. Ill. 1953).

McNutt v. General Motors, etc., Corp., 298 U. S. 178 (1936) rests upon an attack directed at a regulatory statute. There General Motors sought to restrain enforcement of an Indiana Act regulating the business of purchasing contracts arising out of retail installment sales. In the case before us we are not dealing with state taxation or its regulatory authority but with an alleged invasion by the defendants of a right asserted by plaintiff. If the plaintiff's alleged right fails because of some defect in the Illinois Fair Trade Act that is something else and should be faced. But to stop short and reverse this case on the mechanical basis of a tenuous determination of the jurisdictional dollar sign is an approach I refuse to pursue.

[¶ 68,720] Federal Trade Commission v. James H. Sewell, doing business as Burns Cuboid Company.

In the Supreme Court of the United States. October Term, 1956. No. 823. Dated May 27, 1957.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Federal Trade Commission Act

Unfair Practices—Misrepresentation—Medicinal or Curative Properties—Shoe Insert—Validity of Federal Trade Commission Order.—A Federal Trade Commission order prohibiting a manufacturer of a shoe insert from (1) advertising that its insert has a special effect on the cuboid bone of the foot and on other related bones or that its insert is a scientific device, and from (2) making general claims (concerning "balance," "balancer," "improved health," "better posture," "poise," "improvement of stance," "elimination of foot fatigue," and "better foot action") as to the value of its insert was upheld by the United States Supreme Court on an appeal from a judgment of a Court of Appeals affirming the order insofar as it prohibited the making of technical claims but not affirming the order insofar as it prohibited the making of the general claims. The Court of Appeals had held that the general claims as to the value of the insert were within the legitimate field of "puffing" and that doctors' opinions and their few case histories of failures of the device did not overcome the manufacturer's proof of frequent successful use by customers. The Supreme Court reversed the judgment and remanded the case with instructions to affirm and enforce the Commission's order on the authority of *FTC v. Standard Education Society,* 1932-1939 TRADE CASES ¶ 55,170, 302 U. S. 112, and *FTC v. Algoma Lumber Co.,* 1932-1939 TRADE CASES ¶ 55,041, 291 U. S. 67.

See Unfair Practices, Vol. 2, ¶ 5087.26, 5201.621; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.27, 8621.650.

For the petitioner: J. Lee Rankin, Solicitor General; Victor R. Hansen, Assistant Attorney General; Charles H. Weston, Attorney, Department of Justice; Earl W. Kintner, General Counsel, Federal Trade Commission; and Robert B. Dawkins, Assistant General Counsel, FTC.

For the respondent: George R. Maury, Los Angeles, Cal.

Reversing a judgment of the U. S. Court of Appeals, Ninth Circuit, 1956 Trade Cases ¶ 68,508, in FTC Dkt. 5850.

[*FTC Order Upheld*]

PER CURIAM [*In full text*]: The petition for writ of certiorari is granted and the judgment is reversed. The case is remanded with instructions to affirm and enforce the order of the Federal Trade Commission. *Federal Trade Commission v. Standard Education Society* [1932-1939 TRADE CASES ¶ 55,170], 302 U. S. 112, 113-17; *Federal Trade Commission v. Algoma Lumber Co.* [1932-1939 TRADE CASES ¶ 55,041], 291 U. S. 67, 73.

[¶ 68,721] P. Sorensen Manufacturing Co., Inc. v. Federal Trade Commission.

In the United States Court of Appeals for the District of Columbia Circuit. No. 13530. Decided May 23, 1957.

On Petition to Review an Order of the Federal Trade Commission.

Robinson-Patman Price Discrimination Act

Price Discrimination—Individual Purchase Discounts—Cumulative Discounts—Rebates—Legality.—A Federal Trade Commission order prohibiting a manufacturer of automotive parts from discriminating in prices in the sale of its products to purchasers buying under warehouse distributors' sales agreements and purchasers buying under authorized distributors' agreements was affirmed. Under a warehouse distributor's sales agreement, the manufacturer was bound to pay a 20 per cent discount off the current distributor's prices on each factory purchase and 10 per cent on each warehouse purchase. Under an author-

ized distributor's agreement, a purchaser was allowed a 10 per cent discount and a "performance rebate" of 3 per cent if his accumulated annual purchases were between $3,000 and $6,000, and 5 per cent if such purchases were over $6,000. The two classes of customers competed with each other in the trade areas in which they mutually operated.

See Price Discrimination, Vol. 1, ¶ 3505.495, 3508.465; FTC Enforcement and Procedure, Vol. 2, ¶ 8801.

For the petitioner: James W. Cassedy.

For the respondent: James E. Corkey, Attorney, Federal Trade Commission, with whom Earl W. Kintner, General Counsel, Federal Trade Commission; Robert B. Dawkins, Assistant General Counsel, Federal Trade Commission; and Miles J. Brown, Attorney, Federal Trade Commission, were on the brief.

Affirming a Federal Trade Commission cease and desist order in Dkt. 6052.

Before EDGERTON, Chief Judge, and DANAHER and BASTIAN, Circuit Judges.

[*FTC Order Affirmed*]

PER CURIAM [*In full text*]: The order of the Federal Trade Commission is affirmed. Clayton Act, § 2(a), 38 Stat. 730, as amended by Robinson-Patman Act as amended, 49 Stat. 1526, 15 U. S. C. § 13. *Moog Industries, Inc. v. Federal Trade Commission* [1956 TRADE CASES ¶ 68,527], 238 F. 2d 43 (8th Cir.), cert. granted on other grounds, 353 U. S. 908; *E. Edelman & Company v. Federal Trade Commission* [1956 TRADE CASES ¶ 68,558], 239 F. 2d 152 (7th Cir.); *P. & D. Manufacturing Co., Inc. v. Federal Trade Commission* [1957 TRADE CASES ¶ 68,693], — F. 2d — (7th Cir., No. 11798, decided April 30, 1957.)

Affirmed.

[¶ 68,722] Federal Trade Commission v. William B. Rubin, President, The Sweets Company of America, Inc., and The Sweets Company of America, Inc., a corporation.

In the United States Court of Appeals for the Second Circuit. No. 312—October Term, 1956. Docket No. 24449. Argued May 9, 1957; decided May 27, 1957.

Appeal from an order of the United States District Court for the Southern District of New York. DIMOCK, District Judge.

Federal Trade Commission and Clayton Acts

Federal Trade Commission Enforcement and Procedure—Access to Documentary Evidence—Power to Issue Subpoena in Clayton Act Proceeding.—An order of a United States District Court denying a Federal Trade Commission application for the enforcement of an administrative subpoena directing the president of a corporation to produce documentary evidence and to appear and testify before a hearing examiner in a proceeding before the Commission on a complaint charging the corporation with having violated Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, was reversed and the District Court was directed to grant the application. The District Court had held that the Federal Trade Commission did not have the power to issue a subpoena under Section 9 of the Federal Trade Commission Act in a proceeding instituted for the enforcement of the Clayton Act.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8741, 8801.870.

For the appellant: Earl W. Kintner, General Counsel, Federal Trade Commission; Robert B. Dawkins, Assistant General Counsel, FTC; and John T. Loughlin, Attorney, FTC.

For the appellees: Becker, Ross & Stone (Albert A. DeStefano, Jerome Thomases, and Jesse Margolin, of counsel), New York, N. Y.

Reversing a decision of the U. S. District Court, Southern District of New York, 1956 Trade Cases ¶ 68,505, in FTC Dkt. 6460.

Before: CHASE, HINCKS and LUMBARD, Circuit Judges.

[*Appeal*]

Appeal from an order of the District Court for the Southern District of New York denying an application made by the Federal Trade Commission for the enforcement of an administrative subpoena *duces tecum.* The subpoena directed the respondent, William B. Rubin, President of The Sweets Company of America, Inc., to produce documentary evidence described in it and to appear and testify before a hearing examiner of the Commission in a proceeding before the Commission on a complaint charging the corporation with having violated Section 2(d) of the Clayton Act, as amended, 49 Stat. 1526; 15 U. S. C. 13(d). DIMOCK, Judge. Reversed.

[*FTC Subpoena Power*]

PER CURIAM [*In full text*]: Order reversed with directions to grant the application. *Federal Trade Commission v. Tuttle,* 2 Cir. decided April 2, 1957 [1957 TRADE CASES ¶ 68,669]; *Menzies et al. v. Federal Trade Commission,* 4 Cir., decided March 7, 1957 [1957 TRADE CASES ¶ 68,648], cert. denied May 13, 1957; and *Federal Trade Commission v. Reed,* 7 Cir. decided April 11, 1957 [1957 TRADE CASES ¶ 68,676].

[¶ 68,723] United States v. E. I. du Pont de Nemours and Company et al.

In the Supreme Court of the United States. October Term, 1956. No. 3. Dated June 3, 1957.

On Appeal from the United States District Court for the Northern District of Illinois. WALTER J. LABUY, District Judge.

Case No. 987 in the Antitrust Division of the Department of Justice.

Clayton Antitrust Act

Acquisitions of Stock or Assets—Stock Acquisition—Vertical Integration (Supplier Corporation's Acquisition of Stock in Customer Corporation)—Applicability of Prohibition to Holding and Use of Stock—Tendency to Create Monopoly (Reasonable Probability Test)—Relevant Market—Intent.—A chemical company's acquisition, holding, and use of 23 per cent of the stock of an automobile manufacturer, which resulted in a reasonable probability (at the time of suit) of the creation of a monopoly, violated Section 7 of the Clayton Act, as it existed prior to its amendment in 1950. The section, prior to such amendment, applied to an acquisition by a supplier corporation of the stock of a customer corporation, that is, it applied to vertical acquisitions as well as to horizontal acquisitions. Also, Section 7, prior to amendment, was applicable not only to the acquisition of stock but also to the holding and subsequent use of the acquired stock. While the section is designed to arrest the creation of trusts, conspiracies, and monopolies in their incipiency, the word "incipiency" connotes not only the time when the stock is acquired but any time when the acquisition threatens to ripen into a prohibited effect. The statutory policy of fostering free competition is furthered when no supplier has an advantage over his competitors from an acquisition of his customer's stock likely to have the effects condemned by the statute.

The chemical company's commanding position as a supplier of automobile finishes and fabrics to the automobile manufacturer was achieved because its acquisition of the automobile manufacturer's stock, and the consequent close intercompany relationship between the two manufacturers, led to the insulation of most of the automobile manufacturer's market from free competition, with the resultant likelihood, at the time of suit, of the creation of a monopoly of a line of commerce. The bounds of the relevant market, the determination of which is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition within the area of effective competition, were not coextensive with the total market for finishes and fabrics, but were coextensive with the automobile industry, the relevant market for automobile finishes and fabrics. The market affected was substantial, and there was a likelihood that competition might be foreclosed in a substantial share of that market. The substantiality of a relevant market comprising the automobile industry was undisputed, and the substantiality of the automobile manufacturer's share of that market was fully established. Furthermore, the evidence established that the acquisition was not made solely for investment purposes and that the bulk of the chemical company's

production had always supplied the largest part of the requirements of the automobile manufacturer. The chemical company's commanding position was promoted by its stock interest and was not gained solely on competitive merit. It purposely employed its stock to pry open the automobile manufacturer's market to entrench itself as the primary supplier of finishes and fabrics to the automobile manufacturer. It was not requisite to the proof of the violation to show that a restraint or monopoly was intended.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4205.30, 4206.350, 4206.375.

For the appellant: J. Lee Rankin, Solicitor General; Victor R. Hansen, Assistant Attorney General; John F. Davis, Assistant to the Solicitor General; Victor H. Kramer and Margaret H. Brass, Attorneys, Department of Justice, Washington, D. C.

For the appellees: John L. O'Brian, Hugh B. Cox, Charles A. Horsky, and Daniel M. Gribbon (Covington & Burling, of counsel), Washington, D. C., for E. I. du Pont de Nemours and Co., Philip C. Scott, Leonard Joseph, and Dewey, Ballantine, Bushby, Palmer & Wood, New York, N. Y., on brief for Christiana Securities Co. and Delaware Realty & Investment Corp. Robert L. Stern and Miles G. Seeley, Chicago, Ill.; Henry M. Hogan and Robert A. Nitschke, Detroit, Mich.; William A. Grier, New York, N. Y. (Mayer, Friedlich, Spiess, Tierney, Brown & Platt, Chicago, Ill., of counsel), on brief for General Motors Corp.

Reversing and remanding a decision of the U. S. District Court, Northern District of Illinois, Eastern Division, 1954 Trade Cases ¶ 67,905. For prior decisions of the U. S. District Court, see 1954 Trade Cases ¶ 67,898; 1953 Trade Cases ¶ 67,509, 67,444, and 67,429; 1952 Trade Cases ¶ 67,348, 67,307, 67,292; and 1950-1951 Trade Cases ¶ 62,809 and 62,557; and for a prior decision of the U. S. Supreme Court, see 1950-1951 Trade Cases ¶ 62,633.

[*Scope of Appeal*]

Mr. Justice Brennan delivered the opinion of the Court [*In full text*]:

This is a direct appeal under § 2 of the Expediting Act[1] from a judgment of the District Court for the Northern District of Illinois,[2] dismissing the Government's action brought in 1949 under § 15 of the Clayton Act.[3] The complaint alleged a violation of § 7 of the Act[4] resulting from the purchase by E. I. du Pont de Nemours and Company in 1917-1919 of a 23% stock interest in General Motors Corporation. This appeal is from the dismissal of the action as to du Pont, General Motors and the corporate holders of large amounts of du Pont stock, Christiana Securities Corporation and Delaware Realty & Investment Company.[5]

[*Primary Issue*]

The primary issue is whether du Pont's commanding position as General Motors' supplier of automotive finishes and fabrics was achieved on competitive merit alone, or because its acquisition of the General Motors' stock, and the consequent close intercompany relationship, led to the insulation of most of the General Motors' market from free competition, with the resultant likelihood, at the time of suit, of the creation of a monopoly of a line of commerce.

[*Clayton Act, Section 7*]

The first paragraph of § 7, pertinent here, provides:

> "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."[6]

[1] 32 Stat. 823, as amended, 15 U. S. C. § 29. The Court noted probable jurisdiction. 350 U. S. 815.

[2] [1954 TRADE CASES ¶ 67,905] 126 F. Supp. 235.

[3] 38 Stat. 736, 15 U. S. C. (1946 ed.) § 25.

[4] This action is governed by the Clayton Act as it was before the 1950 amendments, which by their terms are inapplicable to acquisitions prior to 1950. 64 Stat. 1125, 15 U. S. C. § 18.

[5] The amended complaint also alleged violation of §§ 1 and 2 of the Sherman Act. 26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. §§ 1, 2. In view of our determination of the case, we are not deciding the Government's appeal from the dismissal of the action under the Sherman Act.

[6] 38 Stat. 731, 15 U. S. C. (1946 ed.) § 18.

Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended. Acquisitions solely for investment are excepted, but only if, and so long as, the stock is not used by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition.

[*Vertical Acquisitions*]

We are met at the threshold with the argument that § 7 before its amendment applied only to an acquisition of the stock of a competing corporation, and not to an acquisition by a supplier corporation of the stock of a customer corporation—in other words, that the statute applied only to horizontal and not to vertical acquisitions. This is the first case presenting the question in this Court. *International Shoe Co. v. Federal Trade Comm'n,* 280 U. S. 291, and *Thatcher Mfg. Co. v. Federal Trade Comm'n,* 272 U. S. 554, involved corporate acquisitions of stock of competitors.

During the 35 years before this action was brought, the Government did not invoke § 7 against vertical acquisitions. The Federal Trade Commission has said that the section did not apply to vertical acquisitions. See F. T. C. Report on Corporate Mergers and Acquisitions, 168 (1955). Also, the House Committee considering the 1950 revision of § 7 stated that ". . . it has been thought by some that this legislation [the 1914 Act] applies only to the so-called horizontal mergers. . . ." H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11. The House Report adds, however, that the 1950 amendment was purposed ". . . to *make it clear* that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal. . . ." (Italics added.)

This Court has the duty to reconcile administrative interpretations with the broad anti-trust policies laid down by Congress. Cf. *Automatic Canteen Co. v. Federal Trade Comm'n* [1953 Trade Cases ¶ 67,503], 346 U. S. 61, 74. The failure of the Commission to act is not a binding administrative interpretation that Congress did not intend vertical acquisitions to come within the purview of the Act. Accord, *Baltimore & Ohio R. Co. v. Jackson,* 353 U. S. 325, —.

[*Scope of Clayton Act*]

The first paragraph of § 7, written in the disjunctive, plainly is framed to reach not only the corporate acquisition of stock of a competing corporation, where the effect may be substantially to lessen competition between them, but also the corporate acquisition of stock of any corporation, competitor or not, where the effect may be either (1) to restrain commerce in any section or community, or (2) tend to create a monopoly of any line of commerce. The amended complaint does not allege that the effect of du Pont's acquisition may be to restrain commerce in any section or community but alleges that the effect was ". . . to tend to create a monopoly in particular lines of commerce . . . ."

Section 7 contains a second paragraph dealing with a holding company's acquisition of stock in two or more corporations.[7] Much of the legislative history of the section deals with the alleged holding company evil.[8] This history does not aid in interpretation because our concern here is with the first paragraph of the section. There is, however, pertinent legislative history which does aid and support our construction.

Senator Chilton, one of the Senate managers of the bill, explained that the House conferees insisted that to prohibit just the acquisitions where the effect was "substan-

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[7] This paragraph provides:

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." 38 Stat. 731, 15 U. S. C. (1946 ed.) § 18.

[8] See, *e. g.,* S. Rep. No. 698, 63d Cong., 2d Sess. 13; H. R. Rep. No. 627, 63d Cong., 2d Sess. 17.

tially" to lessen competition would not accomplish the designed aim of the statute, because "a corporation might acquire the stock of another corporation, and there would be no lessening of competition, but the tendency might be to create monopoly or to restrain trade or commerce." "Therefore," said Senator Chilton, "there was added . . . the following: 'Or to restrain such commerce in any section or community or tend to create a monopoly of any line of commerce.'"[9] This construction of the section, as embracing three separate and distinct effects of a stock acquisition, has also been recognized by a number of federal courts.[10]

[*Violation—Test*]

We hold that any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of the section whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce. Thus, although du Pont and General Motors are not competitors, a violation of the section has occurred if, as a result of the acquisition, there was at the time of suit a reasonable likelihood of a monopoly of any line of commerce. Judge Maris correctly stated in *Transamerica Corp. v. Board of Governors* [1953 TRADE CASES ¶ 67,536], 206 F. 2d 163, 169:

> "A monopoly involves the power to . . . exclude competition when the monopolist desires to do so. Obviously, under Section 7 it was not necessary . . . to find that . . . [the defendant] has actually achieved monopoly power but merely that the stock acquisitions under attack have brought it measurably closer to that end. For it is the purpose of the Clayton Act to nip monopoly in the bud. Since by definition monopoly involves the power to eliminate competition a lessening of competition is clearly relevant in the determination of the existence of a tendency to monopolize. Accordingly, in order to determine the existence of a tendency to monopoly in . . . any . . . line of business the area or areas of existing effective competition in which monopoly power might be exercised must first be determined. . . ."

Appellees argue that there exists no basis for a finding of a probable restraint or monopoly within the meaning of § 7 because the total General Motors market for finishes and fabrics constituted only a negligible percentage of the total market for these materials for all uses, including automotive uses. It is stated in the General Motors brief that in 1947 du Pont's finish sales to General Motors constituted 3.5% of all sales of finishes to industrial users, and that its fabrics sales to General Motors comprised 1.6% of the total market for the type of fabric used by the automobile industry.

[*Relevant Market*]

Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition "within the area of effective competition."[11] Substantiality can be determined only in terms of the market affected. The record shows that automotive finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics[12] to make

[9] 51 Cong. Rec. 16002.

[10] *Aluminum Co. of America v. Federal Trade Comm'n*, 284 F. 401; *Ronald Fabrics Co. v. Verney Brunswick Mills, Inc.*, CCH 1946-1947 TRADE CASES ¶ 57,514; *United States v. New England Fish Exchange*, 258 F. 732; *cf. Transamerica Corp. v. Board of Governors* [1953 TRADE CASES ¶ 67,536], 206 F. 2d 163; *Sidney Morris & Co. v. National Assn. of Stationers*, 40 F. 2d 620, 625.

[11] *Standard Oil Co. of California v. United States* [1948-1949 TRADE CASES ¶ 62,432], 337 U. S. 293, 299, n. 5. Section 3 of the Act, with which the Court was concerned in *Standard Oil*, makes unlawful certain agreements ". . . where the effect . . . may be to substantially lessen competition or tend to create a monopoly *in any line of commerce.*" 38 Stat. 731, 15 U. S. C. (1946 ed.) § 14. (Emphasis added.)

[12] For example, the following is said as to finishes in the du Pont brief:

"The largest single finish item which du Pont sells to General Motors is a low-viscosity nitrocellulose lacquer, discovered and patented by du Pont and for which its trademark is 'Duco'.

* * *

"The invention and development of 'Duco' represented a truly significant advance in the art of paint making and in the production of automobiles; without 'Duco' mass production of automobiles would not have been possible.

"By the early 1920's the need for better finishing materials for automobiles had become urgent. . . . The varnish method then used in finishing automobiles was described in detail at the trial by automobile pioneers. . . . Finishing an automobile with varnish required an intolerably long time—up to 3 or 4 weeks—to apply the numerous coats needed. When the finish was complete, its longest life expectancy was less than a year, and often it began to peel off before the car was delivered. . . ."

them a "line of commerce" within the meaning of the Clayton Act. *Cf. Van Camp & Sons Co. v. American Can Co.*, 278 U. S. 245.[13] Thus, the bounds of the relevant market for the purposes of this case are not coextensive with the total market for finishes and fabrics, but are coextensive with the automobile industry, the relevant market for automotive finishes and fabrics.[14]

[*Substantiality of Relevant Market*]

The market affected must be substantial. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 357. Moreover, in order to establish a violation of § 7 the Government must prove a likelihood that competition may be "foreclosed in a substantial share of . . . [that market]."[15] Both requirements are satisfied in this case. The substantiality of a relevant market comprising the automobile industry is undisputed. The substantiality of General Motors' share of that market is fully established in the evidence.

General Motors is the colossus of the giant automobile industry. It accounts annually for upwards of two fifths of the total sales of automotive vehicles in the nation.[16] In 1955 General Motors ranked first in sales and second in assets among all United States industrial corporations[17] and became the first corporation to earn over a billion dollars in annual net income.[18] In 1947 General Motors' total purchases of all products from du Pont were $26,628,274, of which $18,938,229 (71%) represented purchases from du Pont's Finishes Division. Of the latter amount purchases of "Duco"[19] and the thinner used to apply "Duco" totaled $12,224,798 (65%), and "Dulux"[20] purchases totaled $3,179,225. Purchases by General Motors of du Pont fabrics in 1948 amounted to $3,700,000, making it the largest account of du Pont's Fabrics Division. Expressed in percentages, du Pont supplied 67% of General Motors' requirements for finishes in 1946 and 68% in 1947.[21] In fabrics du Pont supplied 52.3% of requirements in 1946, and 38.5% in 1947.[22] Because General Motors accounts for almost one-half of the automobile industry's annual sales, its requirements for automotive finishes and fabrics must represent approximately one-half of the relevant market for these materials. Because the record clearly shows that quantitatively and percentagewise du Pont supplies the largest part of General Motors' requirements, we must conclude that du Pont has a substantial share of the relevant market.

[*Holding and Use of Stock*]

The appellees argue that the Government could not maintain this action in 1949 because § 7 is applicable only to the acquisition

Du Pont's Director of Sales since 1944, Nickowitz, testified as to fabrics sold to automobile manufacturers as follows:

"Q. Now, over the years, isn't it true that speaking generally du Pont has followed the policy in selling its fabrics to the automobile field of undercutting its competitors in price? You don't try to sell it on a lower price than that quoted by any other competitor, do you?

"A. Well, we don't know. We go in and we bid based on our costs. *Now, in the automotive industry, we have a different situation than you do in the furniture trade, for example, where you have an established price.*

"You see, in the automobile industry, each manufacturer uses a different construction. They all have their own peculiar ideas of what they want about these fabrics. Some want dyed backs, and some want different finishes, so you don't have any standard prices in the automobile industry." (Emphasis added.)

And see extended discussions in the opinion of the trial court, as to finishes, 126 F. Supp., at 288-292, as to fabrics, *id.*, at 296-300.

[13] "The phrase ['in any line of commerce'] is comprehensive and means that if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words 'in *any* line of commerce' literally are satisfied." 278 U. S., at 253.

[14] The General Motors brief states:
"If the market for these products were solely or mainly the General Motors Corporation, or the automobile industry as a whole, General Motors' volume and present share of the automobile industry might constitute a market large enough for the Government to rely on."

[15] *Standard Oil Co. of California v. United States* [1948-1949 TRADE CASES ¶ 62,432], 337 U. S. 293, at 314.

[16] Moody's Industrials lists General Motors' proportion of the industry:

	Percent		Percent
1938	42+	1947	38.5
1939	42+	1948	38.8
1940	45.6	1949	42.7
1941	45.3	1950	45.6
1942	W. W. II	1951	41.8
1943	W. W. II	1952	40.3
1944	W. W. II	1953	44.7
1945	W. W. II	1954	49.9
1946	36.3	1955	48.8

[17] Fortune Directory of the 500 Largest U. S. Industrial Corporations, July 1956, p. 2.

[18] N. Y. Times, Feb. 3, 1956, p. 1, col. 3.

[19] A finish developed specially by du Pont and General Motors for use as an automotive finish.

[20] A synthetic enamel developed by du Pont which is used on refrigerators, also manufactured by General Motors.

[21] 126 F. Supp., at 295.

[22] *Id.*, at 300-301.

of stock and not to the holding or subsequent use of the stock. This argument misconceives the objective toward which § 7 is directed. The Clayton Act was intended to supplement the Sherman Act.[23] Its aim was primarily to arrest apprehended consequences of inter-corporate relationships before those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case. The Senate declared the objective of the Clayton Act to be as follows:

> ". . . Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890 [the Sherman Act], or other existing anti-trust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies *in their incipiency and before consummation*. . . ." S. Rep. No. 698, 63d Cong., 2d Sess. 1. (Emphasis added.)

"Incipiency" in this context denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect. See *Transamerica Corp. v. Board of Governors* [1953 TRADE CASES ¶ 67,536], 206 F. 2d 163, 166. To accomplish the congressional aim, the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce.[24] Even when the purchase is solely for investment, the plain language of § 7 contemplates an action at any time the stock is used to bring about or in attempting to bring about the substantial lessening of competition.[25]

Prior cases under § 7 were brought at or near the time of acquisition. See, *e. g., International Shoe Co. v. Federal Trade Comm'n*, 280 U. S. 291; *V. Vivaudou, Inc. v. Federal Trade Comm'n*, 54 F. 2d 273; *Federal Trade Comm'n v. Thatcher Mfg. Co.*, 5 F. 2d 615, rev'd in part on another ground, 272 U. S. 554; *United States v. Republic Steel Corp.* [1932-1939 TRADE CASES ¶ 55,071], 11 F. Supp. 117; *Vanadium-Alloys Steel Co.*, 18 F. T. C. 194. None of these cases holds, or even suggests, that the Government is foreclosed from bringing the action at any time when a threat of the prohibited effects is evident.

[*Probability of Restraint*]

Related to this argument is the District Court's conclusion that 30 years of nonrestraint negated "any reasonable probability of such a restraint" at the time of the suit.[26] While it is, of course, true that proof of a mere *possibility* of a prohibited restraint or tendency to monopoly will not establish the statutory requirement that the effect of an acquisition "may be" such restraint or tendency,[27] the basic facts found by the District Court demonstrate the error of its conclusion.[28]

[*Position as Supplier*]

The du Pont Company's commanding position as a General Motors supplier was not achieved until shortly after its purchase of a sizable block of General Motors stock in 1917.[29] At that time its production for the automobile industry and its sales to General Motors were relatively insignificant. General Motors then produced only about 11% of the total automobile production and its requirements, while relatively substantial, were far short of the proportions they assumed as it forged ahead to its present place in the industry.

[*Period Prior to Acquisition*]

At least 10 years before the stock acquisition, the du Pont Company, for over a century the manufacturer of military and commercial explosives, had decided to expand its business into other fields. It forsaw the loss of its market for explosives after the United States Army and Navy decided in 1908 to construct and operate their own plants. Nitrocellulose, a nitrated cotton, was the principal raw material used

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[23] *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346.

[24] *Cf. Corn Products Refining Co. v. Federal Trade Comm'n* [1944-1945 TRADE CASES ¶ 57,363], 324 U. S. 726, 738.

[25] Section 7 provides, in pertinent part:

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. . . ." 38 Stat. 731, 15 U. S. C. (1946 ed.) § 18.

[26] 126 F. Supp., at 335.

[27] *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, at 356-357.

[28] There is no significant dispute as to the basic facts pertinent to the decision. We are thus not confronted here with the provision of Fed. Rules Civ. Proc., 52(a), that findings of fact shall not be set aside unless clearly erroneous.

[29] Before 1917, du Pont supplied General Motors with coated fabrics. 126 F. Supp., at 297.

in du Pont's manufacture of smokeless powder. A search for outlets for this raw material uncovered requirements in the manufacture of lacquers, celluloid, artificial leather and artificial silk. The first step taken was the du Pont purchase in 1910 of the Fabrikoid Company, then the largest manufacturer of artificial leather, reconstituted as the du Pont Fabrikoid Company in 1913.

The expansion program was barely started, however, when World War I intervened. The du Pont Company suddenly found itself engulfed with orders for military explosives from foreign nations later to be allies of the United States in the war, and it had to increase its capacity and plant facilities from 700,000 to 37,000,000 pounds per month at a cost exceeding $200,000,000. Profits accumulated and ultimately amounted to $232,000,000. The need to find postwar uses for its expanded facilities and organization now being greater than ever, du Pont continued its expansion program during the war years, setting aside $90,000,000 for the purpose. In September 1915, du Pont bought the Arlington Works, one of the nation's two largest celluloid companies. In June 1916, the Fairfield Rubber Company, producers of rubber-coated fabrics for automobile and carriage tops, was taken over by du Pont Fabrikoid. In March 1917, purchase was made of Harrison Brothers and Company, manufacturers of paint, varnish, acids and certain inorganic chemicals used in paint manufacture. Shortly afterwards, Harrison absorbed Beckton Chemical Company, a color manufacturer, and, also in 1917, the Bridgeport Wood Finishing Company, a varnish manufacturer.

Thus, before the first block of General Motors stock was acquired, du Pont was seeking markets not only for its nitrocellulose, but also for the artificial leather, celluloid, rubber-coated goods, and paints and varnishes in demand by automobile companies. In that connection, the trial court expressly found that ". . . reports and other documents written at or near the time of the investment show that du Pont's representatives were well aware that General Motors was a large consumer of products of the kind offered by du Pont," and that John J. Raskob, du Pont's treasurer and the principal promoter of the investment, "for one, thought that du Pont would ultimately get all that business . . . ."[30]

[*Stock Acquisition*]

The Company's interest in buying into General Motors was stimulated by Raskob and Pierre S. du Pont, then du Pont's president, who acquired personal holdings of General Motors stock in 1914. General Motors was organized six years earlier by William C. Durant to acquire previously independent automobile manufacturing companies—Buick, Cadillac, Oakland and Oldsmobile. Durant later brought in Chevrolet, organized by him when he was temporarily out of power, during 1910-1915, and a bankers' group controlled General Motors. In 1915, when Durant and the bankers deadlocked on the choice of a Board of Directors, they resolved the deadlock by an agreement under which Pierre S. du Pont was named Chairman of the General Motors Board, and Pierre S. du Pont, Raskob and two nominees of Mr. du Pont were named neutral directors. By 1916, Durant settled his differences with the bankers and resumed the presidency and his controlling position in General Motors. He prevailed upon Pierre S. du Pont and Raskob to continue their interest in General Motors' affairs, which both did as members of the Finance Committee, working closely with Durant in matters of finances and operations and plans for future expansion. Durant persistently urged both men and the "Wilmington people, as he called it,"[31] to buy more stock in General Motors.

Finally, Raskob broached to Pierre S. du Pont the proposal that part of the fund earmarked for du Pont expansion be used in the purchase of General Motors stock. At this time about $50,000,000 of the $90,000,000 fund was still in hand. Raskob foresaw the success of the automobile industry and the opportunity for great profit in a substantial purchase of General Motors stock. On December 19, 1917, Raskob submitted a Treasurer's Report to the du Pont Finance Committee recommending a purchase of General Motors stock in the amount of $25,000,000. That report makes clear that more than just a profitable investment was contemplated. A major consideration was that an expanding General Motors would provide a substantial market needed by the burgeoning du Pont organ-

[30] 126 F. Supp., at 243.

[31] 126 F. Supp., at 241.

ization. Raskob's summary of reasons in support of the purchase includes this statement: "Our interest in the General Motors Company will undoubtedly secure for us the entire Fabrikoid, Pyralin [celluloid], paint and varnish business of those companies, *which is a substantial factor.*" (Italics added.) [32]

This thought, that the purchase would result in du Pont's obtaining a new and substantial market, was echoed in the Company's 1917 and 1918 annual reports to stockholders. In the 1917 report appears: "Though this is a new line of activity, it is one of great promise and one that seems to be well suited to the character of our organization. *The motor companies are very large customers of our Fabrikoid and Pyralin as well as paints and varnishes.*" (Italics added.) The 1918 report says: "The consumption of paints, varnishes and fabrikoid in the manufacture of automobiles gives another common interest."

[*Investment*]

This background of the acquisition, particularly the plain implications of the contemporaneous documents, destroys any basis for a conclusion that the purchase was made "solely for investment." Moreover, immediately after the acquisition, du Pont's influence growing out of it was brought to bear within General Motors to achieve primacy for du Pont as General Motors' supplier of automotive fabrics and finishes.

[*Purchase Policy*]

Two years were to pass before du Pont's total purchases of General Motors stock brought its percentage to 23% of the outstanding stock and its aggregate outlay to $49,000,000. During that period, du Pont and Durant worked under an arrangement giving du Pont primary responsibility for finances and Durant the responsibility for operations. But J. A. Haskell, du Pont's former sales manager and vice-president, became the General Motors vice-president in charge of the operations committee. The trial judge said that Haskell ". . . was willing to undertake the responsibility of keeping du Pont informed of General Motors affairs during Durant's regime . . . ." [33]

Haskell frankly and openly set about gaining the maximum share of the General Motors market for du Pont. In a contemporaneous 1918 document, he reveals his intention to "pave the way for perhaps a more general adoption of our material," and that he was thinking "how best to get cooperation [from the several General Motors Divisions] whereby makers of such of the low priced cars as it would seem possible and wise to get transferred will be put in the frame of mind necessary for its adoption [du Pont's artificial leather]."

Haskell set up lines of communication within General Motors to be in a position to know at all times what du Pont products and what products of du Pont competitors were being used. It is not pure imagination to suppose that such surveillance from that source made an impressive impact upon purchasing officials. It would be understandably difficult for them not to interpret it as meaning that a preference was to be given to du Pont products. Haskell also actively pushed the program to substitute Fabrikoid artificial leathers for genuine leather and sponsored use of du Pont's Pyralin sheeting through a liaison arrangement set up between himself and the du Pont sales organization.

Thus sprung from the barrier, du Pont quickly swept into a commanding lead over its competitors, who were never afterwards in serious contention. Indeed, General Motors' then principal paint supplier, Flint Varnish and Chemical Works, early in 1918 saw the handwriting on the wall. The Flint president came to Durant asking to be bought out, telling Durant, as the trial judge found, that he "knew du Pont had bought a substantial interest in General Motors and was interested in the paint industry; that . . . [he] felt he would lose a valuable customer, General Motors." [34] The du Pont Company bought the Flint Works and later dissolved it.

In less than four years, by August 1921, Lammot du Pont, then a du Pont vice-president and later Chairman of the Board of General Motors, in response to a query from Pierre S. du Pont, then Chairman of the Board of both du Pont and General Motors, "whether General Motors was taking its entire requirements of du Pont products from du Pont," was able to reply that four of General Motors' eight operating divisions bought from du Pont their entire requirements of paints and varnishes,

[32] 126 F. Supp., at 241.
[33] 126 F. Supp., at 245.
[34] 126 F. Supp., at 267.

five their entire requirements of Fabrikoid, four their entire requirements of rubber cloth, and seven their entire requirements of Pyralin and celluloid. Lammot du Pont quoted du Pont's sales department as feeling that "the condition is improving and that eventually satisfactory conditions will be established in every branch, but they wouldn't mind seeing things go faster." Pierre S. du Pont responded that "with the change of management at Cadillac, Oakland and Olds [Cadillac was taking very little paints and varnishes, and Oakland but 50%; Olds was taking only part of its requirements for fabrikoid], I believe that you should be able to sell substantially all of the paint, varnish and fabrikoid products needed." He also suggested that "a drive should be made for the Fisher Body business. Is there any reason why they have not dealt with us?"

Fisher Body was stubbornly resistant to du Pont sales pressure. General Motors, in 1920, during Durant's time, acquired 60% stock control of Fisher Body Company. However, a voting trust was established giving the Fisher brothers broad powers of management. They insisted on running their own show and for years withstood efforts of high-ranking du Pont and General Motors executives to get them to switch to du Pont from their accustomed sources of supply. Even after General Motors obtained 100% stock control in 1926, the Fisher brothers retained sufficient power to hold out. By 1947 and 1948, however, Fisher resistance had collapsed, and the proportions of its requirements supplied by du Pont compared favorably with the purchases by other General Motors Divisions.

In 1926, the du Pont officials felt that too much General Motors business was going to its competitors. When Pierre S. du Pont and Raskob expressed surprise, Lammot du Pont gave them a breakdown, by dollar amounts, of the purchases made from du Pont's competitors. This breakdown showed, however, that only Fisher Body of the General Motors divisions was obtaining any substantial proportion of its requirements from du Pont's competitors.

Competitors did obtain higher percentages of the General Motors business in later years, although never high enough at any time substantially to affect the dollar amount of du Pont's sales. Indeed it appears likely that General Motors probably turned to outside sources of supply at least in part because its requirements outstripped du Pont's production, when General Motors proportion of total automobile sales grew greater and the company took its place as the sales leader of the automobile industry. For example, an undisputed Government exhibit shows that General Motors took 93% of du Pont's automobile Duco production in 1941 and 83% in 1947.

[*Use of Stock Holding*]

The fact that sticks out in this voluminous record is that the bulk of du Pont's production has always supplied the largest part of the requirements of the one customer in the automobile industry connected to du Pont by a stock interest. The inference is overwhelming that du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit.

We agree with the trial court that considerations of price, quality and service were not overlooked by either du Pont or General Motors. Pride in its products and its high financial stake in General Motors' success would naturally lead du Pont to try to supply the best. But the wisdom of this business judgment cannot obscure the fact, plainly revealed by the record, that du Pont purposely employed its stock to pry open the General Motors market to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics.[35]

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[35] The du Pont policy is well epitomized in a 1926 letter written by a former du Pont employee, J. L. Pratt, when a General Motors vice-president and member of the Executive Committee, to the general manager of a General Motors Division:

"I am glad to know that your manufacturing, chemical and purchasing divisions feel they would be in better hands possibly by dealing with du Pont than with local companies. From a business standpoint no doubt your organization would be influenced to give the business, under equal conditions, to the local concerns. However, I think when General Motors divisions recognize the sacrifice that the du Pont Company made in 1920 and 1921, to keep General Motors Corporation from being put in a very bad light publicly—the du Pont Company going to the extent of borrowing $35,000,000 on its notes when the company was entirely free of debt, in order to prevent a large amount of General Motors stock being thrown on the open market—they should give weight to this which in my mind more than overbalances considera-

Similarly, the fact that all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including du Pont's competitors, does not defeat the Government's right to relief. It is not requisite to the proof of a violation of § 7 to show that restraint or monopoly was intended.

[*Test of Violation*]

The statutory policy of fostering free competition is obviously furthered when no supplier has an advantage over his competitors from an acquisition of his customer's stock likely to have the effects condemned by the statute. We repeat, that the test of a violation of § 7 is whether at the time of suit there is a reasonable probability that the acquisition is likely to result in the condemned restraints. The conclusion upon this record is inescapable that such likelihood was proved as to this acquisition. The fire that was kindled in 1917 continues to smolder. It burned briskly to forge the ties that bind the General Motors market to du Pont, and if it has quieted down, it remains hot, and, from past performance, is likely at any time to blaze and make the fusion complete.[36]

[*Equitable Relief*]

The judgment must therefore be reversed and the cause remanded to the District Court for a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute. The District Courts, in the framing of equitable decrees, are clothed "with large discretion to model their judgments to fit the exigencies of the particular case." *International Salt Co. v. United States* [1946-1947 TRADE CASES ¶ 57,635], 332 U. S. 392, 400-401.

The motion of the appellees Christiana Securities Company and Delaware Realty and Investment Company for dismissal of the appeal as to them is denied. It seems appropriate that they be retained as parties pending determination by the District Court of the relief to be granted.

It is so ordered.

MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER took no part in the consideration or decision of this case.

[Dissenting Opinion]

MR. JUSTICE BURTON, whom MR. JUSTICE FRANKFURTER joins, dissenting.

In June 1949, the United States brought this civil action in the United States District Court for the Northern District of Illinois under § 4 of the Sherman Act and § 15 of the Clayton Act to enjoin alleged violations of §§ 1 and 2 of the Sherman Act, and § 7 of the Clayton Act. The amended complaint, insofar as pertinent to the issues here, alleged that du Pont and General Motors have been engaged, since 1915, in a combination and conspiracy to restrain and monopolize interstate trade, and that du Pont's acquisition of General Motors' stock had the effect of restraining trade and tending to create a monopoly. In brief it was alleged that, by means of the relationship between du Pont and General Motors, du Pont intended to obtain, and did obtain, an illegal preference over its competitors in the sale to General Motors of its products, and a further illegal preference in the development of chemical discoveries made by General Motors. Appellees denied the charges.

The trial of these issues took nearly seven months. The District Court heard 52 wit-

tion of local conditions. In other words, I feel that where conditions are equal from the standpoint of quality, service and price, the du Pont Company should have the major share of General Motors divisions' business on those items that the du Pont Company can take on the basis of quality, service and price. If it is possible to use the product from more than one company I do not think it advisable to give any one company all of the business, as I think it is desirable to always keep a competitive situation, otherwise any supplier is liable to grow slack in seeing that you have the best service and price possible.

"I have expressed my own personal sentiments in this letter to you in order that you might have my point of view, but I do not wish to influence your organization in any way that would be against your own good judgment, keeping in mind that above all the prime consideration is to do the best thing for Delco-Light Company, and that considerations in regard to the du Pont Company or other concerns are secondary, and I am sure this is your feeling."

[36] The potency of the influence of du Pont's 23% stock interest is greater today because of the diffusion of the remaining shares which, in 1947, were held by 436,510 stockholders; 92% owned no more than 100 shares each, and 60% owned no more than 25 shares each. 126 F. Supp., at 244.

nesses, including most of the principal actors, and received over 2,000 exhibits. The evidence contained in the 8,283-page transcript of record covers in minute and intimate detail the facts bearing on the Government's charge that du Pont, by coercion, agreement, control or influence, had interfered unlawfully with General Motors' purchasing and manufacturing policies. On the basis of this evidence, the District Court found that the Government had failed to prove its case and, specifically, that (a) du Pont did not control General Motors, (b) there had been "no limitation or restraint upon General Motors' freedom to deal freely and fully with competitors of du Pont" or upon its "freedom . . . to deal with its chemical discoveries," and (c) after 30 years in which no such restraint had resulted, there was no "basis for a finding that there is or has been any reasonable probability of such a restraint within the meaning of the Clayton Act." [1954 TRADE CASES ¶ 67,905] 126 F. Supp. 235, 335.

The Government's basic contention in this Court is that du Pont violated §§ 1 and 2 of the Sherman Act in that, by means of its alleged control of General Motors, it obtained an unlawful preference with respect to General Motors' purchases of materials. In the closing pages of its brief, and for a few minutes in its oral argument, the Government added the assertion that du Pont had violated § 7 of the Clayton Act in that its stock interest in General Motors "has been used to channel General Motors' purchases to du Pont."

This Court, ignoring the Sherman Act issues which have been the focal point of eight years of litigation, now holds that du Pont's acquisition of a 23% stock interest in General Motors during the years 1917-1919 violates § 7 of the Clayton Act because "at the time of suit [in 1949] there [was] a reasonable probability that the acquisition [was] likely to result in the condemned restraints." *Ante*, p. 17. In reaching this conclusion, the Court holds (1) that § 7 of the Clayton Act applies to vertical as well as horizontal stock acquisitions; (2) that in determining whether the effect of the stock acquisition is such as to constitute a restraint within § 7, the time chosen by the Government in bringing the action is controlling rather than the time of the acquisition itself; and (3) that § 7 is violated when, at the time of suit, there is a reasonable probability that the stock acquisition is likely to result in the foreclosure of competitors of the acquiring corporation from a substantial share of the relevant market.

In applying these principles to this case, the Court purports to accept the carefully documented findings of fact of the District Court. Actually, it overturns numerous well-supported findings of the District Court by now concluding that du Pont did not purchase General Motors' stock solely for investment; that du Pont's stock interest resulted in practical or working control of General Motors; that du Pont has used or might use this "control" to secure preferences in supplying General Motors with automobile finishes and fabrics; that the relevant market includes only automobile finishes and fabrics; and that there was, even at the time of suit in 1949, a reasonable probability that du Pont's competitors might be foreclosed from a substantial share of this relevant market.

The Court's decision is far reaching. Although § 7 of the Clayton Act was enacted in 1914—over 40 years ago—this is the first case in which the United States or the Federal Trade Commission has sought to apply it to a vertical integration.[1] Likewise, this appears to be the first case in which it ever has been argued that § 7 is applicable to a stock acquisition which took place many years before.[2] The Court, in accepting both of these contentions, disregards the language and purpose of the statute, 40 years of administrative practice, and all the precedents except one District Court decision. The sweeping character of the Court's pronouncement is further evident from the fact that to make its case the Court requires no showing of any misuse of a stock interest—either at the time of acquisition or subsequently—to gain preferential treatment from the acquired corporation. All that is required, if this case is to be our guide, is that some court in some future year be persuaded that a "reasonable probability" then exists that an advantage over competi-

[1] *Ronald Fabrics Co. v. Verney Brunswick Mills, Inc.*, CCH 1946-1947 TRADE CASES ¶ 57,514 (D. C. S. D. N. Y. 1946), discussed *infra*, n. 10, was a private action for treble damages.

[2] *Transamerica Corp. v. Board of Governors* [1953 TRADE CASES ¶ 67,536], 206 F. 2d 163 (C. A. 3d Cir. 1953), involved a series of stock acquisitions over many years, some of which took place at about the time of suit.

tors in a narrowly construed market may be obtained as a result of the stock interest. Thus, over 40 years after the enactment of the Clayton Act, it now becomes apparent for the first time that § 7 has been a sleeping giant all along. Every corporation which has acquired a stock interest in another corporation after the enactment of the Clayton Act in 1914, and which has had business dealings with that corporation is exposed, retroactively, to the bite of the newly discovered teeth of § 7.

For the reasons given below, I believe that the Court has erred in (1) applying § 7 to a vertical acquisition; (2) holding that the time chosen by the Government in bringing the action is controlling rather than the time of the stock acquisition itself; and (3) concluding, in disregard of the findings of fact of the trial court, that the facts of this case fall within its theory of illegality.

I.

[*Application of Section 7 to Vertical Acquisition*]

Section 7 of the Clayton Act, quoted in full in the Appendix, *post*, pp. 48-49, does not make unlawful all intercorporate acquisitions and mergers.[3] It does not apply to acquisitions of physical assets.[4] It applies only to certain acquisitions of stock, and even then with important exceptions. The first paragraph of § 7, which is the statutory provision primarily involved in this case, provides—

> "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." 38 Stat. 731-732, 15 U. S. C. (1946 ed.) § 18.

This paragraph makes unlawful only those intercorporate stock acquisitions which may result in any of three effects: (1) substantially lessen competition between the acquiring and the acquired corporations; (2) restrain commerce in any section or community; or (3) tend to create a monopoly of any line of commerce. The Government concedes that General Motors and du Pont have never been in competition with each other. Since the substantially lessen competition clause applies only to acquisitions involving competing corporations (generally referred to as horizontal acquisitions), that clause concededly is not applicable to this case. The questions before us are whether the other unlawful effects, namely, restraint of commerce in any section or community and tendency to create a monopoly of any line of commerce, are applicable to this case, and, if so, whether the 1917-1919 acquisition of General Motors' stock by du Pont resulted or may result in either of those unlawful effects.

Section 7 never has been authoritatively interpreted as prohibiting the acquisition of stock in a corporation that is not engaged in the same line of business as the acquiring corporation. Although the language of the Act is ambiguous, the relevant legislative history, administrative practice, and judicial interpretation support the conclusion that § 7 does not apply to vertical acquisitions.

The report of the House Committee on the Judiciary, presented by Representative Clayton, stated emphatically that the provisions relating to stock acquisitions by corporations, which originally appeared as § 8 of the bill, were intended to eliminate the evils of *holding companies*. H. R. Rep. No. 627, 63d Cong., 2d Sess. 17. Although a "holding company" was defined as "a company that holds the stock of another company or companies," the one "evil" referred to was that a holding company "is a means

[3] Section 7 of the Clayton Act, 38 Stat. 731, 15 U. S. C. (1946 ed.) § 18, was amended in 1950 so as to broaden its application, 64 Stat. 1125, 15 U. S. C. § 18. The amendments, by their terms, were inapplicable to acquisitions made before 1950. Thus this case is governed by the original language of § 7 and not by § 7, as amended.

[4] One of the earliest rulings of the Federal Trade Commission was that § 7 did not prohibit asset acquisitions. 1 F. T. C. 541-542. The primary purpose of the 1950 amendments was to bring asset acquisitions within § 7. Proponents of the 1950 amendments asserted on several occasions that the omission of asset acquisitions in the original Clayton Act had been inadvertent. See, *e. g.,* 96 Cong. Rec. 16443. However, the legislative history of the Clayton Act demonstrates that the purpose of § 7 was to prevent the formation of holding companies and certain evils peculiar to stock acquisitions, particularly the secrecy of ownership. See 51 Cong. Rec. 9073, 14254, 14316, 14420, 14456; H. R. Rep. No. 627, 63d Cong., 2d Sess. 17; S. Rep. No. 698, 63d Cong., 2d Sess. 13.

of holding under one control the *competing* companies whose stocks it has thus acquired." (Italics supplied.) *Ibid.* Two minority statements appended to the House Report evidence a similar understanding that the provisions of the bill were limited to *competing corporations. Id.*, Pt. 2, p. 6; Pt. 3, p. 8. The substance of the House Report was adopted by the Senate Committee on the Judiciary in its report on the bill. S. Rep. No. 698, 63d Cong., 2d Sess. 13, 43, 46.

The extensive debates on the bill in each House of Congress contain many detailed discussions of the provisions relating to intercorporate stock acquisitions. These discussions are devoid of any suggestion that the provisions were to apply to vertical acquisitions.[5] On the contrary, these provisions of the bill were repeatedly described as prohibiting the acquisition of stock of competing companies.[6] The one specific reference to a vertical acquisition during the entire debate on these provisions ended with a flat statement by Senator Reed to the effect that the bill as then written (containing the tendency toward monopoly clause but not the restraint of commerce clause) would *not* prevent a steel manufacturing corporation from acquiring stock in an ore producing corporation, a classic type of vertical integration.[7] A reading of the legislative history of the bill leaves the distinct impression that intercorporate relationships between buyers and sellers which resulted in noncompetitive preferences were intended to be dealt with exclusively by the provision forbidding interlocking directorates (§ 8 of the Clayton Act), if not covered by the specific prohibitions of certain price discriminations (§ 2), and of certain exclusive selling or leasing contracts (§ 3).[8]

Forty years of administrative practice provide additional support for this view. Neither the Department of Justice nor the Federal Trade Commission, the two principal enforcing agencies, has brought any action under old § 7 (other than the instant case) that has not involved a stock acquisition in allegedly competing corporations. The Federal Trade Commission repeatedly has declared its understanding that § 7, prior to its amendment in 1950, applied only to competing corporations.[9] In a recent report it stated without qualification:

> "While the 1914 act applied solely to horizontal mergers, the 1950 act applies not only to horizontal acquisitions but to vertical and conglomerate acquisitions

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[5] The remarks of Senator Chilton relied on by the majority, *ante*, p. 3, do not indicate that he thought that § 7 was applicable to vertical acquisitions. His statements indicate merely that he thought that the restraint and monopoly clauses of § 7 were not entirely synonymous with the substantially lessen competition clause.

[6] See, *e. g.*, 51 Cong. Rec. 9270-9271 (Representative Carlin); *id.*, at 9554 (Representative Barkley); *id.*, at 14254-14255 (Senator Cummins); *id.*, at 14313 (Senator Reed); *id.*, at 15856-15861 (Senator Walsh); *id.*, at 15940 (Senator Nelson); *id.*, at 16001 (Senator Chilton); *id.*, at 16320 (Representative Floyd).

[7] 51 Cong. Rec. 14455. Senator Reed had offered an amendment to the first paragraph of § 7 which would have prevented a corporation from acquiring stock in another corporation engaged in the same line of business. This was an attempt to *stiffen* the bill in order to relieve the Government from proving that competition had been substantially lessened by the acquisition, an element of proof which he, Senator Cummins, and others thought would be quite difficult. See 51 Cong. Rec. 14254-14255, 14419-14420. Senator Chilton asked Senator Reed whether his amendment would prevent a corporation engaged in the manufacture of steel from acquiring stock in a corporation engaged in the production of iron ore. Senator Reed replied that his amendment would *not* bar such an acquisition, *but that neither would the bill as written:*

"But I call the Senator's attention to the fact that if the illustration he uses would not be covered by the language of my amendment it certainly would not be covered by the language I seek to amend. His argument would go as much against that, and even more than against my amendment. I do not claim that this will stop everything. I claim that it will be a long step in that direction." *Id.*, at 14455.

No one disputed Senator Reed's interpretation of § 7.

[8] See, *e. g.*, the statement by Representative Carlin, one of the managers of the bill in the House, to the effect that the interlocking directorate provision contained in § 8 would prevent a director of a corporation which supplied railroads with materials from becoming a railroad director and, in effect, "buy[ing] supplies from himself." 51 Cong. Rec. 9272.

[9] See, *e. g.*, F. T. C., Ann. Rep. for Fiscal Year 1929, 6-7, 60, where the Commission stated that it could take no corrective action under the Clayton Act against large consolidations in the food industry "even though the consolidation was effected through the acquisition or exchange of capital stock," because "most of these consolidations and acquisitions were of corporations engaged in the distribution of allied but noncompetitive products." See also, F. T. C., Ann. Rep. for Fiscal Year 1927, 13-15; Statement by Chief Counsel Kelley in Hearings before a Subcommittee of the Senate Committee on the Judiciary on H. R. 2734, 81st Cong., 1st and 2d Sess. 37; Report of the Federal Trade Commission on Interlocking Directorates, H. R. Doc. No. 652, 81st Cong., 2d Sess. 1.

which might substantially lessen competition or tend to create a monopoly." F. T. C., Report on Corporate Mergers and Acquisitions (May 1955), 168, H. R. Doc. No. 169, 84th Cong., 1st Sess.

Beginning in 1927, the Federal Trade Commission included in its annual recommendations to Congress a request that § 7 be amended to remedy its inadequacies. This result was achieved in 1950. 64 Stat. 1125, 15 U. S. C. § 18. As the Court recognizes in its opinion, *ante,* p. 3, n. 6, one of the reasons for amending § 7 in 1950 was, in the words of the House Report on the amendments, "to make it clear that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal . . . ." H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11. Forty years of established administrative practice, acquiesced in and recognized by Congress, is persuasive evidence of the proper scope of § 7. *Federal Trade Commission v. Bunte Bros., Inc.* [1940-1943 TRADE CASES ¶ 56,098], 312 U. S. 349, 351-352.

The cases cited by the Court, with the one exception of *Ronald Fabrics Co. v. Verney Brunswick Mills, Inc.,* CCH 1946-1947 TRADE CASES ¶ 57,514 (D. C. S. D. N. Y. 1946),[10] do not support the Court's conclusion that § 7 applies to a vertical acquisition. In *Aluminum Co. of America v. Federal Trade Commission,* 284 F. 401 (C. A. 3d Cir. 1922), the Aluminum Company, which previously had had a monopoly of all sheet aluminum produced in the United States, acquired control through an intermediary corporation of a competing sheet aluminum company established in 1916. A divestiture order of the Federal Trade Commission was upheld, the court holding that the stock acquisition substantially lessened competition and tended to create a monopoly of the sheet aluminum business. In *United States v. New England Fish Exchange,* 258 F. 732 (D. C. Mass. 1919), two holding companies which had acquired the stock of virtually all the wholesale fish dealers trading on the New England Fish Exchange, which handled about 95% of all the ground fish sold in interstate commerce in the United States, were held to have violated the provisions of § 7. Each of these cases was concerned with the acquisition of directly competing corporations—not vertical acquisitions. Statements in the opinions, not essential to the decisions, merely stand for the proposition that the restraint and monopoly clauses of § 7 are not entirely synonymous with the substantially lessen competition clause.

Assuming that the three unlawful effects mentioned in § 7 are not entirely synonymous with each other,[11] such an assumption does not require the conclusion that § 7 was intended to apply to vertical acquisitions as well as to horizontal acquisitions. Corporations engaged in the same business activity in different areas do not necessarily "compete" with each other so that their combination would substantially lessen competition between them, even though their combination might result in a restraint of commerce or a tendency toward monopoly violative of § 7. Such a possibility was presented in *Transamerica Corp. v. Board of Governors* [1953 TRADE CASES ¶ 67,536], 206 F. 2d 163 (C. A. 3d Cir. 1953), where a banking corporation through a series of transactions acquired stock in 48 local banking corporations, most of which were located in communities in which no other bank was acquired. A divestiture order of the Board was reversed on the ground that the Board had not proved that the acquisitions of these banks in five western States either substantially lessened competition or tended to create a monopoly.

Finally, this Court has twice construed old § 7 as applying only to stock acquisitions involving competing corporations. In *Inter-*

[10] In the *Ronald Fabrics* case, a rayon converter alleged that a competing corporation had restrained commerce by acquiring control of a source of supply of rayon. The District Court held that this allegation stated a cause of action under § 7 of the Clayton Act.

[11] A minority in the Senate, led by Senators Cummins and Walsh, sought to strike out the "tend to create a monopoly" language of § 7. 51 Cong. Rec. 14314-14316, 14319, 14459-14461. They argued that this language was superfluous because the creation of a monopoly always substantially lessened competition, and because the Sherman Act contained similar language, and that there was a danger that the language would be considered as an implied repeal of the Sherman Act. The failure of these efforts to eliminate the tendency toward monopoly clause (the restraint of commerce clause had not been added to § 7 at this time) indicates that the tendency toward monopoly clause was not intended to be limited to situations already encompassed by the substantially lessen competition clause. Similarly, the remarks of Senator Chilton, quoted by the Court from 51 Cong. Rec. 16002, *ante,* pp. 4-5, indicate that he thought the tendency toward monopoly and restraint of commerce clauses added something. But I find no evidence that what they did add included vertical acquisitions.

national Shoe Co. v. Federal Trade Commission, 280 U. S. 291 (1930), the Court held that the acquisition of the fifth largest shoe manufacturing company by the largest shoe manufacturer did not violate either the substantially lessen competition clause *or* the restraint of commerce clause of § 7 because the pre-existing competition between the two corporations was insubstantial, and because the acquired corporation was in a precarious financial condition. Substantial pre-existing competition was said to be a requisite for violation of either clause of § 7. 280 U. S., at 298, 303. An even more direct holding is found in *Thatcher Mfg. Co. v. Federal Trade Commission,* 272 U. S. 554 (1926), where this Court affirmed that portion of the lower court's decree which had allowed Thatcher, a milk bottle manufacturer, to retain the assets of Woodbury, a bottle manufacturer specializing in condiment and whiskey bottles, on the ground that the acquisition did not violate any of the three clauses of § 7 since Thatcher was not in competition with Woodbury. 272 U. S., at 560, affirming in part and reversing in part *Federal Trade Commission v. Thatcher Mfg. Co.,* 5 F. 2d 615 (C. A. 3d Cir. 1925). These holdings apparently will be overruled *sub silentio* by today's decision.

The legislative history, administrative practice, and judicial interpretation of § 7 provide the perspective in which the Government's present assertion that § 7 applies to vertical acquisitions should be viewed. Seen as a whole, they offer convincing evidence that § 7, properly construed, has reference only to horizontal acquisitions. I would so hold. However, even if the opposite view be accepted, the foregoing views of the enforcing agencies and the courts are material to a proper consideration of the other issues which must then be reached.

II.

[*Time Controlling Bringing of Action*]

In this case the Government is challenging, in 1949, a stock acquisition that took place in 1917-1919. The Court, without advancing reasons to support its conclusion, holds that in determining whether the effect of the stock acquisition is such as to violate § 7, the time chosen by the Government in bringing its suit is controlling rather than the time of the acquisition of the stock. This seems to me to ignore the language and structure of § 7, the purpose of the Clayton Act, and all existing administrative and judicial precedents.

The first paragraph of § 7 provides that "no corporation . . . shall acquire . . . the stock . . . of another corporation . . . where the effect of such acquisition may be . . . ." Yet the Court construes this provision as if it read "no corporation . . . shall acquire *or continue to hold* . . . the stock . . . of another corporation . . . *whenever it shall appear that* the effect of such acquisition *or continued holding* may be . . . ." Continued holding, to be sure, is a prerequisite to any action under § 7 because, if the stock is no longer held, the violation has been purged and there is nothing to divest.[12] But the fact of continued holding does not allow the Government to dispense with the necessity of proving that the stock was unlawfully acquired. The offense described by § 7 is the acquisition, not the holding or the use, of stock. When the acquisition has been made, the offense, if any, is complete. The statutory language is unequivocal. It makes the test the probable effect of the acquisition at the time of the actual acquisition, and not at some later date to be arbitrarily chosen by the Government in bringing suit.

The distinction carefully made in the several paragraphs of § 7 between an unlawful acquisition and an unlawful use of stock reinforces this conclusion. The first paragraph of § 7, which speaks only in terms of *acquisition* of stock, is concerned solely with the purchase of stock in "another corporation." It is the only provision that is applicable in this case. The second paragraph, which expressly prohibits both *acquisition* and *use,* is concerned with stock purchases in "two or more corporations." Concededly, it is not applicable here. When Congress chose to make unlawful the use of stock subsequent to its acquisition, it did so in specific terms. The omission of the phrase "or the use of such stock by the voting or granting of proxies or otherwise," contained in the second paragraph of § 7, from the first paragraph of the section was not inadvertent. The phrase therefore cannot be read into the first paragraph of § 7.[13]

[12] *Federal Trade Commission v. Western Meat Co.,* 272 U. S. 554, 561.

[13] It might be argued that the mention of subsequent misuse in the third paragraph of

The Clayton Act was not intended to replace the Sherman Act in remedying actual restraints and monopolies. Its purpose was to supplement the Sherman Act by checking anticompetitive tendencies in their incipiency, before they reached the point at which the Sherman Act comes into play. This purpose was well stated in the Senate Report on the bill:

> "Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890, or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." S. Rep. No. 698, 63d Cong., 2d Sess. 1.

This purpose places emphasis on the probable anticompetitive effects of transactions or occurrences viewed as of the date of their occurrence. The determination required by the Act is one of predicting the probable outcome of a particular transaction, here an acquisition of stock in another corporation. If, at the time of the stock acquisition, a potential threat to competition is apparent, the acquisition is unlawful under § 7. If, on the other hand, a potential threat to competition is not then apparent, an antitrust violation is not involved unless subsequent use of the stock constitutes a restraint of trade prohibited by the Sherman Act.[14]

The Court ignores the all-important lawfulness or unlawfulness of the stock acquisition at or about the time it occurred, and limits its attention to the probable anticompetitive effects of the continued holding of the stock at the time of suit, some 30 years later. The result is to subject a good-faith stock acquisition, lawful when made, to the hazard that the continued holding of the stock may make the acquisition illegal through unforeseen developments. Such a view is not supported by the statutory language and violates elementary principles of fairness. Suits brought under the Clayton Act are not subject to any statute of limitations, and it is doubtful whether the doctrine of laches applies as against the Government. The result is that unexpected and unforeseeable developments occurring long after a stock acquisition can be used to challenge the legality of continued holding of the stock. In such an action, the Government need only prove that *probable* rather than *actual* anticompetitive effects exist as of the time of suit. The Government may thus set aside a transaction which was entirely lawful when made, merely by showing that it would have been unlawful had it occurred at the time of suit, many years later. The growth of the acquired corporation, a fortuitous decline in the number of its competitors, or the achievement of control by an accidental diffusion of other stock may result, under this test, in rendering the originally lawful acquisition unlawful *ab initio*. Strikingly enough, all of these factors are involved in this case.[15]

The Court's holding is unfair to the individuals who entered into transactions on the assumption, justified by the language of § 7, that their actions would be judged by the facts available to them at the time they made their decision.

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§ 7, the investment proviso, enlarges the substantive content of the first paragraph of § 7. This paragraph provides that "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition." But the mention of *use* in this paragraph has the effect of limiting the exception it contains, *i. e.*, the exception for stock purchased "solely for investment." This exception is lost if the stock is subsequently misused. But the exception contained in this paragraph does not come into play unless the acquisition first comes within the substantive prohibition of the first two paragraphs of § 7. This limitation on the exception cannot expand the substantive prohibition to which the exception applies.

[14] It may be that § 7 is inapplicable when the Government fails to bring suit within a reasonable period after the consummation of the stock acquisition. If so, the 30 years here involved would exceed a reasonable period of incipiency. Even though § 7 of the Clayton Act, under this theory, would be inapplicable, any alleged restraint could be dealt with under the Sherman Act.

[15] The Court apparently concedes that du Pont's stock acquisition in General Motors was lawful when made because "its sales to General Motors were relatively insignificant" at that time and because "General Motors then produced only about 11% of the total automobile production . . . ." *Ante*, p. 12. Throughout, the Court stresses the growth in size of General Motors. *Ante*, pp. 8-9, 12. The decline in the number of automobile manufacturers is not mentioned, but is well known. And the Court states that diffusion of General Motors' stock through the years has increased "The potency of the influence of du Pont's 23% stock interest . . . ." *Ante*, p. 20, n. 36.

"The prohibition [of § 7] is addressed to parties who contemplate engaging in merger transactions and is meant, in the first instance, to guide them in deciding upon a course of action. The only standard they are capable of applying is one addressed to the circumstances viewed as of the date of the proposed transaction. Since this is the standard which the parties must apply in deciding whether to undertake a transaction, it seems reasonable to conclude that it is the standard which enforcement agencies should apply in deciding whether the transaction violates the statute." Neal, The Clayton Act and the Transamerica Case, 5 Stan. L. Rev. 179, 220-221.

The Court cites no authority in support of its new interpretation of this 40-year-old statute. On the other hand, examination of the dozen or more cases brought under § 7 reveals that in every case the inquiry heretofore has centered on the probable anticompetitive effects of the stock acquisition at or near the time it was made.[16] See, *e.g., International Shoe Co. v. Federal Trade Commission,* 280 U. S. 291 (1930); *Transamerica Corp. v. Board of Governors* [1946-1947 TRADE CASES ¶ 67,536], 206 F. 2d 163 (C. A. 3d Cir. 1953); *V. Vivaudou, Inc. v. Federal Trade Commission,* 54 F. 2d 273 (C. A. 2d Cir. 1931); *Federal Trade Commission v. Thatcher Mfg. Co.,* 5 F. 2d 615 (C. A. 3d Cir. 1925), rev'd in part on another ground, 272 U. S. 554; *United States v. Republic Steel Corp.* [1932-1939 TRADE CASES ¶ 55,071], 11 F. Supp. 117 (D. C. N. D. Ohio 1935); *In re Vanadium-Alloys Steel Co.,* 18 F. T. C. 194 (1934). The conclusion thus seems inescapable that the unlawfulness of a stock acquisition under the first paragraph of § 7 properly turns on the potential threat to competition created by the acquisition of the stock at the time of its acquisition and not by its subsequent use.

That the time of acquisition is controlling does not mean that the Government is unable to bring an action if it fails to proceed within a few years of the stock acquisition. It means only that if the Government chooses to bring its action many years later, it must prove what § 7 plainly requires—that the acquisition threatened competition when made.

Nor does it mean that evidence of subsequent events is necessarily irrelevant. Evidence that anticompetitive effects have occurred since the acquisition, and that these effects are traceable to the original acquisition rather than to other factors, may support an inference that such effects were "reasonably probable" at the time of acquisition. The element of causation is the necessary link with the past. However, if events subsequent to the acquisition indicate that no anticompetitive effects have occurred, that evidence may support an inference that an unlawful potential did not exist at the time of acquisition. Evidence as to what happened after the acquisition is relevant to the extent that it bears on the central question whether, at the time of the acquisition, there was a reasonable probability of a threat to competition.

I agree with the Court that § 7 does not require findings and conclusions of *actual* anticompetitive effects. Unlike the Sherman Act, § 7 merely requires proof of a reasonable *probability* of a substantial lessening of competition, restraint of commerce, or tendency toward monopoly. *International Shoe Co. v. Federal Trade Commission,* 280 U. S. 291; *Transamerica Corp. v. Board of Governors* [1946-1947 TRADE CASES ¶ 67,536], 206 F. 2d 163. When a vertical acquisition is involved, its legality thus turns on whether there is a reasonable probability that it will foreclose competition from a substantial share of the market, either by significantly restricting access to needed supplies or by significantly limiting the market for any product. See Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) 122-127. The determination of such probable economic consequences requires study of the markets affected, of the companies involved in relation to those markets, and of the probable immediate and future effects on competition. A mere showing that a substantial dollar volume of sales is involved cannot suffice. As the Court says, "The market affected must be substantial," *ante,* p. 8, and "Substantiality can be determined only in terms of the market affected," *ante,* p. 6. Section 7 thus requires a case-by-case analysis of the relevant economic factors.

[16] Except in this case, the enforcing agencies appear never to have brought an action under § 7 more than four years after the date of the acquisition. Consequently, the precise problem raised here has not been directly adjudicated. Nevertheless, the cases cited in the text spell out the proof required for a violation of § 7, and thus have an important bearing on this problem.

However, when, as here, the Government brings a proceeding nearly 30 years after a stock purchase, it must prove that the acquisition was unlawful when made (*i. e.,* that there was a reasonable probability at that time that du Pont's competitors would be foreclosed from a substantial share of the relevant market), *and* also that the effect of the acquisition continued to be harmful to competition at the time suit was brought. Illegality at the time of acquisition is required by the first paragraph of § 7; continuing illegality is a prerequisite for obtaining equitable relief. See *United States v. W. T. Grant Co.* [1953 TRADE CASES ¶ 67,493], 345 U. S. 629; *United States v. Oregon Medical Society* [1952 TRADE CASES ¶ 67,264], 343 U. S. 326, 333; *United States v. South Buffalo R. Co.,* 333 U. S. 771, 774. This is particularly true under § 7 since it is a prophylactic measure designed to prevent stock acquisitions which probably will have a deleterious effect on competition. Proof that competition has not in fact been harmed during a long period following a stock acquisition itself indicates that a restraint in the future is unlikely. In such a case, the *actual* effect of the acquisition largely supplants the conjecture as to its *probable* effects which otherwise must be relied upon.

In this case, the District Court found that the challenged acquisition, which took place "over thirty years ago," had not resulted in any restraint of trade "In those many intervening years . . . ." The District Court properly concluded that, when there had been no restraint for 30 years, "there is not . . . any basis for a finding that there is . . . any reasonable probability of such a restraint within the meaning of the Clayton Act." 126 F. Supp., at 335. If the evidence supports the District Court's conclusion that there has been no restraint for 30 years, the judgment below must be affirmed.

III.

[*Theory of Illegality Applied to Facts of Case*]

The remaining issues are factual: (1) whether the record establishes the existence of a reasonable probability that du Pont's competitors will be foreclosed from securing General Motors' trade, and (2) whether the record establishes that such foreclosure, if probable, involves a substantial share of the relevant market and significantly limits the competitive opportunities of others trading in that market. In discussing these factual issues, I meet the Court on its own ground, that is, I assume that the old § 7 applies to vertical acquisitions, and that the potential threat at the time of suit is controlling. Even on that basis the record does not support the Court's conclusion that § 7 was violated by this 1917-1919 stock acquisition.

A. FORECLOSURE OF COMPETITORS

This is not a case where a supplier corporation has merged with its customer corporation with the result that the supplier's competitors are automatically and completely foreclosed from the customer's trade.[17] In this case, the only connection between du Pont, the supplier, and General Motors, the customer, is du Pont's 23% stock interest in General Motors. A conclusion that such a stock interest automatically forecloses du Pont's competitors from selling to General Motors would be without justification. Whether a foreclosure has occurred in the past or is probable in the future is a question of fact turning on the evidence in the record.

The Court, at the outset of its opinion, states that the primary issue is whether du Pont's position as a substantial supplier to General Motors "was achieved on competitive merit alone," or resulted from du Pont's stock interest in General Motors. *Ante,* p. 2. In resolving this issue, the Court states that the "basic facts" are not in dispute and hence that it is unnecessary to set aside the findings of fact of the District Court as clearly erroneous. See Fed. Rules Civ. Proc., 52(a). The basic facts are said to be that du Pont had no standing as a General Motors' supplier before the stock purchases of 1917-1919, that it gained a "commanding position" after the stock purchases, and that certain items of evidence in this gigantic record tend to indicate that du Pont hoped to get and actually did get a preference in General Motors' trade. From these alleged facts the Court draws the conclusion that du

[17] *Cf. United States v. Columbia Steel Co.* [1948-1949 TRADE CASES ¶ 62,260], 334 U. S. 495, holding that even the exclusion of competition resulting from complete vertical integration does not violate the Sherman Act unless competition in a substantial portion of a market is restrained.

Pont has misused its 23% stock interest in General Motors "to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics." *Ante,* p. 19. "The inference is overwhelming," the Court concludes, "that du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit." *Ante,* pp. 18-19. With these words, the Court overturns the District Court's unequivocal findings to the effect that du Pont was a principal supplier to General Motors prior to the 1917-1919 stock purchases, that du Pont maintained this position in the years following the stock purchases, and that for the entire 30-year period preceding the suit, General Motors' purchases of du Pont's products were based solely on the competitive merits of those products. The evidence supporting these findings of the District Court may be summarized as follows:

Du Pont is primarily a manufacturer of chemicals and chemical products. Thousands of its products could be used by General Motors in manufacturing automobiles, appliances and machinery. Despite du Pont's sales efforts over a period of 40 years, General Motors buys many of the commodities produced by du Pont from du Pont's competitors.[18] The Court, ignoring the many products which General Motors declines to buy from du Pont or which it buys only in small quantities, concentrates on the few products which du Pont has sold in large volume to General Motors for many years—paints and fabrics. Before examining the history of those large-volume purchases, it is essential to understand where and by whom purchasing decisions within General Motors have been made.

For many years, General Motors has been organized into some 30 operating divisions, each of which has final authority to make, and does make, its own purchasing decisions. This decentralized management system places full responsibility for purchasing decisions on the officers of the respective divisions. To speak of "selling to General Motors" is, therefore, misleading. A prospective supplier, instead of selling to General Motors, sells to Chevrolet, or Frigidaire, or Ternstedt, or Delco Light, as divisions. Moreover, when there are several plants within a division, each plant frequently has its own purchasing agent and presents a separate selling job.

The record discloses that each division buys independently, that the pattern of buying varies greatly from one division to another, and that within each division purchases from du Pont have fluctuated greatly in response to price, quality, service and other competitive considerations. For example, Oldsmobile is the only division which buys antifreeze from du Pont and one of the two car divisions which does not finish its cars with Duco. Buick alone buys du Pont motor enamel, and Cadillac alone uses du Pont's copper electroplating exclusively. Thus the alleged nefarious influence arising from du Pont's stock interest apparently affects the Oldsmobile antifreeze buyer, but not the Oldsmobile paint buyer; the paint buyers at Chevrolet, Buick and Pontiac, but not the antifreeze or electroplating buyers; and the electroplating buyer at Cadillac, but not the Cadillac paint buyer.

1. *Paints.*—Du Pont, for many years, has had marked success in the manufacture and sale of paints, varnishes, lacquers and re-

[18] The following table compares General Motors' purchases, in 1947, of several products from du Pont with its purchases of the same products from competitors of du Pont.

Type of product	Purchases from du Pont	Purchases from competitors of of du Pont	Total General Motors' purchases	Percent of purchases from du Pont
Finishes	$18,724,000	$ 8,635,000	$27,359,000	68.4
Fabrics (imitation leather and coated fabrics)	3,639,000	5,815,000	9,454,000	38.5
Adhesives	12,000	3,056,000	3,068,000	.4
Chemicals:				
Anodes	2,000	1,206,000	1,208,000	.2
Solvents	439,000	3,183,000	3,622,000	12.1
	$22,816,000	$21,895,000	$44,711,000	51.0

lated products.[19] In 1939, it produced 9.5% of the total dollar value of all finishes produced in the United States and, in 1947, 8.1%. In recent years, approximately three-fourths of du Pont's total sales to General Motors have consisted of industrial finishes.[20] Although du Pont has been General Motors' principal supplier of paint for many years, General Motors continues to buy about 30% of its paint requirements from competitors of du Pont.[21] Moreover, the sales of paint from du Pont to General Motors do not bulk large in the respective total sales and purchases of either company. In 1948, du Pont's finish sales to General Motors were only 3% of its total sales of all products; they were an infinitesimal percentage of General Motors' total purchases.

Two products account for a high proportion of these finish sales to General Motors: "Duco," a nitrocellulose lacquer invented and patented by du Pont, and "Dulux," a synthetic resin enamel developed by du Pont.[22] However, Duco and Dulux did not come into commercial use until 1924 and 1931, respectively, and du Pont's position as a principal manufacturer of finishes was attained much earlier.

Du Pont first assumed a leading position in the automotive finish field with its acquisition, in 1918, of a majority of the stock of the Flint Varnish & Color Works at Flint, Michigan. At that time, and for some years before, Flint supplied the finishes used on all General Motors' cars except Cadillac, and also for many other automobile companies. Du Pont's acquisition of General Motors' stock in 1917-1919 did not influence the General Motors' divisions in purchasing from Flint. In 1921, Flint lost one-half of the Oakland business and, in 1923, a substantial portion of the business at Buick, Oakland and Oldsmobile. 126 F. Supp., at 288.

The invention and development of Duco in the early 1920's represented a significant technological advance. Automobiles previously had been finished by applying numerous coats of varnish. The finishing process took from 12 to 33 days, and the storage space and working capital tied up in otherwise completed cars were immense. The life expectancy of varnish finishes was less than a year. In December 1921, General Motors created a Paint and Enamel Committee which contacted numerous paint manufacturers in an attempt to find a quicker drying and more durable finish.

Meanwhile, du Pont had been doing pioneering work in nitrocellulose lacquers. In 1920, a du Pont employee invented a quick drying and durable lacquer which contained a large amount of film-forming solids. This patented finish, named Duco, was submitted to the General Motors Paint and Enamel Committee in 1922 to be tested

[19] The following table compares du Pont's total sales of industrial finishes in recent years with its sales of the same finishes to General Motors:

Year	Sales to General Motors: Duco	Other finishes	Total	Total finish sales	Sales to General Motors as percent of total sales
1938	$ 4,569,604	$1,625,625	$ 6,195,229	$ 31,357,134	19.8
1939	6,312,005	2,448,844	8,760,849	38,514,763	22.7
1940	8,876,970	2,850,091	11,727,061	44,974,778	26.1
1941	9,768,119	3,757,389	13,525,508	61,204,127	22.1
1946	6,911,596	3,518,256	10,429,852	75,117,079	13.9
1947	12,224,798	6,713,431	18,938,229	105,266,655	18.0

The years 1942 through 1945 are omitted from all tables because of the suspension of automobile production during the war.

[20] In 1947, a typical year, General Motors' total purchases of all products from du Pont were $26,628,274. Of this amount, $18,938,229, or 71% of the total, was finishes.

[21] In 1947, over 400 paint manufacturers other than du Pont sold finishes to General Motors. The total amount they sold was $8,635,000, 31.6% of General Motors' requirements. Twenty-five companies, other than du Pont, each sold amounts of finishes to General Motors in excess of $30,000 in that year; one company sold as much as $3,205,000.

[22] In 1947, General Motors' purchases of industrial finishes from du Pont, by type of finish, were as follows:

Duco	$12,224,798	65%
Dulux	3,179,225	17
All Others	3,534,206	18
	$18,938,229	100%

Thus, Duco and Dulux comprised 82% of du Pont's finish sales to General Motors in that year.

along with finishes of other manufacturers. After two years of testing and improvement, the Paint and Enamel Committee became satisfied that Duco was far superior to any other product or any other method of finishing automobiles then available.

The gradual adoption of Duco by some of the General Motors' car divisions, viewed in conjunction with its proved superiority as an auto finish, illustrates the independent buying of each division and demonstrates that Duco made its way on its own merits. Oakland (now Pontiac) first adopted Duco for use on its open cars in 1924. The new finish was an immense success and was used on all Oakland cars the following year. Buick and Chevrolet adopted Duco in 1925, but Cadillac, which had offered it as an optional finish in 1925, did not abandon varnish for Duco until 1926.[23]

From the beginning, General Motors continued to look for competitive materials. Letters were sent to other manufacturers urging them to submit samples of their pyroxylin paint for testing. Until 1927, none of the competing lacquers was comparable in quality to Duco. But the strenuous efforts by General Motors to develop competitive sources of lacquer eventually worked a substantial change in the du Pont position. Oldsmobile and Cadillac switched to a competitor, Rinshed-Mason, in 1927, and have continued to buy almost exclusively from that company ever since. Chevrolet, Buick and Pontiac continued to buy Duco, partly because of better service from nearby du Pont plants, and partly because repeated testing failed to disclose any lacquer superior to Duco.

Finally, the success of Duco has never been confined to the General Motors' car divisions. In 1924 and 1925, nearly all car manufacturers abandoned varnish for Duco. By the end of 1925, all cars, except Ford and Cadillac, were using Duco. Nash, Hudson, Studebaker, Packard and Willys have bought, and still buy, Duco in substantial amounts from du Pont. Chrysler bought Duco in large volume until the early 1930's when, in pursuance of a policy to obtain suppliers to whom it would be the most important customer, it concentrated its purchases on one company, Pittsburgh Plate Glass. Ford has chosen to make a large part of its own requirements. During the 1920's when Ford was losing its leadership in the low-priced field to Chevrolet, it continued to finish its cars in Black Japan. Mr. Ford is reported to have said, "Paint them any color, as long as they are black." Finally, in the 1930's, Ford was forced to shift to a synthetic enamel finish of its own manufacture. During this transition period, du Pont sold Ford a substantial amount of finishes. In 1935, Ford was making half, and buying half from du Pont; by 1937, Ford was making three-fourths and buying one-fourth from du Pont. In 1938, Henry Ford "issued instructions that the Ford Motor Company was not to purchase any more material from the du Pont company." From that time until Henry Ford II became active in Ford management, purchases from du Pont practically ceased. Since then, Ford has purchased finishes from du Pont in very substantial amounts.

General Motors has continued to test paints on thousands of cars annually. Du Pont has retained its position as primary lacquer supplier to several General Motors' divisions because these divisions have felt that Duco best fits their needs. Kettering, who was a leader in General Motors' research activities and who had been active in the testing and development of pyroxylin lacquers, testified that "one of the reasons" why General Motors' cars had a higher resale value than comparable cars "in a used car lot" "is the paint."

As the District Court found, *"In view of all the evidence of record, the only reasonable conclusion is that du Pont has continued to sell Duco in substantial quantities to General Motors only because General Motors believes such purchases best fit its needs."* (Italics supplied.) 126 F. Supp., at 296.

The second largest item which General Motors buys from du Pont is Dulux, a synthetic enamel finish used on refrigerators and other appliances. Prior to the development of Dulux, Duco was widely used as a finish for refrigerators. However, in 1927, Duco began to be replaced by porcelain, particularly at Frigidaire, a General Motors' appliance division. In 1930 and 1931, in collaboration with General Electric, du Pont

[23] Du Pont initially sold more Duco to other auto manufacturers than it did to General Motors. In 1926, du Pont's sales of colored Duco were distributed as follows: to General Motors, 19%; to other auto manufacturers, 33%; to all others, 48%. The primary market for clear Duco has always been the furniture industry.

developed Dulux, a greatly superior and cheaper product. Since its development, Dulux has been used *exclusively* by all the major manufacturers of refrigerators and other appliances—General Electric, Westinghouse, Crosley, and many others—except Frigidaire, which continues to finish part of its refrigerators with porcelain. Disinterested witnesses testified as to the superior quality and service which has led them to continue to buy Dulux.[24] The District Court did not err in concluding that Dulux—

> "is apparently an ideal refrigerator finish and is widely used by a number of major manufacturers other than General Motors. Several representatives of competitive refrigerator manufacturers testified that they purchased 100% of their requirements from du Pont. *There is no evidence that General Motors purchased from du Pont for any reason other than those that prompted its competitors to buy Dulux from du Pont—excellence of product, fair price and continuing quality of service.*" (Italics supplied.) 126 F. Supp., at 296.

The Court fails to note that du Pont's efforts to sell paints other than Duco and Dulux to General Motors have met with considerably less success. Du Pont does sell substantial amounts of automotive undercoats to Chevrolet and Buick but it has failed, despite continued sales efforts, to change the preference of Fisher Body, the largest purchaser of undercoats, for a competitor's undercoat. The successes and failures of other du Pont finish products at various General Motors' divisions emphasize the independent buying of each division and negate the notion that influence or coercion is responsible for what purchases do occur. Frigidaire uses large quantities of black finishing and machine varnish, but has not bought these products from du Pont since 1926. At A C Spark Plug Division, located in Flint, Michigan, where du Pont has a finishes plant, du Pont has been consistently successful in selling a substantial volume of the finishes used by that division. Delco-Remy Division, however, purchases most of its requirements of insulating varnish from du Pont's competitors. The Electromotive Division prefers a competitive lacquer for the interior finish of its locomotives, but uses Duco on the exterior because the railroads, most of which use Duco for the exterior of the balance of the train, specify that finish. At Guide Lamp Division, du Pont developed and still supplies a finish for the inside of headlight reflectors, but a competitor developed, and has kept, that division's substantial primer business. At the Inland Division, which produces steering wheels, du Pont had some of the business at one time, but has been completely supplanted by a competitor offering better service.

The du Pont experience at the Packard Electric Division, which uses large quantities of high and low tension cable lacquer, is illustrative. Until 1932, Packard Electric was a separate company wholly unrelated to General Motors, and du Pont was a principal supplier of low tension lacquer and the sole supplier of black high tension lacquer. Now, as a division of General Motors, Packard Electric purchases its entire requirements of high tension lacquer from du Pont competitors, and produces its own low tension lacquer from film scrap bought from du Pont competitors.

The District Court did not err in concluding, on the basis of this evidence, that du Pont's success in selling General Motors a substantial portion of its paint requirements was due to the superior quality of Duco and Dulux and to du Pont's continuing research and outstanding service, and that *"du Pont's position was at all times a matter of sales effort and keeping General Motors satisfied. There is no evidence that General Motors or any Division of General Motors was ever prevented by du Pont from using a finish manufactured by one of du Pont's competitors; nor is there any evidence that General Motors has suffered competitively*

[24] For example, Van Derau, a Westinghouse executive, testified that his company bought its entire requirements of refrigerator finishes from du Pont because of du Pont's quality and service:

"Now, another factor—and I think I can say this without it being harmful to any other suppliers—du Pont has the finest trained technical group at their beck and call, at the beck and call of the users of the materials, of anybody in the business and we have had several times, when we have had a little problem, and I am thinking of one in particular where we were going to find it very difficult to keep in production until the trouble would be overcome, which I called from Pittsburgh to the Chicago office, and the next morning one of the men of du Pont was on the job, and within a very few hours they had materials coming in from their Toledo plant that kept us in production.

"You cannot laugh off that kind of service. They have been simply excellent, and I don't know how you could say, any better."

from its substantial use of Duco." (Italics supplied.) 126 F. Supp., at 296.

2. *Fabrics.*—The principal fabrics which du Pont has sold to General Motors are imitation leather (du Pont's "Fabrikoid" and "Fabrilite") and top material for open cars and convertibles (du Pont's "Pontop," "Everbright" and "Teal").[25] Its sales of these materials to General Motors in 1947 totaled $3,369,000, or about 38.5% of General Motors' total purchases of such materials. In earlier years, before closed cars with all metal tops came to predominate, these materials constituted a larger proportion of the total fabrics used in an automobile than they do today. By 1946 they averaged, apart from the top material for convertibles, only about 1.6 yards, costing about $2.22 per car. They are used principally for seat tops and backs, kick pads, rear shelves, etc. Du Pont does not manufacture the cotton and wool products of which most of the upholstery is composed.

Du Pont entered the manufacture of coated fabrics in 1910, when it purchased the Fabrikoid Company of Newburgh, New York. "Artificial leather," as it was then known, was of poor quality and had very limited areas of acceptance. As du Pont succeeded in improving both its quality and appearance, its use rapidly broadened. By mid-1913, du Pont Fabrikoid, a pyroxylin-coated fabric, had been accepted by the automobile industry for upholstery and interior trim. Three years later, in 1916, almost every automobile company was a purchaser of Fabrikoid, and a contemporary du Pont estimate in that year stated that 60% of all cars produced in the United States would be equipped with Fabrikoid. In that same year, du Pont rounded out its line of fabrics by acquiring the Fairfield Rubber Company, a manufacturer of rubber-coated fabrics. Du Pont thus had achieved, before it purchased its General Motors' stock, a leading position in the automotive fabric field. Before 1917, it was supplying substantially all of the coated fabrics requirements at Chevrolet and Oldsmobile, about half of the requirements at Buick, and about a third of the requirements at Oakland. At the Cadillac division, du Pont supplied all of the coated fabrics for interior trim but none of the top material. 126 F. Supp., at 296-297.

Although there have been variations from year to year and from one car division to another in response to competitive considerations, du Pont generally has maintained its pre-1917 position as the principal supplier of coated and combined fabrics to General Motors. In 1926, General Motors purchased about 55.5% of these fabrics from du Pont, largely because Chevrolet switched entirely to du Pont after an unfortunate experience with competitive products during the preceding year. By 1930, the proportion had declined to about 31.5%, and du Pont was selling more fabrics to Ford than to General Motors. At the time of suit, du Pont's share had increased to 38.5%, the remainder being supplied by du Pont's competitors.

In addition to the mass of evidence supporting the District Court's finding that "*such purchases of fabrics as the General Motors divisions have made from du Pont from time to time were based upon each division's exercise of its business judgment and are not the result of du Pont domination*" (emphasis supplied), 126 F. Supp., at 301, the record clearly indicates that du Pont's fabrics can and have made their way in the automotive industry on their merits. Prior to the early 1920's, du Pont was the principal supplier of coated fabrics to all three of the then major producers—Ford, Willys-Overland and General Motors. After Ford and Willys began to produce their own coated fabrics they still turned to du Pont for much of what they could not produce.

[25] The following table compares du Pont's total sales of industrial fabrics, primarily imitation leather and coated fabrics, in several recent years, with the sales of those same products to General Motors:

Year	Sales to GM	Sales to others	Total sales	GM sales as percent of total sales
1938	$ 446,357	$ 6,647,112	$ 7,093,469	6.6
1939	803,854	7,775,778	8,579,632	9.4
1940	1,285,280	7,780,105	9,065,385	14.2
1941	1,773,079	13,093,469	14,866,548	11.9
1946	2,083,166	14,170,639	16,253,805	12.8
1947	3,639,316	16,723,610	20,362,926	17.9

Chrysler purchased substantial amounts from du Pont until, in the early 1930's, it embarked on its policy of one principal supplier for each product and chose Textileather, a du Pont competitor. Du Pont has continued to be Ford's largest supplier for the material which it does not manufacture for itself. Du Pont likewise has supplied, over the years, a considerable part of the coated and combined fabrics of most of the smaller automobile companies.

The District Court did not err in concluding that *"Du Pont, the record shows, has maintained its position as the principal fabric supplier to General Motors through its early leadership in the field and by concentrating upon satisfactorily meeting General Motors' changing requirements as to quality, service and delivery."* (Emphasis supplied.) 126 F. Supp., at 301.

3. *Other Products.*—The Court concludes only that du Pont has been given an unlawful preference with respect to paints and fabrics. By limiting the issue to these products, it eliminates from deserved consideration those products which General Motors does not buy in large quantities or proportions from du Pont.[26] Yet the logic of the Court's argument—that the stock relationship between du Pont and General Motors inevitably has or will result in a preference for du Pont products—requires consideration of the total commercial relations between the two companies. Du Pont "influence," if there were any, would be expected to apply to all products which du Pont makes and which General Motors buys.

However, the evidence shows that du Pont has attempted to sell to the various General Motors' divisions a wide range of products in addition to paint and fabrics, and that it has succeeded in doing so only when these divisions, exercising their own independent business judgment, have decided on the basis of quality, service and price that their economic interests would best be served by purchasing from du Pont. Six such groups of products were considered in detail by the District Court: plastics, brake fluid, casehardening materials, electroplating materials, safety glass, and synthetic rubber and rubber chemicals. 126 F. Supp., at 319-324. A few examples drawn from the findings will suffice.

Du Pont's sales to General Motors of celluloid (du Pont's "Pyralin"), used as windows in the side curtains of early automobiles, initially declined in 1918 after the stock purchase, and only revived when an improved product was adopted by all the large auto manufacturers. Instead of purchasing brake fluid and safety glass from du Pont, General Motors embarked, during the 1930's, on its own production of these substantial items. With respect to casehardening materials, General Motors has purchased less than half of its requirements from du Pont, while other auto manufacturers have purchased amounts larger in proportion and quantity. Although du Pont's new electroplating processes were widely adopted in the automobile and other industries in the 1930's only Cadillac has used du Pont's processes exclusively, Oldsmobile and Pontiac have used it occasionally, and Chevrolet and Buick never have used it except for brief periods. Neoprene, a synthetic rubber developed by du Pont,

[26] The following table compares the dollar amount, in 1947, of du Pont's total sales of the products of its various departments with the amount sold by it to General Motors:

Type of product	Du Pont sales to General Motors	Total du Pont sales	Sales to General Motors, as percent of total sales
Finishes	$18,938,229	$105,266,655	18.0
Fabrics	3,639,316	20,362,926	17.9
Ammonia	1,742,416	50,320,207	3.5
Grasselli Chemicals	1,024,320	74,212,311	1.4
Electrochemicals	1,019,272	47,687,843	2.1
Plastics	105,422	34,828,026	0.3
Organic Chemicals	83,254	94,632,256	0.1
Rayon	45,616	250,467,514	(*)
Explosives	26,032	58,875,482	(*)
Pigments	3,530	31,496,024	(*)
Photo Products	867	25,699,756	(*)
	$26,628,274	$793,849,000	3.4

* Less than 0.1%.

has been used to a much greater extent by Chrysler and Ford than by General Motors. Chrysler also uses, and helped develop, du Pont's synthetic rubber adhesive for brake linings, but the General Motors divisions prefer a more expensive type of synthetic rubber.

The record supports the conclusion of the District Court:

"All of the evidence bearing upon du Pont's efforts to sell these various miscellaneous products to General Motors supports a finding that the latter bought or refused to buy solely in accordance with the dictates of its own purchasing judgment. There is no evidence that General Motors was constrained to favor, or buy, a product solely because it was offered by du Pont. On the other hand, the record discloses numerous instances in which General Motors rejected du Pont's products in favor of those of one of its competitors. *The variety of situations and circumstances in which such rejections occurred satisfies the Court that there was no limitation whatsoever upon General Motors' freedom to buy or to refuse to buy from du Pont as it pleased.*" (Emphasis supplied.) 126 F. Supp., at 324.

Evidence Relied on by the Court.—The Court, disregarding the mass of evidence supporting the District Court's conclusion that General Motors purchased du Pont's paint and fabrics solely because of their competitive merit, relies for its contrary conclusion on passages drawn from several documents written during the years 1918-1926, and on the logical fallacy that because du Pont over a long period supplied a substantial portion of General Motors' requirements of paint and fabrics, its position must have been obtained by misuse of its stock interest rather than competitive considerations.

The isolated instances of alleged pressure or intent to obtain noncompetitive preferences are four: (1) the Raskob report of December 1917; (2) several letters of J. A. Haskell, written during 1918-1920; (3) certain reports and letters of Pierre and Lammot du Pont during 1921-1924; and (4) a 1926 letter of John L. Pratt. Passages drawn from these 1918-1926 documents do not justify the conclusions reached by the Court. Each of them is a matter of disputed significance which cannot be evaluated without passing on the motivation and intent of the author. Each failed to achieve its specific object. Read in the context of the situations to which they were addressed, each is entirely consistent with the finding of the District Court that although du Pont was trying to get as much General Motors' business as it could, there was no restriction on General Motors' freedom to buy as it chose, and that General Motors' buyers did not regard themselves as in any way limited.[27] Moreover, even if isolated paragraphs in these documents, taken from their context, are given some significance, and the other evidence relating to the period from 1918 to 1926 is entirely ignored, *all* of the evidence after 1926 affirmatively establishes without essential contradiction

[27] Because the Court quotes fully from, and appears to place special weight on, the 1926 letter of J. L. Pratt, a brief discussion of it is appropriate by way of illustration. *Ante*, pp. 19-20, n. 35.

The letter only purports to be an expression of Pratt's personal views—he makes it clear in the last paragraph that he is expressing his own opinions and not General Motors' policy. It has, therefore, comparatively little bearing on du Pont's intent. Moreover, it is significant that Pratt's attitude toward du Pont was based *not* on the stock relationship, but on the fact that du Pont saved General Motors from financial disaster in 1920. His views, apparently, would have been the same whether or not du Pont owned stock in General Motors. In any event, all that Pratt says is that, in making purchases, General Motors should "always keep a competitive situation," and "the prime consideration is to do the best thing for Delco-Light Company . . ." (Pratt was writing to the general manager of Delco, a General Motors' division.)

An examination of the circumstances in which this letter was written disposes of any notion that it expressed a policy that General Motors should prefer du Pont's products when they were equal in quality, service and price. The circumstances were these: Delco Light was buying paint from a competitor of du Pont. When the competitor failed to solve a paint problem which confronted Delco, it called on du Pont for help. However, although du Pont solved the problem and obtained one order for paint, Delco asked du Pont to withhold delivery so that the competitor could be given another opportunity to retain the business. Understandingly, Elms of the du Pont Paint Department was somewhat piqued by this, and he wrote a personal letter to his friend Pratt asking for his assistance. Pratt's letter to the general manager of Delco was the result.

Despite the fact that the du Pont product was offered at a lower price and the fact that the technical staff at Delco thought the du Pont product superior, Delco nevertheless continued to buy from the competitor. Du Pont never did receive the business to which the correspondence related. Judged by either its content or its result, the Pratt letter is a poor example of an alleged du Pont policy of "purposely employ[ing] its stock to pry open the General Motors market . . ." *Ante*, p. 19.

that du Pont did not use its stock interest to receive any preferential treatment from General Motors.

Nor can present illegality be presumed from the bare fact that du Pont has continued to make substantial sales of several products to General Motors.[28] In the first place, the record affirmatively shows that the new products which du Pont has sold to General Motors since 1926 have made their way, at General Motors as elsewhere, on their merits. Sales of Duco, Dulux, Fabrilite and Teal are not attributable in any way to dealings in the earlier period. Secondly, the Court's presumption is based on the fact that du Pont does not sell to all other automobile manufacturers in the same proportion as it does to General Motors. But there is no reason why it should—the Government has not shown that sellers normally sell to all members of an industry in the same proportion. In any event, the record fully explains the disproportion. Since 1930, du Pont's sales to other members of the industry have proportionately declined, largely because Ford has chosen to make the major share of its requirements of paint and fabrics, and because Chrysler has followed the policy of selecting a single supplier to whom it can be the most important customer. The fact is that du Pont *has* continued to sell in substantial amounts to the smaller members of the automobile industry. The growth in the dominance of General Motors, Ford and Chrysler—companies which together account for more than 85% of automobile production—when combined with the policies adopted by Ford and Chrysler, adequately explains why du Pont sells a larger proportion of paint and fabrics to General Motors than it does to the industry as a whole.

It is true that § 7 of the Clayton Act does not require proof of actual anticompetitive effects or proof of an intent to restrain trade. But these matters become crucial when the Court rests its conclusion that du Pont's stock interest violates the Act on evidence relating solely to an alleged du Pont intent to obtain a noncompetitive preference from General Motors, and on a finding that such a preference was actually secured through the unlawful use of du Pont's stock interest. Preference and intent are also relevant because the Government has brought this case 30 years after the event. If no actual restraint has occurred during this long period, the probability of a restraint in the future is indeed slight. Especially is this so when the only change in recent years has been in the direction of diminishing du Pont's participation in General Motors' affairs.

Rule 52(a) Governs This Case.—The foregoing summary of the evidence relating to General Motors' purchases of paint and fabrics from du Pont, comparatively brief as it is, reveals that a multitude of factual issues underlie this case. The occurrence of events, the reasons why these events took place, and the motives of the men who participated in them are drawn in question. The issue of credibility is of great importance. The District Judge had the opportunity to observe the demeanor of the witnesses and to judge their credibility at first hand. Thus, this case is a proper one for the application of the principle embodied in Rule 52(a) of the Federal Rules of Civil Procedure: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." *United States v. Oregon Medical Society* [1952 TRADE CASES ¶ 67,264], 343 U. S. 326, 330-332, 339; *United States v. Yellow Cab Co.* [1948-1949 TRADE CASES ¶ 62,522], 338 U. S. 338, 341-342.

This is not a situation in which oral testimony is contradicted by contemporaneous documents. See *United States v. United States Gypsum Co.* [1948-1949 TRADE CASES ¶ 62,226], 333 U. S. 364. In this case, the findings of the District Court are supported both by contemporaneous documents and by oral testimony. For example, General Motors' search for a better automotive finish, the superiority of the product developed by du Pont, and General Motors' continuous efforts to secure an equally good lacquer from other sources are all proved by letters and reports written in the early 1920's as well as by the oral testimony of many witnesses. Similarly, contemporaneous

[28] The Court, without referring to any supporting evidence, ventures the conjecture that "General Motors probably turned to outside sources of supply at least in part because its requirements outstripped du Pont's production . . ." *Ante*, p. 18. As I read the record, du Pont was actively soliciting more business from General Motors and others throughout the period covered in this suit. I find no hint that du Pont was surfeited with business and unable to fill General Motors' orders.

exhibits prove that General Motors purchased fabrics from du Pont because of the superiority of du Pont products, and that on other occasions it turned to competing suppliers even though du Pont's product was just as good. Appellate review of detailed findings based on substantial oral testimony and corroborative documents must be limited to setting aside those that are clearly erroneous. The careful and detailed findings of fact of the District Court in this case cannot be so labeled.[29]

B. RELEVANT MARKET

Finally, even assuming the correctness of the Court's conclusion that du Pont's competitors have been or will be foreclosed from General Motors' paint and fabric trade, it is still necessary to resolve one more issue in favor of the Government in order to reverse the District Court. It is necessary to hold that the Government proved that this foreclosure involves a substantial share of the relevant market and that it significantly limits the competitive opportunities of others trading in that market.[30]

The relevant market is the "area of effective competition" within which the defendants operate. *Standard Oil Co. of California v. United States* [1948-1949 TRADE CASES ¶ 62,432], 337 U. S. 293, 299-300, n. 5. "[T]he problem of defining a market turns on discovering patterns of trade which are followed in practice." *United States v. United Shoe Machinery Corp.* [1953 TRADE CASES ¶ 67,436], 110 F. Supp. 295, 303, aff'd *per curiam,* 347 U. S. 521. "Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another." *United States v. E. I. du Pont de Nemours & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 393. This determination is primarily one of fact.

The Court holds that the relevant market in this case is the automotive market for finishes and fabrics, and not the total industrial market for these products. The Court reaches that conclusion because in its view "automotive finishes and fabrics have sufficient peculiar characteristics and uses

[29] The Court also overturns the District Court's express finding that du Pont purchased General Motors' stock *solely for investment.* The Court does this on the basis of an alleged du Pont purpose to secure a noncompetitive preference which the Court finds expressed in the Raskob letter and in certain statements in du Pont's 1917 and 1918 reports to its stockholders. These documents, however, are not inconsistent with the District Court's finding of an investment purpose. The District Court said:

"Raskob's report, the testimony of Pierre S. and Irenee du Pont and all the circumstances leading up to du Pont's acquisition of this substantial interest in General Motors, as shown by the record, establish that the acquisition was essentially an investment. Its motivation was the profitable employment of a large part of the surplus which du Pont had available and uncommitted to expansion of its own business.

. . . . .

"Raskob's reports and other documents written at or near the time of the investment show that du Pont's representatives were well aware that General Motors was a large consumer of products of the kind offered by du Pont. Raskob, for one, thought that du Pont would ultimately get all that business, but there is no evidence that Raskob expected to secure General Motors trade by imposing any limitation upon its freedom to buy from suppliers of its choice. Other documents also establish du Pont's continued interest in selling to General Motors—even to the extent of the latter's entire requirements—but they similarly make no suggestion that the desired result was to be achieved by limiting General Motors purchasing freedom. On the contrary, a number of them explicitly recognized that General Motors trade could only be secured on a competitive basis." 126 F. Supp., at 242, 243.

Whether any stock purchase is an investment turns largely on the intent of the purchaser. *Pennsylvania R. Co. v. Interstate Commerce Commission* [1932-1939 TRADE CASES ¶ 55,035], 66 F. 2d 37, aff'd by an equally divided court, 291 U. S. 651. In this case, since the District Court's finding with reference to that intent is unequivocal and not clearly erroneous, the stock acquisition falls within the proviso, stated in the third paragraph of § 7, expressly excepting acquisitions made "solely for investment."

[30] The District Court did not reach this question since it found that there was no reasonable probability of any foreclosure of du Pont's competitors by reason of du Pont's 23% stock interest in General Motors. Consequently, there are no findings of fact dealing with the relevant market. Also, the record appears deficient on such crucial questions as the characteristics of the products, the uses to which they are put, the extent to which they are interchangeable with competitors' products, and so on. For these reasons, I believe the Court in any event should remand the case to the District Court to give the District Judge, who is more familiar with the record than we can be, an opportunity to review the record, and entertain argument with respect to the substantiality of the share of the relevant market affected by the foreclosure which the Court finds to exist. By declining to remand, the Court necessitates a scrutiny here of this huge record for a determination of an essentially factual question not passed on by the District Court, and not thoroughly briefed or argued by the parties.

to constitute them products distinct from all other finishes and fabrics . . . ." *Ante,* pp. 6-7. We are not told what these "peculiar characteristics" are. Nothing is said about finishes other than that Duco represented an important contribution to the process of manufacturing automobiles. Nothing is said about fabrics other than that sales to the automobile industry are made by means of bids rather than fixed price schedules. Dulux is included in the "automobile" market even though it is used on refrigerators and other appliances, but not on automobiles. So are other finishes and fabrics used on diesel locomotives, engines, parts, appliances and other products which General Motors manufactures. Arbitrary conclusions are not an adequate substitute for analysis of the pertinent facts contained in the record.

The record does not show that the fabrics and finishes used in the manufacture of automobiles have peculiar characteristics differentiating them from the finishes and fabrics used in other industries. What evidence there is in the record affirmatively indicates the contrary. The sales of the four products principally involved in this case—Duco, Dulux, imitation leather, and coated fabrics—support this conclusion.

Duco was first marketed not to General Motors, but to the auto refinishing trade and to manufacturers of furniture, brush handles and pencils. In 1927, 44% of du Pont's sales of colored Duco, and 51.5% of its total sales, were to purchasers other than auto manufacturers. Although the record does not disclose exact figures for all years, it does show that a substantial portion of du Pont's sales of Duco have continued to be for non-automotive uses.[31]

It is also significant that Duco was a patented product. Prior to the expiration of the patent in 1944, only three years before this suit was brought, du Pont issued over 250 licenses—to all that applied—covering its patented process. If Duco is to be treated as a separate market solely because of its initial superiority, du Pont is being penalized rather than rewarded for contributing to technological advance.

Dulux has never been used in the manufacture of automobiles. It replaced Duco and other lacquers as a finish on refrigerators, washers, dryers, and other appliances, and continues to have wide use on metallic objects requiring a durable finish. Yet the Court includes it as a finish having the unspecified but "peculiar characteristics" distinctive of "automotive finishes." *Ante,* p. 6.

In 1947, when du Pont's sales of Duco and Dulux to General Motors totaled about $15,400,000, the total national market for paints and finishes was $1,248,000,000, of which about $552,000,000 was for varnishes, lacquers, enamels, japans, thinners and dopes, the kinds of finishes sold primarily to industrial users.[32] There is no evidence in this record establishing that these industrial finishes are not competitive with Duco and Dulux. There is considerable evidence that many of them are. It is probable that du Pont's total sales of finishes to General Motors in 1947 constituted less than 3.5% of all sales of industrial finishes.

The record also shows that the types of fabrics used for automobile trim and con-

[31] The Court states that "General Motors took 93% of du Pont's automobile Duco production in 1941 and 83% in 1947." *Ante,* p. 18. These figures are of little significance. Not only do they omit the crucial sales—those made outside the automobile industry—but they give a misleading impression with respect to du Pont's sales to the automobile industry. As previously stated, Ford chose to make its own requirements after about 1935 and Chrysler desired to concentrate its purchases on one supplier. Under these figures, after eliminating Ford and Chrysler, and deducting du Pont's sales to General Motors, du Pont must have supplied nearly half of the entire requirements of all remaining auto manufacturers in 1941 and an even larger portion in 1947.

The record does not contain complete figures on the amount of Duco sold outside the automobile industry. However, there are figures for selected years. In 1927, for example, 51.5% of all Duco sales were to other than automobile manufacturers (1,166,220 gallons, out of a total of 2,263,000 gallons). In 1948, du Pont's gross sales to purchasers other than General Motors of the same kinds of finishes bought by General Motors amounted to about $97,000,000; its sales to General Motors in the same year were $21,000,000, or 21.7% of the total. The record reveals that General Motors' purchases of finishes from du Pont have ranged, in recent years, from 14% to 26% of du Pont's sales of such finishes to all customers. The conclusion seems clear that du Pont's finishes have found wide acceptance in innumerable industries and that du Pont is not dependent on General Motors for a captive paint market.

[32] U. S. Department of Commerce, Bureau of the Census, II Census of Manufactures: 1947, Statistics by Industry, 414-415. There were 1,291 establishments manufacturing these products. Du Pont's total sales were 8.1% of the industry.

vertible tops—imitation leather and coated fabrics—are used in the manufacture of innumerable products, such as luggage, furniture, railroad upholstery, books, brief cases, baby carriages, hassocks, bicycle saddles, sporting goods, footwear, belts and table mats. In 1947, General Motors purchased about $9,454,000 of imitation leather and coated fabrics. Of this amount, $3,639,000 was purchased from du Pont (38.5%) and $5,815,000 from over 50 du Pont competitors. Since du Pont produced about 10% of the national market for these products in 1946, 1947 and 1948, and since only 20% of its sales were to the automobile industry, the du Pont sales to the automobile industry constituted only about 2% of the total market. The Court ignores the record by treating this small fraction of the total market as a market of distinct products.

It will not do merely to stress the large size of these two corporations. The figures as to their total sales—$793,000,000 for du Pont and $3,815,000,000 for General Motors in 1947—do not fairly reflect the volume of commerce involved in this case. The commerce involved here is about $19,000,000 of industrial finishes and about $3,700,000 of certain industrial fabrics—less than 3.5% of the national market for industrial finishes, and only about 1.6% of the national market for these fabrics. The Clayton Act is not violated unless the stock acquisition substantially threatens the competitive opportunities available to others. *International Shoe Co. v. Federal Trade Commission,* 280 U. S. 291; *Transamerica Corp. v. Board of Governors* [1953 Trade Cases ¶ 67,536], 206 F. 2d 163; *V. Vivaudou, Inc. v. Federal Trade Commission,* 54 F. 2d 273. The effect on the market for the product, not that on the transactions of the acquired company, is controlling. *Fargo Glass & Paint Co. v. Globe American Corp.* [1953 Trade Cases ¶ 67,427], 201 F. 2d 534.[33]

The Court might be justified in holding that products sold to the automotive industry constitute the relevant market in the case of products such as carburetors or tires which are sold primarily to automobile manufacturers. But the sale of Duco, Dulux, imitation leather, and coated fabrics is not so limited.

The burden was on the Government to prove that a substantial share of the relevant market would, in all probability, be affected by du Pont's 23% stock interest in General Motors. The Government proved only that du Pont's sales of finishes and fabrics to General Motors were large in volume, and that General Motors was the leading manufacturer of automobiles during the later years covered by the record. The Government did not show that the identical products were not used on a large scale for many other purposes in many other industries. Nor did the Government show that the automobile industry in general, or General Motors in particular, comprised a large or substantial share of the total market. What evidence there is in the record affirmatively indicates that the products involved do have wide use in many industries, and that an insubstantial portion of this total market would be affected even if an unlawful preference existed or were probable.

For the reasons stated, I conclude that § 7 of the Clayton Act, prior to its amendment in 1950, did not apply to vertical acquisitions; that the Government failed to prove that there was a reasonable probability at the time of the stock acquisition (1917-1919) of a restraint of commerce or a tendency toward monopoly; and that, in any event, the District Court was not clearly in error in concluding that the Government

[33] In the *Fargo* case, Maytag, an appliance manufacturer, acquired a 40% stock interest in, and contracted to purchase the entire output of, Globe, a gas range manufacturer. A Globe dealer, who lost his source of supply as a result of the transaction, brought a treble damage action alleging, *inter alia,* that the stock acquisition violated § 7 of the Clayton Act. The evidence showed that there were about 70 manufacturers of gas ranges, and that Globe was about eighteenth in size, selling a little less than 2% of the national market (about $5,000,000 a year). The Court of Appeals for the Seventh Circuit held that the stock acquisition did not violate § 7 because the plaintiff had other readily available sources of supply.

The acquisition of an outlet is governed by similar principles. In either case, the question is whether competitors may be substantially limited in their competitive opportunities. Assuming that du Pont had purchased General Motors outright, and thus commanded an outlet consuming about 4% of the national market for industrial finishes and about 2% of the national market for industrial fabrics, it seems unlikely that du Pont's paint and fabric competitors would be substantially limited in selling their products, when 96% and 98%, respectively, of the national market would remain open to them.

failed to prove that du Pont's competitors have been or may be foreclosed from a substantial share of the relevant market. Accordingly, I would affirm the judgment of the District Court.

Appendix to Mr. Justice Burton's Dissent

"SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

"Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

"Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided." 38 Stat. 731-732, 15 U. S. C. (1946 ed.) § 18.

[¶ 68,724] G. D. Searle & Co. v. Institutional Drug Distributors, Inc., et al. Institutional Drug Distributors, Inc., Counterclaimant and Third-Party Plaintiff v. G. D. Searle & Co., Counterdefendant v. Stephen Chase, Lewis S. Hoyt and Julius K. Hornbein, Third-Party Defendants.

In the United States District Court for the Southern District of California, Central Division. No. 19884-Y. Dated May 17, 1957.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Refusal To Deal—Termination of Distributor's Privilege of Making Bids—Legality.—A manufacturer of drugs did not violate Section 1 or 2 of the Sherman Act when it terminated a drug distributor's privilege of making bids for the sale of the manufacturer's products to city and county hospitals and other institutions for a commission of ten per cent of list prices because the distributor had made bids below the listed prices and had offered larger discounts for cash payments. The manufacturer was engaged in the production and sale of drugs which it developed through its own research, it did not act as a wholesaler or a retailer, and it did not compete with the distributor or others in the sale of drugs to city and county

hospitals and other institutions. A unilateral refusal to deal is not unlawful, and this is especially true where, as in the instant action, there was competition in the market as to every one of the manufacturer's products. In view of such competition, the manufacturer was not in a position to control prices or exclude competition. Those who sold the manufacturer's products were free to sell competitive products. The manufacturer's arrangements as to price were within the scope of the restrictions that a manufacturing company may impose on penalty of refusing to deal.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785; Monopolies, Vol. 1, ¶ 2530.10, 2610.720.

Resale Price Fixing—Monopolies—Vertical Price Fixing—Exemption of Fair Trade Laws.—A manufacturer of drugs did not fix prices in violation of the Sherman Act by giving certain wholesale druggists, with whom it had fair trade agreements, and a drug distributor the privilege of making bids for the sale of its products to city and county hospitals and other institutions for a commission of ten per cent of list prices on the understanding that the bids were to be made at the prices stated in its price list. The manufacturer was engaged in the production and sale of drugs which it developed through its own research, it did not act as a wholesaler or a retailer, and it did not compete with the wholesale druggists or the distributor in the sale of drugs to hospitals and other institutions. The understandings which the manufacturer entered into were permitted under the California Fair Trade Act, and, consequently, were excepted from the operation of the antitrust laws under the Miller-Tydings and McGuire Acts. Furthermore, there was no unlawful price fixing because the manufacturer was not in competition with the wholesale druggists or the distributor. While, at times, the manufacturer sold direct to hospitals and other institutions, it did not do so when the wholesale druggists or the distributor submitted bids. There was no horizontal price fixing. The manufacturer's arrangements as to bids to institutions and hospitals which received the products in quantities not available to wholesalers or retailers were outside the purview of the antitrust laws. Also, in view of the fact that other products were sold in competition with the manufacturer's products, the manufacturer did not exercise unreasonable monopoly powers, and it was not in a position to control prices or exclude competition. The manufacturer's arrangements as to price were within the scope of the restrictions that a manufacturing company may impose on penalty of refusing to deal.

See Combinations and Conspiracies, Vol. 1, ¶ 2011; Monopolies, Vol. 1, ¶ 2610.660; Resale Price Fixing, Vol. 1, ¶ 3015.20, 3100.

For the plaintiff and counterdefendant: Sidley, Austin, Burgess & Smith by James E. S. Baker, Chicago, Ill.; and McCutcheon, Black, Harnagel & Greene, by Philip K. Verleger, Los Angeles, Cal., for G. D. Searle & Co.

For the defendant and third-party plaintiff: Elwood S. Kendrick, Jack Corinblit, and Fred Weller, Los Angeles, Cal., for the Institutional Drug Distributors, Inc.

For the third-party defendants: McCutcheon, Black, Harnagel & Greene, Los Angeles, Cal., for Stephen Chase and Lewis S. Hoyt; and Nicholas & Mack, by Augustus F. Mack, Jr., Los Angeles, Cal., for Julius K. Hornbein.

Opinion

LEON R. YANKWICH, Chief Judge [*In full text except for omissions indicated by asterisks*]: The action is for infringement of a trademark and seeks injunctive relief and damages. The defendants in their Answer have attacked the validity of the trademark and have also urged that injunctive relief be denied upon the ground that the plaintiff has been guilty of monopolistic practices and price-fixing in violation of the antitrust laws of the United States. (15 U. S. C. A., 15, 26, § 1115(b)(7))

The facts out of which the controversy arises are stated briefly in the Memorandum filed when preliminary injunction was issued. (*G. D. Searle & Co. v. Institutional Drug Distributors, Inc.*, D. C. Cal., 1955, 141 F. Supp. 838)

A hearing on the merits confirms the conclusion arrived at previously on the basis of affidavits and depositions that

the mark is valid and has been infringed by the defendants and that the plaintiff, to be referred to as Searle, has not been guilty of any practices in violation of antitrust laws which would call for denial of permanent injunctive relief.

I

The Mark Involved

As stated in the previous Memorandum, the plaintiff drug manufacturers registered on March 17, 1949, the mark "Dramamine" which was first used in commerce on January 28, 1949.

* * *

II

"Strong" Marks

The mark is not descriptive. By all standards it is a strong mark. * * *

* * *

In the case before us we have an instance of a strong, fanciful mark, used by pharmaceutical manufacturing company doing business on a national scale and spending millions in advertising the product and others it manufactures and sells under tradenames and trademarks, being infringed by one of the persons, the defendant, used by them in limited transactions in a certain California locality.

By oral understanding, without any binding written agreement, the defendant was given the privilege of making bids to public institutions for sale of its products, at their catalogue prices. For this he received ten per cent of the price. After the relationship was terminated he proceeded to imitate the label of one of their most successful drug products. Admittedly the cause for the severance was that the defendant offered the drug to institutions at a lower than its catalogued price and allowed a larger discount for cash payments within a certain period. Which brings us to the question whether this method of bidding, to be described in more detail later, amounted to the type of horizontal price fixing which is condemned as a restraint of interstate commerce under the antitrust laws of the United States.

III

The Nature of the Plaintiff's Activities

[*Nature of Business*]

Before considering the question just posited, it is well to state the nature of the activities in which Searle engages. Its business is that of pharmaceutical manufacturer limited to medicinal drugs in the human fields. This means that they do not engage in producing medicines that might be used in the treatment of animals. But in the conduct of its business rather than relying on copying other formulae, they devote special attention to the actual discovery of new medicinal products. No medicinal products are marketed unless, as the Vice-President of the Company in charge of distribution stated, they have satisfied themselves

> "at least and are in a position to document their claims that the product is an improvement over anything that has previously been available to the medical profession in that particular field of medicine."

For this reason, they are not what is described as a full-line pharmaceutical house, but restrict themselves to manufacture and sale of the relatively small number of medicinal drugs which have been developed by them. More than 300 of their employees are engaged in research. A great majority of them have PhD degrees in biology or chemistry. The laboratory facilities operated consist of two buildings at Skokie, Ill., the first one of which is one story in height and occupies a ground area in excess of an acre. The second building is three stories in height and also occupies a ground area in excess of an acre. Between them they are equipped with between 150 and 200 individual, fully-equipped laboratories. In order to facilitate research, there is maintained an animal colony and all the facilities that go with it.

The manufacturing of a pharmaceutical product takes many forms, the first one being the manufacture of the chemical substance. The second is the manufacture of the tablet. The same witness described the process in this manner:

> "There actually are many forms of pharmaceuticals, but in the manufacture of a tablet, having satisfied everybody that is concerned that the chemical is pure, quite of the proper strength, then it is joined with other materials and is what is known as a granulation. Those materials are known as excipients and they are there purely for the purpose of making the tablet stand together rather than crumble too easily, or for the purpose of assuring that the tablet shall disintegrate in the body within the time in which it should, for the medicine to be effective.

That then goes . . . to the compressing stage where it is compressed into the tablet. From that point on, it necessarily must be packaged and necessarily must be labeled and all of those things are very carefully controlled.

"The obvious purpose of the manufacturing part of the business is to assure that the product is properly manufactured, that it is of proper potency, that it is in a form which will remain stable and above all, that is it properly packaged and properly labeled, because in this business there is no room for mistakes. It would be a pretty serious matter if the wrong tablet got into the wrong bottle, and actually in our business, in the manufacturing end of our business, we have more people analyzing and controlling the product than we do otherwise, actually manufacturing as we consider it to be that important."

[*Distributor of Drugs*]

In the manner of distribution of drugs, hospitals have a unique position. For this reason, the packaging of drugs for hospitals is different from that which, through wholesalers, reaches the retail trade. The retailer has need for a package which is in line with his rate of sale and distribution. This calls for a relatively small package. As a prescription is written by a doctor, the patient may take the prescription to any of the drug stores in his locality. So the retail druggist never knows exactly what his volume will be and is therefore inclined to buy a smaller package. This, Searle allows him to do. In this manner, the drug will retain its potency even though it remains on the shelves for several months. Larger packages are provided for larger drug stores located in a medical building where the rate of prescription might be high. In a hospital in which the prescriptions are filled in the hospital pharmacy, it is possible to use large packaging because the hospital can anticipate the rate of use of a particular drug. So hospitals prefer larger packages and Searle supplies them.

There is in evidence a package of the drug involved which, when filled, contains 5000 tablets,—a size that could not be used by the average retail store without a good deal of repackaging involving the danger of contamination of the drug. The package normally used for the wholesale trade for distribution through retail outlets consists of a glass bottle containing 100 tablets.

[*Representatives*]

As a drug is of little value unless the medical profession knows of it, it is necessary that they be informed of the drug and of its nature in order that they may prescribe it, and that the drug be easily procurable by the patients. So a pattern of distribution is adopted which was done with the particular product involved. The witness referred to described what he called the normal pattern of distribution in this manner:

"That is accomplished by essentially three means: First, by a large number of representatives who travel in this country constantly, whose responsibility it is to call upon the physicians and give them this information by word of mouth. Secondly, it is accomplished by announcements that go through the drug literature channels. The third is accomplished by paid advertising in the medical journals of the country."

The representatives who call chiefly on physicians, pharmacies, wholesalers and retailers, in regard to its products to keep them up-to-date on any new development that may come about, are called by Searle "medical representatives."

Searle prepares special manuals relating to its products, called "reference manuals" which inform the profession about the product and the experience with it in laboratories or clinically.

[*Development of Drug*]

In the case of the drug to which the trademark "Dramamine" was adopted, its effect on motion sickness, nausea and vomiting was first noticed by a clinician at Johns Hopkins University, who had prescribed it for a woman patient who stated to him that in coming to the hospital on the street car she did not feel dizzy when she took the drug. Later experiments were carried on in 1948 by the United States Army on a transport. Two of the clinicians accompanied a rather ancient transport from the United States to Germany and gave the drug to the soldiers in order to observe its effect on motion sickness. These and other experiments ultimately resulted in the development of the Searle brand of dimenhydrinate to which the trade name "Dramamine" was attached by their laboratory men and, as already appears, later registered and used in interstate commerce.

[*Importance of Business Facts*]

This rather lengthy description is necessary in order to understand that in this case we are not dealing with an ordinary company engaged in the wholesale distribution of drug products, many of which they do not manufacture, like McKesson & Robbins or others, but with a manufacturing concern engaged in the manufacture and improvement of either recognized drugs or drugs of their own invention applied to the cure of human illnesses. In considering the alleged violation of antitrust laws, these facts have a particular significance.

IV

No Antitrust Violation

[*"Unclean Hands"*]

The violation of antitrust laws is pleaded in the Answer under the general claim of "unclean hands" which is used in cases of this character to prevent enforcement of equity when misuse of a trademark is alleged. (87 C. J. S., Trademarks, § 102; *Morton Salt Co. v. G. S. Suppiger Co.*, 1942 [1940-1943 TRADE CASES ¶ 56,176], 314 U. S. 488, 494; *Renaud Sales Co. v. Davis.*, 1 Cir., 1939, 104 F. 2d 683; *Strey v. Devine's, Inc.*, 7 Cir., 1954, 217 F. 2d 187, 190) The Lanham Act specifically provides for denial of relief in trademark cases when a violation of the antitrust laws is shown to exist. (15 U. S. C. A. § 1115(b)(7)) This provision was especially pleaded and evidence in the record was directed to prove violation of the Sherman Act. (15 U. S. C. A., § 1 and § 2)

[*Fair Trade Laws*]

I am of the view that the defendant has not shown a violation of either section. On the contrary, the facts disclose that whatever understandings plaintiff entered into with the defendant and other persons through whom, at times, it acted, were permitted under § 16902 of the California Business & Professions Code. Consequently, they are excepted from the operation of antitrust laws both under the Miller-Tydings Act of 1937, (50 Stat. 693; 15 U. S. C. A., § 1) and the McGuire Act of 1952. (15 U. S. C. A., § 45)

As stated, Searle is a manufacturer of pharmaceutical products having a medical value in the human field. The product to which the mark under discussion is attached is one of them. Of the twenty-five products listed in one of their catalogues twenty-three are sold under coined trademarks or tradenames, the other two under their chemical names. The plaintiff *is not* a wholesaler or retailer.

The evidence shows that while the plaintiff had in 1949 some one hundred and fifty representatives and in 1957 some three hundred representatives throughout the country, ninety per cent of them call on physicians. They do not take orders from them nor do they sell them any products. They merely offer them samples. And the only way they know that their mission has been successful is when the physicians on whom they called prescribe the product, which is supplied through regular drug channels.

[*Bidding System*]

Prior to December, 1956, Searle adopted a system of selling to hospitals and public institutions which, in effect, functioned in this manner: In the Los Angeles area five wholesale druggists with whom they had "fair trade" agreements,[1] were given

[1] The Fair Trade Agreement called "Manufacturer-Wholesaler Contract" contained these clauses:

"Whereas, the Manufacturer is the producer or the distributor of various commodities and the Wholesaler is engaged in the sale of such commodities at wholesale in various states which have enacted fair trade acts, and the Manufacturer and the Wholesaler desire to avail themselves of the provisions of such fair trade acts and of the fair trade acts of such other states as shall enact such statutes;

"Now, Therefore, in consideration of the premises, and the mutual benefits and obligations accruing to and assumed by the parties hereto from and by the execution and delivery of this agreement, the parties hereto agree as follows:

. . .

"2. The Wholesaler will not (except as specifically permitted by statute) directly or indirectly, advertise, offer for sale or sell any of the Products to any buyer in any state in which at the time of such sale a fair trade act shall be in effect at less than the minimum wholesale selling price at that time stipulated therefor in such state by the Manufacturer.

"3. The minimum wholesale selling prices stipulated by the Manufacturer for the Products in various states are those now or hereafter designated in Schedule A plus, in each sale, the amount of all sales and excise taxes applicable to such sale.

"The Manufacturer, at any time and from time to time by written notice given to the Wholesaler as hereinafter provided, may (a) eliminate one or more Products from Schedule A; (b) add one or more Products to Schedule

the right to make bids for Searle products to city or county hospitals or other institutions requiring bids. The products were shipped by Searle from Skokie, Ill., a suburb of Chicago, Ill., or San Francisco, Calif., direct to the institution. The bills bore the legend "sold to (name of drug company)", "shipped to (name of institution)" and the price. The drug companies were allowed ten per cent of the list price. The defendant was given the same privilege. They were not wholesalers. They carried no stock of drugs. They merely were permitted to make bids for Searle products at the list price. No formal agreement existed between them and Searle as to these matters, except that it was understood that the bids were to be made at the prices stated in the catalogue. Like the drug companies, the defendant was to receive as a commission ten per cent of the invoice price. Searle charged no sales tax, it being collected by the drug companies or the defendant. Searle looked to the drug companies and the defendant for payment of the invoices. They in turn collected the full price from the institution, giving to Searle ninety per cent of it.[2]

[*No Unlawful Price Fixing*]

There is no denial that the privilege was withdrawn when it was learned that the defendant had made bids below the amount set forth in the catalogue and had offered higher discounts. It is doubtful, to say the least, whether this arrangement, regardless of any fair trade practices constituted an agreement to fix prices of the type which the courts have condemned. (See *United States v. Colgate & Co.,* 1919, 250 U. S. 300; *Adams-Mitchell Co. v. Cambridge Distributing Co.,* 2 Cir., 1950 [1950-1951 TRADE CASES ¶ 62,856], 189 F. 2d 913; and see, *Cutter Laboratories v. Lyophile-Cryochem Corp.,* 9 Cir., 1949 [1950-1951 TRADE CASES ¶ 62,542], 179 F. 2d 93)

Certain it is that Searle *was not* in competition with the drug companies and the defendant, nor they with it. While, at times, they sold direct to institutions, they did not do so during the period when this special arrangement called "drop shipments" obtained.

I do not think that the sale to institutions of products under their own brands put them in the class of competitors of the drug companies and the defendant so as to subject them to the charge of horizontal price fixing. (*Dr. Miles Medical Co. v. John D. Parke & Sons Co.,* 1911, 220 U. S. 373, 408; *United States v. Masonite Corp.,* 1942 [1940-1943 TRADE CASES ¶ 56,209], 316 U. S. 265, 274-275; *United States v. Bausch & Lomb Co.,* 1944 [1944-1945 TRADE CASES ¶ 57,224], 321 U. S. 707, 720; *United States v. Frankfort Distilleries, Inc.,* 1945 [1944-1945 TRADE CASES ¶ 57,338], 324 U. S. 293, 295-298; *Schwegmann Bros. v. Calvert Distillers Corp.,* 1951 [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384; *United States v. McKesson & Robbins,* 1956 [1956 TRADE CASES ¶ 68,368], 351 U. S. 305, 311-313)

In reality, the arrangement was one whereby the drug companies and the defendant, in a limited area, became the agents or representatives or "brokers" of the plaintiff in placing the products which

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A and stipulate minimum wholesale selling prices therefor; and/or (c) change the minimum wholesale selling price of any one or more of the Products.

"Each elimination from and each addition to Schedule A and each change in any minimum wholesale selling price, including each such change made pursuant to Article 4 of this agreement, shall be effective at the opening of business on the date specified in the notice thereof, and such notice (which may take the form of a revised Schedule A which specifies its effective date) shall be mailed so that, in the ordinary course of the mails, it will be received by the Wholesaler before the date so specified.

"4. In the event that, pursuant to any agreement similar to this one, the Manufacturer shall stipulate a minimum wholesale selling price for any of the Products in any given state which shall be different from the minimum wholesale selling price at the time stipulated for such products in such state under this agreement, the Manufacturer will give prompt written notice of such fact to the Wholesaler and such different minimum wholesale selling price shall be effective under this agreement as provided in Article 3 hereof."

[2] The general form of agreement entitled "Manufacturer-Wholesaler Agreement" and entered into between Searle and the wholesale druggists in the Los Angeles area contained this clause relating to drop shipments:

"7. We will allow you a handling discount of 10% (based upon our quotation) on drop shipments of Searle Tablets in Bulk Packages Only to any accredited hospital, physician or established clinic which orders such shipments through you. In the case of institutions which are city, county or state controlled, this handling discount arrangement extends to drop shipments of Any Searle Item or Package Size. Under no circumstances will we allow a handling discount on Federal Government business."

they manufactured in institutions in exchange for the commission. The fact that the invoices spoke of the goods as "sold" to the druggist and to the defendants and that the plaintiff looked to them to collect the money does not, in my view, alter the situation. (See *Woodworkers Tool Works v. Byrne,* 9 Cir., 1951, 191 F. 2d 667; *Woodworkers Tool Works v. Byrne,* 9 Cir., 1953, 202 F. 2d 530) The test applied in the tort case just cited is even truer in a case like this when realities must govern in determining the meaning of relationship. (*United States v. Richfield Oil Corp.,* D. C. Cal., 1951 [1950-1951 TRADE CASES ¶ 62,878], 99 F. Supp. 280, 293. And see, *Federal Trade Commission v. Curtis Publishing Co.,* 1923, 260 U. S. 568; *United States v. General Electric Co.,* 1926, 272 U. S. 476)

We are inescapably led to the conclusion that Searle's arrangements as to bids to public institutions and hospitals who received the products in quantities not available to wholesalers or retailers were outside the purview of the antitrust laws whether we consider them in the light of the state fair trade laws or not.

To amplify, Plaintiff's Hospital Catalog states:

> "Sales of tablets in bulk quantities are restricted to physicians and hospitals."

We are, therefore, dealing with a commodity which was packaged for only the hospital trade and which was available only directly from Searle. As stated, there were two ways of supplying this commodity to the hospitals. One was by direct sales from Searle to the hospital, the other was by the "drop shipment." These were not competing but supplementary methods. "Drop shipment" was used where a hospital did not wish to deal direct with Searle, but required a local source. Where the hospital dealt direct, there was a direct account, and no bidding. There were, in effect, two markets and two parallel sets of accounts. The plaintiff's Vice-President in charge of distribution, Franklin P. O'Brien, testified:

> "The Court: Did you at times submit a bid direct or did you always do it through a wholesaler?
>
> "The Witness: No, in the case where a hospital had a direct account with us, then they did not ask for bids. But in cases where a hospital asked for bids, we allowed anybody who wished to bid and we ourselves did not bid."

Other testimony indicates that Searle would not ship on a "drop shipment" order to a hospital where they had a direct account. There was also the testimony of Mr. Butler, the mainstay of the defendant, that as to Searle's products, his concern bid only at Los Angeles County, Los Angeles City and San Bernardino County, so far as he could recall. He actually sold Searle goods to one account only, the County of Los Angeles. While the arrangement with the defendant continued Searle neither bid nor sold to these accounts.

These and other facts, already alluded to, indicate the absence of competition between Searle and the defendant or others. Essentially, Searle was a manufacturer and such sales were merely incidental and accessory to its main business,—that of manufacturing. (See, *General Electric Company v. Kimball Jewelers, Inc.,* 1956 [1956 TRADE CASES ¶ 68,291], 333 Mass. 665, 132 N. E. 2d 652, 657)

[*Competition—Monopoly*]

One other matter should be adverted to. The evidence shows clearly that both as to the pharmaceutical product to which the mark was attached, and as to other products which Searle manufactured and sold under various tradenames, there were other products manufactured by other pharmaceutical companies ***in actual competition with each of them.*** So we are back to the fact that Searle did not exercise unreasonable monopoly powers, that they were not in a position to "control price or exclude competition". (*United States v. duPont & Co.,* 1956 [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 391)

Very apposite here are the following words of the Supreme Court in the case just cited:

> "Thus one can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However, this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. *Illegal power must be appraised in terms of the competitive market for the product.*
>
> "Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how

far buyers will go to substitute one commodity for another. For example, one can think of building materials as in commodity competition but one could hardly say that brick competed with steel or wood or cement or stone in the meaning of Sherman Act litigation; the products are too different. This is the interindustry competition emphasized by some economists. See Lilienthal, Big Business, c. 5. On the other hand, there are certain differences in the formulae for soft drinks but one can hardly say that each one is an illegal monopoly. Whatever the market may be, we hold that control of price or competition establishes the existence of monopoly power under § 2. Section 2 requires the application of a reasonable approach in determining the existence of monopoly power just as surely as did § 1." (p. 393) (Emphasis added)

So here the only monopoly is that which the excellence of its products may have given to Searle. Indicative of the freedom of action in the field is the fact that the defendant, after being deprived of the privilege of bidding for Searle products, caused a chemist to manufacture a kilo of the chemical product (dimenhydrinate) sold under the trademark of "Dramamine". They did not go beyond that because, as stated, the injunction intervened and stopped in their incipiency their activities in infringing the mark. Only one advertisement appeared in which the mark "Dramamine" was used, dividing the syllables in this manner: "Dram-a-mine", and adding the letters "I. D. D.", the initials of the defendant's corporate name.

Summary and Conclusion

[*Trade-Mark*]

From what precedes the following conclusions may be drawn. The plaintiff has a valid mark which has been infringed by the defendant. The fact that the harm which the defendant might do to a concern such as plaintiff's with its large resources is not great, affects only the right to recover damages and makes the case one in which the remedy should be limited to injunctive relief. (15 U. S. C. A., § 1117; *Champion Plug Co. v. Sanders,* 1947, 331 U. S. 125, 130-131; *National Dryer Mfg. Corp. v. National Machinery Co.,* D. C. Pa. 1955, 136 F. Supp. 886) Otherwise the plaintiff is entitled to the full relief as spelled out by the court in *Mishawaka Mfg. Co. v. Kresge Co.,* 1942, 316 U. S. 203, 205:

"The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trademark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress." (p. 205)

[*Refused to Deal*]

As already stated, the plaintiff has not been guilty of violation of any of the antitrust laws. The arrangements as to price are within the scope of the restrictions that a manufacturing company may place on sale on penalty of refusing to deal with a particular person. Not every monopolistic practice violates the antitrust law. Monopolistic restrictions are condemned only if they affect a substantial segment of interstate commerce. Unilateral refusal to deal is not a violation of law. (Charles F. Barber, Refusal to Deal Under the Antitrust Laws, 1954, 103 U. of Pa. L. Rev. 847) This is especially true where, as here, there was competition in the market as to every one of the products manufactured by the plaintiff. (*United States v. E. I. duPont de Nemours & Co.,* 1956 [1956 TRADE CASES ¶ 68,369], 351 U. S. 377. See, Donald F. Turner, Antitrust Policy and the Cellophane Case, 1956, 70 Harv. L. Rev., 281)

The only real advantages the plaintiff has are those flowing from the primacy which its trademarked and tradenamed products and their quality has given them over the course of years. To this they are legitimately entitled. There can be no unlawful monopolization

"unless accompanied by a purpose or intent to exclude competition." (*Cutter Laboratories v. Lyophile-Cryochem Corp.,* 9 Cir., 1949, 179 F. 2d 80, 93)

Here, the field was left open to those with whom Searle dealt to sell products com-

petitive to those manufactured by Searle. There was no requirement of "exclusive representation" of the type which the antitrust laws condemn *as a condition to dealing in Searle products* or even "Dramamine". (See, *Standard Oil of California v. United States,* 1949 [1948-1949 TRADE CASES ¶ 62,432], 337 U. S. 293; *Richfield Oil Corp. v. United States,* 1952 [1952 TRADE CASES ¶ 67,262], 343 U. S. 922)

So Judgment will be for the plaintiff for injunctive relief and costs.

[*Damages—Jury Trial*]

One observation should be added as to the form of the Judgment. The defendant by counterclaim seeks damages for violation of the antitrust laws, (15 U. S. C. A., § 15 and § 26) and has asked for a jury trial. The scope of the trial of the counterclaim will be markedly affected by the correctness of the findings of this Court on the subject of the validity of the trademark and of the lawfulness of the practices outlined in this opinion. So this is a case in which the provisions of Rule 54(b) of the Federal Rules of Civil Procedure should apply. The Judgment will, therefore, be declared *final* as to the issues involved within the meaning of that rule. Formal judgment and findings to be prepared by counsel for the plaintiff under local Rule 7.

[¶ 68,725] Congress Building Corporation v. Loew's, Incorporated, et al.

In the United States Court of Appeals for the Seventh Circuit. September Term 1956—April Session 1957. No. 11941. Dated May 31, 1957.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. KNOCH, District Judge.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Who May Bring Suit —Non-Operating Landlord of Motion Picture Theatre—Injury to Business or Property.— A non-operating landlord of a motion picture theatre which was entitled, under the terms of its lease, to a fixed minimum rental plus a percentage of the lessee's gross receipts could maintain a treble damage action alleging that the lessee, other motion picture exhibitors, and motion picture distributors engaged in a conspiracy to monopolize and restrain trade in the exhibition of motion pictures, that the effect of the conspiracy was to relegate the theatre to an inferior playing position and that it was thereby deprived of rentals under the percentage clause that it otherwise would have received. The injury allegedly sustained by the lessor was susceptible of proof, both as to the fact of injury and as to the amount of damages; the injury to the lessor as a non-operating theatre owner was not unforseeable; the acts of the defendants were the direct and proximate cause of such injury; and the lessor was seeking recovery in its own right, not derivatively through the lessee. The lessor was injured in its business or property within the meaning of Section 4 of the Clayton Act. The lessor's rights under the lease were of value, and to the extent that the value of any of the rights was diminished, the lessor was injured. Whatever the legal characterization of these rights, they were within the term "property" as used in the Act. "It is the source of injury, not the character of property or business injured, which constitutes the test of recovery." Furthermore, the failure of the lessor to demand that the defendants refrain from their alleged illegal acts does not legalize or immunize defendants against liability to the lessor. Section 4 does not require a demand as a condition precedent to the maintenance of an action.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.55.

Private Enforcement and Procedure—Suit for Civil Damages—Defenses—Statute of Limitations—Applicable Statute—Allegation of Claim Within Limitation Period.—Since a non-operating landlord of a motion picture theatre commenced its treble damage action prior to the enactment of the Federal statute of limitations, the action was governed by an Illinois statute of limitations which prescribes a two-year limitation period. The allegations of injury and antitrust violation encompassed all the time from July, 1933, to the date of the action, and the complaint clearly alleged a claim that was within the

limitation period. The defendants' contention that the last act from which damage could have accrued occurred more than two years prior to the filing of the complaint was rejected. The complaint allegedly a conspiracy to monopolize first and first subsequent run film exhibition. "We cannot understand how the fact that plaintiff's theatre was moved up to a first subsequent run exhibiting position affects or negates the alleged effect on it of the first run monopoly and the clearance period which is imposed before it gets even first subsequent run films." The change in playing position may lessen the alleged diversion of patronage, but it does not eliminate or legalize it.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010, 9010.100, 9010.200.

For the plaintiff-appellant: Thomas C. McConnell, W. Donald McSweeney, Francis J. McConnell, Harry D. Lavery, and Benjamin Wham, Chicago, Ill.

For the defendants-appellees: John F. Caskey, New York, N. Y., and Robert W. Bergstrom, Samuel W. Block, Wesley G. Hall, David Levinson, John J. Faissler, and Harold D. Shapiro, Chicago, Ill.

Reversing and remanding a decision of the U. S. District Court, Northern District of Illinois, Eastern Division, 1956 Trade Cases ¶ 68,513.

Before FINNEGAN, LINDLEY and SWAIM, Circuit Judges.

[*Trial Court Ruling*]

SWAIM, Circuit Judge [*In full text*]: This action was commenced in the District Court as a private antitrust suit under Sections 4 and 16 of the Clayton Act, 15 U. S. C. A. §§ 15, 26, to recover treble damages for injuries alleged to have been sustained by reason of defendants' violationn of the Sherman and Clayton Acts, and for injunctive relief. The District Court granted defendants' motion for summary judgment on the ground that plaintiff is not a person injured in its business or property within the meaning of Section 4 of the Clayton Act and, therefore, is not entitled to maintain this action. (Reported in CCH [1956] TRADE CASES Par. 68,513 (1956).)

[*Non-operating Lessor of Theatre*]

Plaintiff is the non-operating owner-lessor of a motion picture theater property located in Chicago, Illinois. The theater is leased to defendant Balaban & Katz (B & K) which controls the operation of the theater. Under the terms of the lease plaintiff is entitled to a fixed minimum rental plus a percentage of the lessee's gross receipts. The lessee has at all times paid the minimum rental, but, as alleged by plaintiff, the receipts, and thus the amounts payable by the lessee under the percentage clause, have been kept down due to the illegal trade practices of the defendant-lessee B & K, certain motion picture distributors and certain affiliated exhibitors in the City of Chicago. Plaintiff alleged that the defendants, including the defendant-lessee, engaged in a conspiracy to monopolize first and first subsequent run exhibition of motion pictures in the City of Chicago and to restrain trade and commerce in the licensing of motion pictures for exhibition by suppressing the competition of independent exhibitors, by the establishment of a uniform system of minimum theater admission prices to be charged by exhibitors, uniform playing positions for theaters and a uniform system for releasing motion pictures for exhibition. Plaintiff further alleged that the effect of these illegal trade practices was to relegate its theater to an inferior exhibiting position thereby depriving plaintiff of rentals under the percentage clause that it otherwise would have received.

[*Right To Maintain Action*]

The question of whether a non-operating lessor may maintain a treble damage action has been infrequently litigated and such decisions as there are are difficult to reconcile. In *East Orange Amusement Co. v. Vitagraph, Inc.*, D. C. N. J., CCH Trade Cas. [TRADE REGULATION REPORTS, Ninth Edition, Supp. 1941-1943] Par. 52,965 (1943), the lessor claimed that antitrust violations had caused his lessee to default in the payment of rent and that this default, in turn, resulted in the lessor's loss of his real estate to a mortgagee. And in *Camrel Co. v. Paramount Film Distributing Corp.*, D. C. S. D. N. Y., CCH [1944-1945] TRADE CASES Par. 57,233 (1944), the lessor claimed, as a result of alleged antitrust violations, injury to the rental and market value of its real estate and, in addition, injury under a percentage rental clause like that in the instant

case. The District Court in each of the above cases upheld the lessor's capacity to sue by denying motions to dismiss. However, neither court gave substantial treatment to the problem. The authority of these cases may be in doubt because of later decisions by the Courts of Appeal for their respective circuits. See *Harrison v. Paramount Pictures, Inc.,* D. C. E. D. Pa. [1953 TRADE CASES ¶ 67,568], 115 F. Supp. 312, aff'd 3 Cir. [1954 TRADE CASES ¶ 67,721], 211 F. 2d 405, certiorari denied 348 U. S. 828; *Melrose Realty Co. v. Loew's Inc.,* 3 Cir. [1956 TRADE CASES ¶ 68,358, 68,423], 234 F. 2d 518, certiorari denied 352 U. S. 890; *Productive Inventions, Inc. v. Trico Products Corp.,* 2 Cir. [1955 TRADE CASES ¶ 68,104], 224 F. 2d 678, certiorari denied 350 U. S. 936 (these cases will be considered shortly).

This problem was also before the court in *Westmoreland Asbestos Co. v. Johns-Manville Corp.,* D. C. S. D. N. Y., 30 F. Supp. 389, aff'd 2 Cir., 113 F. 2d 114, where it was held that the injuries to the lessor were too remote to entitle him to maintain the action. It must be noted that in the *East Orange, Camrel* and *Westmoreland* cases the lessee was also a victim of the alleged antitrust violations which is not the case here, as the defendant-lessee is alleged to have been a participant in the trade practices complained of.

Harrision v. Paramount Pictures, Inc., D. C. E. D. Pa. [1953 TRADE CASES ¶ 67,568], 115 F. Supp. 312, is the first decision to deal fully with the problems peculiar to a suit by a lessor. The lessor, a non-operating theater owner, claimed injury to the market value of her theater and injury under a percentage rental clause, as a result of alleged antitrust violations. Although the court's opinion is not explicit on this point, it appears that the lessee was alleged to be one of the co-conspirators. The court held that the lessor did not have capacity to sue on two alternative lines of argument: (1) that the interest of the lessor was such that there could be no injury in "his business or property," as required by Section 4 of the Clayton Act; (2) that even if there were injury to his business or property within the meaning of Section 4, it would be too remote to be compensable. The Court of Appeals affirmed in a per curiam opinion and adopted the reasoning of the district judge. 3 Cir. [1954 TRADE CASES ¶ 67,721], 211 F. 2d 405, certiorari denied 348 U. S. 828.

The problem was next considered in *Steiner v. 20th Century-Fox Film Corp.,* 9 Cir. [1956 TRADE CASES ¶ 68,304], 232 F. 2d 190. The lessor, another non-operating theater owner, claimed that as a result of alleged antitrust violations she was forced to lease her theater for less than a reasonable rental. The prime lessee was alleged to be one of the co-conspirators and initially was made a party defendant. However, the lessor dismissed her complaint as against the lessee. There, as here, it was asserted that the lessor's interest is too remote to be compensable. The court distinguished the *Harrison* case and held that the lessor was entitled to maintain the action, saying:

> "Here the complaint affirmatively alleges direct injury to the [lessor], not the lessee. It is said the appellees' wrongful acts operated directly upon the [lessor]. This is sufficient for the [lessor] to become a proper party to complain of the conspiracy alleged." 232 F. 2d at 193.

The court distinguished the *Harrison* case as follows:

> "The cases cited by the appellees are not factually similar to the case at bar. In *Harrison v. Paramount Pictures* [citation] there were no direct dealings between the plaintiff and defendant. Here the [lessor] asserts the appellees conspired with the prime lessee to force [lessor] to receive less than a reasonable rent." 232 F. 2d at 193.

The court's treatment of the *Harrison* case is confusing. If, when the court said, "there were no direct dealings between the plaintiff and defendant" in *Harrison,* it meant that the lessee was not alleged to be one of the co-conspirators, it is in error. If, on the other hand, the court meant that there were no direct dealings between the plaintiff and the defendants other than the lessee, it is probably correct. The court may have well intended the latter since there is some language in the court's opinion which indicates the lessor in *Steiner* alleged that the defendants other than the lessee had direct dealings with her. The question then arises whether this is a significant distinction.

The problem was again considered by the Third Circuit in *Melrose Realty Co. v. Loew's Inc.* [1956 TRADE CASES ¶ 68,358, 68,423], 234 F. 2d 518, certiorari denied 352 U. S. 890, and the court adhered to the rule laid down in the *Harrison* case. The only reference made by the court to the

Steiner case is found in Chief Judge Biggs' dissent on the petition for rehearing. 234 F. 2d at 519.

The rationale of *Harrison* was approved by the Second Circuit in *Productive Inventions, Inc. v. Trico Products Corp.* [1955 Trade Cases ¶ 68,104], 224 F. 2d 678, certiorari denied 350 U. S. 936. The plaintiff, a patentee, who had granted to another an exclusive license upon a royalty basis, claimed injury due to a loss of royalties on sales that might have been made save for the allaged antitrust violations of the defendant. The court held that the licensor had no standing to sue because its loss was "beyond the limit of injuries cognizable under the antitrust laws." The injury asserted by the licensor is analogous to the injury claimed by the plaintiff in the instant case under the percentage rental clause. It should be noted, however, that the licensee was also a victim of the alleged antitrust violations, and not a co-conspirator.

The *Harrison* rationale has been also cited with approval in *Miley v. John Hancock Mutual Life Insurance Co.,* D. C. Mass. [1957 Trade Cases ¶ 68,609], 148 F. Supp. 299; and *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.,* D. C. Mass. [1957 Trade Cases ¶ 68,602], 147 F. Supp. 907. In *Miley,* the plaintiff, an insurance broker, claimed injury to his business due to loss of insurance premiums which he would have earned save for the alleged antitrust violations of the defendants by causing the insurance company which he was representing to lose a profitable contract. And in the *Snow Crest* case the plaintiff claimed injury due to loss of business as the supplier of another who was the intended victim of the alleged antitrust violations. In each of these cases the court adopted the *Harrison* rationale and held that the interest of the plaintiff was too remote to be compensable and, therefore, each lacked the standing to maintain the action.

The situation in the Northern District of Illinois, Eastern Division, only adds to the confusion. In two recent decisions, in cases virtually indistinguishable factually from the instant case, that court has held that a non-operating theater owner is entitled to maintain a treble damage action. *Tower Building Corp. v. Loew's Inc.,* CCH [1956] Trade Cases Par. 68,537 (1956); and *1617 Belmont Co. v. Columbia Pictures Corp.,* No. 52-C-251 (unreported).

[*Dissimilar Situations*]

Turning to factually dissimilar situations where this general problem has been considered, we find some degree of uniformity. The courts have uniformly denied recovery to stockholders. *Gerli v. Silk Ass'n of America,* D. C. S. D. N. Y., 36 F. 2d 959; *Loeb v. Eastman Kodak Co.,* 3 Cir., 183 Fed. 704, creditors, *Loeb v. Eastman Kodak Co., supra,* and deposed officers of a corporation, *Corey v. Boston Ice Co.,* D. C. Mass., 207 Fed. 465, who claimed injury as the result of alleged antitrust violations. See also *Productive Inventions, Inc. v. Trico Products Corp.,* 2 Cir. [1955 Trade Cases ¶ 68,104], 224 F. 2d 678, certiorari denied 350 U. S. 936; *Miley v. John Hancock Mutual Life Insurance Co.,* D. C. Mass. [1957 Trade Cases ¶ 68,609], 148 F. Supp. 299; and *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.,* D. C. Mass. [1957 Trade Cases ¶ 68,602], 147 F. Supp. 907, which are discussed above. On the other hand, this court has permitted a sales agent to recover lost commissions and it is of note that his employer was a participant in the trade practices complained of. *Roseland v. Phister Mfg. Co.,* 7 Cir. [1940-1943 Trade Cases ¶ 56,187], 125 F. 2d 417. See also, *Vines v. General Outdoor Advertising Co.,* 2 Cir. [1948-1949 Trade Cases ¶ 62,340], 171 F. 2d 487; *McWhirter v. Monroe Calculating Mach. Co.,* D. C. W. D. Mo. [1948-1949 Trade Cases ¶ 62,227], 76 F. Supp. 456; and *Klein v. Sales Builders, Inc.,* D. C. N. D. Ill., CCH [1950-1951] Trade Cases Par. 62,600 (1950).

It is not clear why the interest of a sales agent should be considered less remote than the interest of either a stockholder, creditor or employee. However, the diverse treatment of the stockholder-creditor cases and the sales agent cases is not without its justification. To permit individual stockholder recovery would run counter to the traditional treatment of corporate injury that the corporation is the proper party to redress corporate wrongs. And direct recovery by the individual creditor would give him a preference over other creditors of the insolvent business and such recovery may act to thwart the policy of the bankruptcy laws. Further, the number of stockholders and creditors might produce an insurmountable problem of multiplicity of suits. These problems are not present in the sales agent situation nor are they present in the non-operating lessor situation.

On the basis of this analysis, it would seem more logical that the instant case be aligned with the sales agent cases, rather than the stockholder-creditor cases. It is also true that considerations such as these may be grounds for distinction in cases where the lessee is also injured as the result of antitrust violations and cases where the lessee is a party to the antitrust violations. For example, would the defendants be subject to two actions, one by the lessor and one by the lessee. Suppose the lessee sues first and recovers, should the damages be apportioned between lessor and lessee and, if so, how? Another problem is that of settlements by one of the parties without the participation or consent of the other. See *Hempstead Theatre Corp. v. Metropolitan Playhouses, Inc.*, 308 N. Y. 712, 124 N. E. 2d 332. None of these problems is present in the lessor situation where the lessee is a party to the antitrust violations, and may justify a different result.

[*Clayton Act*]

Section 4 of the Clayton Act provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained * * *."

Notwithstanding the broad language of Section 4, which literally, at least, appears to give the plaintiff herein a cause of action, the courts have narrowed the apparent scope of this statute usually on the ground, more or less expressed, that in view of the severity of the penalty a line must be drawn. Thus, in the *Harrison* case the court said:

> "In determining the scope of the Act it must be remembered that the treble damage feature is an enforcement provision and superimposes a penalty upon compensation. As such it should not be literally construed if unreasonable results would be reached by so doing. Obviously, there must be a limit somewhere." 115 F. Supp. at 317.

And in *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, D. C. Mass., 147 F. Supp. at 909, the court said:

> "Without trying to spell out in detail the justification for these decisions, it may be noted that if they had gone the other way, there would as a result of the treble damage provisions of the anti-trust acts have been given in each case to the plaintiff what has sometimes been called a 'windfall.' [Citing] In effect, businessmen would be subjected to liabilities of indefinable scope for conduct already subject to drastic private remedies."

Compare with these statements, however, the one made by this court in *Roseland v. Phister Mfg. Co.*, 125 F. 2d at 420:

> "We may not by what seems to us a strained and unjustified limitation bar plaintiff from the statutory remedy. 'Congress evidently foresaw the wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to encourage disregard of the law.'"

And as recently as this year the Supreme Court has admonished the inferior federal courts that:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' [citing] and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. [Citing] Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of § 5 of the Clayton Act. [Citing] In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." *Radovich v. Nat. Football League* [1957 TRADE CASES ¶ 68,628], 352 U. S. 445, 453-454.

[*Existence of Competition*]

Since the District Court decision in the *Harrison* case is the only decision to deal fully with the problems peculiar to a suit by a lessor and since defendants' argument herein suggests no additional considerations, we shall consider in detail the rationale set forth therein. The court said, 115 F. Supp. at 316:

> "The plaintiff has not shown and does not allege that she has ever had any business transactions with the defendants. She is not in the business of operating a motion picture theater."

We do not think it significant that the plaintiff was not in direct competition with

the defendants. In *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, D. C. Mass., 147 F. Supp. at 909, the court stated:

> "Courts aware of these considerations have been reluctant to allow those who were not in direct competition with the defendant to have a private action even though as a matter of logic their losses were foreseeable. Congress has failed to amend the antitrust laws on this point in the face of repeated decisions. It seems to have been content for the judiciary to take a position narrower than that often applied in nonstatutory tort cases and in cases where plaintiffs are not allowed a multiple recovery."

Not only in this "limitation" without support in the language of Section 4 but it appears to have been implicitly rejected by the Supreme Court. *E.g., Radovich v. Nat. Football League* [1957 TRADE CASES ¶ 68,628], 352 U. S. 445; and *Bigelow v. R. K. O. Radio Pictures, Inc.* [1946-1947 TRADE CASES ¶ 57,445], 327 U. S. 251. And furthermore, there are many decisions to the contrary. *E.g., Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390; *Steiner v. 20th Century-Fox Film Corp.*, 9 Cir. [1956 TRADE CASES ¶ 68,304], 232 F. 2d 190; *Roseland v. Phister Mfg. Co.*, 7 Cir. [1940-1943 TRADE CASES ¶ 56,187], 125 F. 2d 417; *McWhirter v. Monroe Calculating Mach. Co.*, D. C. W. D. Mo. [1948-1949 TRADE CASES ¶ 62,227], 76 F. Supp. 456; *Klein v. Sales Builders, Inc.*, D. C. N. D. Ill., CCH [1950-1951] TRADE CASES Par. 62,600 (1950); *East Orange Amusement Co. v. Vitagraph, Inc.*, D. C. N. J., CCH Trade Cas. [TRADE REGULATION REPORTS, Ninth Edition, Supp. 1941-1943] Par. 52,965 (1943); *Camrel Co. v. Paramount Film Distributing Corp.*, D. C. S. D. N. Y., CCH [1944-1945] TRADE CASES Par. 57,233 (1944).

[*Lessor's Interest*]

As to the question of injury the court in *Harrison* said, 115 F. Supp. at 316:

> "First, she says that if the theatre had been operated by the tenant showing pictures on first-run, the receipts would have been greater and she might have obtained a larger rental, by way of percentage, than she did. The fact is that while she would have had a right to rental above the minimum, if earned, she had nothing more than a hope that it ever would be earned."

To characterize the interest of the lessor under the percentage clause as no more than a "hope" is to subtly beg the question and ignore the fact that most economic dealings and transactions are founded on "hope"—the hope of making a profit. In any event, it would seem to be a hope which should not be impaired with impunity by violations of the law. See *Vines v. General Outdoor Advertising Co.*, 2 Cir. [1948-1949 TRADE CASES ¶ 62,340], 171 F. 2d 487; *Roseland v. Phister Mfg. Co.*, 7 Cir. [1940-1943 TRADE CASES ¶ 56,187], 125 F. 2d 417. Furthermore, it may be fairly assumed that in bargaining for the percentage clause, the lessor undoubtedly accepted a lower minimum rental than it would otherwise have agreed to. In other words, plaintiff accepted a lower minimum rental in return for the "hope" of a percentage of the lessee's receipts, and thereby accepted as well, a share of the risks of the business. Since plaintiff accepted some part of the business risks, plaintiff would appear to be entitled to rely on statutory remedies whose purpose is to reduce such risks. This would obviously be the case if the plaintiff and B & K were partners in the operation of the theater.

[*Antitrust Violation*]

In *Harrison* the court continued, 115 F. Supp. at 316:

> "The tenant could have operated the business, from whatever motive, so as to keep the percentage from ever exceeding the minimum, for example, by cutting admission charges, discontinuing advertising or showing nothing but foreign language or documentary films, and there would be no right which the plaintiff could have asserted against him in that respect."

This statement ignores the fact that the lessor is not asserting mismanagement by the lessee or merely expressing disappointment in the lessee's receipts, but rather that the lessee in conjunction with others conspired to and did violate the antitrust laws to the plaintiff's injury. Surely the fact that the operation of the theater was entrusted to the discretion of the lessee does not give the lessee the right to flaunt the antitrust laws, nor can we see why this fact should deny plaintiff the protection of and the right to rely on statutory remedies provided by the antitrust laws.

[*Direct Injury*]

The court continued, 115 F. Supp. at 317:

> "But even if it be assumed that the plaintiff had some property, some right, which was susceptible of injury, and that

such injury could be traced to the acts of defendants, the question of remoteness remains."

If the plaintiff's allegations are proved, we are not at a loss to see how it can be said that it has not been injured. In fact, everyone seems to concede the existence of the injury, but then counter with the argument that it is too remote to be compensable. We think the alleged acts of the defendants are clearly the direct and proximate cause of the injury. What intervening factors are there to consider? The only one that suggests itself is that if competitive conditions had prevailed would the lessee's operation of the theater have been more profitable with resulting pecuniary benefit to the lessor under the percentage clause. This problem, however, is present when a lessee sues. See *Bigelow v. R. K. O. Radio Pictures, Inc.* [1946-1947 TRADE CASES ¶ 57,445], 327 U. S. 251. In fact, the similarity between the proof necessary in each of these cases is obvious. The antitrust violation has allegedly decreased the receipts of the enterprise by an amount which is ascertainable and recoverable where the lessee sues. See *Bigelow v. R. K. O. Radio Pictures, Inc., supra.* For a lessor to establish the extent of his injury under the percentage clause, he would make virtually the same proof as the lessee. The only hidden assumption in this analysis is that in most instances the interests of the lessor and lessee would coincide. In other words, whatever operation of the theater would produce the greatest return for the lessee would also produce the greatest return for the lessor. Only when the outside interests of the lessee dictated a less profitable operation of the lessor's theater would there be a divergence in their respective interests.

[*Multiplicity of Suits*]

In the *Harrison* case the court continued, 115 F. Supp. at 317:

"The difficulties which would arise unless some consideration be given to the remoteness or indirectness of the injury are particularly apparent in the motion picture business, in which thousands of theatres are owned by persons who have nothing to do with the operation of them and no right to interfere."

However, to deny recovery to the plaintiff would "devitalize the remedy by strained interpretations calculated to encourage disregard of the law." *Roseland v. Phister Mfg. Co.,* 7 Cir. [1940-1943 TRADE CASES ¶ 56,187], 125 F. 2d at 420. The only thing an intended violator need do is join forces with the lessee as was done here and violate the law with impunity, free from private actions for treble damages. The problem of multiplicity of suits to which the court alluded is not similar to stockholder-creditor cases where a single entity exists to redress the wrong, for here there is no such entity. In fact, if the lessor cannot sue there will be no private redress for the defendants' wrongful acts. Furthermore, multiplicity is always present where the acts of the tortfeasor injure more than one individual.

[*Relations with Lessor*]

The court continued, 115 F. Supp. at 317:

"In such a situation, where a tenant desires a particular kind of product, must the distributors seek out the owner of the building to ascertain whether they can safely give the tenant what he wants? It seems clear that unless a line is drawn excluding remote and indirect injuries to property owners in similar cases, an almost intolerable burden would be placed upon the whole industry."

In the first place, the most elementary conceptions of justice and public policy require that a wrongdoer shall bear the risk of any burdens which his wrong has created. *Cf. Bigelow v. R. K. O. Radio Pictures, Inc.* [1946-1947 TRADE CASES ¶ 57,445], 327 U. S. 251. And secondly, the "burden" to which the court alluded is in fact nonexistent. The film distributors can obviously enter into *legitimate* business arrangements with the lessee without incurring liability and without the need for lessor approval of such arrangements. This is not to say, however, that the film distributor can engage in illegal trade practices without fear of legal redress by an injured party.

[*Lessor's Property Rights*]

Finally, we return to the argument that the lessor was not injured in "his property or business" within the meaning of Section 4 of the Clayton Act. The defendants herein contend that, "Once the lease had been executed, plaintiff's 'business' of leasing ceased." We do not think it necessary to consider this "argument," for we think it clear that plaintiff was injured in its property. "A man is injured in his property when his property is diminished." *Chattanooga Foundry & Pipe Works v. City of*

Atlanta, 203 U. S. 390, 399. Under the terms of the lease plaintiff retained the right to the reversion of the fee after the expiration of the leasehold, a right to a minimum rental, and a right to a percentage of the lessee's gross receipts if and when the minimum rental was earned. The lessor's rights under the lease were undoubtedly of value and could have been sold, bartered or given away. To the extent that the value of any of these rights is diminished, the lessor is injured. Whatever the legal characterization of these rights may be, they are clearly within the term "property" as used in Section 4 of the Clayton Act. And as was said in *Roseland v. Phister Mfg. Co.,* 7 Cir., 125 F. 2d at 420, "It is the source of injury, not the character of property or business injured, which constitutes the test of recovery."

[*Summary*]

In summary, the injury that plaintiff allegedly sustained is susceptible of proof, both as to the fact of injury and as to the amount of damages; the injury to plaintiff as a non-operating lessor was not unforeseeable; the acts of the defendants are the direct and proximate cause of such injury; and the plaintiff is seeking recovery in its own right, not derivatively through the lessee. In these circumstances we do not believe that recovery should be denied on some vague notion that "a line must be drawn." We therefore decline to follow the rule laid down by the Third Circuit in the *Harrison* and *Melrose* decisions.

[*Demand by Lessee*]

In the alternative the defendants insist that because the plaintiff did not demand or request of any of the defendants earlier runs for its theater plaintiff is precluded from claiming any damages. Although the parties have briefed and orally argued this point on appeal, the plaintiff proceeds on the assumption that the District Court did not reach this question. However, as we read the District Court's memorandum opinion, it appears that the District Judge was of the opinion that demand is a condition precedent. In so holding we believe the District Judge erred. The failure of the plaintiff to demand that defendants refrain from their illegal trade practices could not legalize such trade practices nor immunize defendants against liability to those injured. *Kobe, Inc. v. Dempsey Pump Co.,* 10 Cir. [1952 TRADE CASES ¶ 67,312], 198 F. 2d 416, certiorari denied 344 U. S. 837; *Ulrich v. Ethyl Gasoline Corp.,* D. C. W. D. Ky., 2 F. R. D. 357. The defendants had a duty to refrain from acts injurious to others and we know of no rule that states that demand is necessary in an action to enforce a liability arising from a tortious act. See generally, 1 Am. Jur., Actions § 36; 1 C. J. S. Actions § 27; 86 C. J. S. Torts § 51. Neither Section 4 of the Clayton Act, nor the terms of any agreement or undertaking by plaintiff with any of the defendants, express or implied, nor the circumstances of this case require a demand as a condition precedent to the maintenance of this action.

We must confess that there is some language in the decision by this court in *Milwaukee Towne Corp. v. Loew's Inc.* [1950-1951 TRADE CASES ¶ 62,891], 190 F. 2d 561, certiorari denied 342 U. S. 909, which lends support to the argument advanced by defendants. See also *J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp.,* 2 Cir. [1954 TRADE CASES ¶ 67,757], 212 F. 2d 840; and see *Vilastor Kent Theatre Corp. v. Brandt,* D. C. S. D. N. Y. [1955 TRADE CASES ¶ 68,102], 18 F. R. D. 199; *T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.,* D. C. S. D. N. Y. [1954 TRADE CASES ¶ 67,761], 16 F. R. D. 173. However, as we read the *Milwaukee Towne* decision, the court did not hold that a demand was a condition precedent to the maintenance of a private antitrust suit. The case was tried on the theory of a refusal to deal, which is also true of the *J. J. Theatres* case, at least in part, and the court held properly, we think, that without a demand or request to deal there could be no refusal to deal. But that is not the case here.

[*Statute of Limitations*]

Defendants also seek to support the judgment below on another ground not passed on by the District Court but which was argued here both orally and in the briefs, namely, that the statute of limitations had run on plaintiff's cause of action before the complaint was filed. This action was commenced on September 1, 1950, prior to the enactment of Section 4B of the Clayton Act, 15 U. S. C. A. § 15b, and is therefore governed by Ill. Rev. Stat. (1955) c. 83, § 15, which prescribes a two year limitation period. *Whitsell v. Alexander,* 7 Cir. [1956 TRADE CASES ¶ 68,255], 229 F. 2d 47, certiorari denied 351 U. S. 932, and cases cited

therein. The allegations of injury and antitrust violation by the plaintiff encompass "all time from July 20, 1933, to the date of this action," and the complaint, standing alone, clearly alleges a claim that is within the limitation period. The defendants argue that the affidavit of one Harry Lustgarten filed in support of their motion for summary judgment establishes that first subsequent run films were exhibited in plaintiff's theater on and subsequent to February 27, 1948, and "[t]hus, the last act from which damage could have accrued occurred, if at all, on February 27, 1948, more than two years prior to the filing of the Complaint." Defendants arrive at this conclusion by an obvious emasculation of the complaint. The plaintiff alleges a conspiracy to monopolize *first* and first subsequent run film exhibition. We cannot understand how the fact that plaintiff's theater was moved up to a first subsequent run exhibiting position affects or negates the alleged effect on it of the first run monopoly and the clearance period which is imposed before it gets even first subsequent run films. At best this change in playing position may lessen the alleged diversion of patronage but it does not eliminate or legalize it. We conclude therefore that the complaint states a claim that is not barred by the statute of limitations. And in view of this conclusion we need not consider whether the plaintiff's amended complaint supplies the deficiencies which the defendants have asserted in arguing that the statute has run nor whether the *Paramount* decree has tolled the statute.

[*Reversed*]

For the reasons set forth above, the judgment of the District Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

FINNEGAN, Circuit Judge, concurs in the result.

[¶ 68,726] First Iowa Hydro Electric Cooperative, F. A. E. Gillmor, Harry J. Strong, and Harry Imel v. Iowa-Illinois Gas and Electric Company, Iowa Power and Light Company, Iowa Southern Utilities Company, Interstate Power Company, Union Electric Power Company, Kansas City Power and Light Company, Iowa Electric Light and Power Company, Northwest Light and Power Company, Wisconsin Power and Light Company, Iowa Public Service Company and Iowa Utilities Association.

In the United States Court of Appeals for the Eighth Circuit. No. 15,548. Dated May 24, 1957.

Appeal from the United States District Court for the Southern District of Iowa. RILEY, District Judge.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Pretrial Procedures—Refusal To Comply with Pretrial Orders—Dismissal of Action——Validity of Order Appointing Master.—A trial court dismissal of a private antitrust action, with prejudice, on the grounds (1) that one of the plaintiffs, as a party and as an officer and manager of a corporate party plaintiff, and another plaintiff, the president and director of the corporate party plaintiff, each willfully and without justification or excuse refused to testify by deposition after having been ordered by the court to testify, and (2) that the plaintiffs willfully and without justification or excuse failed and refused to comply with an order of the court to make a deposit to help defray fees and disbursements of a special master appointed to supervise discovery proceedings, was affirmed. Under the circumstances of the action, the plaintiffs were accorded fair and just treatment by the trial court, and their refusal to proceed in accordance with the Federal Rules of Civil Procedure and their willful and deliberate disobedience of the orders of the court necessitated and justified the dismissal of the action with prejudice. The plaintiffs' contention, among others, that the appointment of the special master was unlawful was rejected. The issues involved in the action were complicated, and the action was exceptional in presenting occasion and necessity for the services of a master preliminary to trial. The order of reference did not amount to an abdication of the judicial function and thereby deprive the parties of a trial before the court on the basic issues involved in the action. The reference was made at an early stage of preparation for trial, and it related, not to the

basic issues in the action, but to pretrial matters. Furthermore, the plaintiffs waived any error that might have been committed in the reference since they failed to make a timely objection to the reference.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013, 9013.440.

For the appellants: J. Roger Wollenberg (Haley, Doty and Wollenberg were with him on the brief).

For the appellees: Larned A. Waterman (Charles D. Waterman, W. B. Waterman, James J. Lamb, Charles D. Waterman, Jr., Donald H. Sitz, Howard A. Steele, W. Z. Proctor, Harris N. Coggeshall, Llewellen E. Slade, Robert Valentine, Robert W. Greenleaf, R. W. Colflesh, Maxwell A. O'Brien, Clement F. Springer, Robert W. Bergstrom, E. Marshall Thomas, Francis J. O'Connor, Robert H. Walker, W. Logan Huiskamp, Joseph A. Concannon, V. Craven Shuttleworth, Tyrrell M. Ingersoll, Harry E. Wilmarth, Byron L. Sifford, Byron Spencer, Joseph J. Kelly, Jr., Earl Smith, Frederic M. Miller, Joseph Brody, Val Schoenthal, and Sherwin J. Markman were with him on the brief).

For a related opinion of the U. S. Court of Appeals, Eighth Circuit, see 1957 Trade Cases ¶ 68,727.

Before WOODROUGH, VOGEL, and VAN OOSTERHOUT, Circuit Judges.

[*Antitrust Action*]

WOODROUGH, Circuit Judge [*In full text*]: This action was brought on February 18, 1954, to recover treble damages and injunctive relief under the Sherman Act and Clayton Act against the ten defendant utility corporations and the unincorporated association which are here as appellees.

[*Trial Court Dismissal*]

After the action had been pending nearly two years and on January 25, 1956, the District Court sustained motions made by the defendants to dismiss it for failure of plaintiffs to prosecute and for disobedience to Court orders in violation of The Federal Rules of Civil Procedure. The Court dismissed the action at plaintiffs' costs [1] with directions that the dismissal should operate as an adjudication upon the merits. The grounds for dismissal were (1) that plaintiff Harry J. Strong as a party plaintiff and as an officer and manager of the corporate party plaintiff First Iowa Hydro Electric Cooperative and plaintiff F. A. E. Gillmor, president and director of said cooperative, each did willfully and without justification or excuse after having been ordered by the Court to testify by deposition, willfully and without justification or excuse refuse to do so; (2) and that the plaintiffs willfully and without justification or excuse failed and refused to comply with an order of the Court to make a deposit of $2500, to defray fees and disbursements of the Special Master.

This appeal is taken to reverse the judgment.

[*Causes of Action*]

The defendants, except the unincorporated association and perhaps one or two others are, and long have been, engaged in distributing and selling electric power in an area that includes parts of Iowa and adjacent States. On September 8th, 1948, the Federal Power Commission granted a license to the plaintiff First Iowa Hydro Electric Cooperative to construct and operate a hydro-electric-project, No. 1853, in the Cedar River which flows through Iowa and to generate and sell its electric power in the same area where appellees operate. In *State of Iowa v. Federal Power Commission,* 178 F. 2d 421, this Court dismissed a petition to vacate the Commission's order granting the license to First Iowa Hydro Electric Cooperative. Our opinion contains a brief outline of the project and our conclusions concerning the powers of the Commission in the matter as declared by the Supreme Court in *First Iowa Hydro Electric Cooperative v. Federal Power Commission* 328 U. S. 152.

Although the probable cost of the project was estimated at many millions of dollars, the cooperative to which the license was granted consisted of the five persons who are joined with it as plaintiffs in this action. Each of the five has paid into the cooperative

[1] Except as to the Master's fees and disbursements, which were divided.

$2.00 for his share in it and the complaint alleged that "said individual plaintiffs constitute all of the members of the First Iowa Hydro Electric Cooperative and each own an equal one-fifth therein."

The complaint filed in this action charged that the defendants, beginning in 1938 when the cooperative was organized under the laws of Iowa (Chapter 390 § 1 of the 1935 Code of Iowa) and continuing thereafter, acted in conspiracy to violate and attempted to violate and violated the provisions against restraint of trade and monopoly contained in the Sherman Act and in the Clayton Act, first, to prevent the issuance of the license for the project to plaintiffs and then to prevent financing the project and construction of it by plaintiffs and thereby did prevent the plaintiffs "from obtaining the necessary funds to construct said project." The period of time covered by the complaint was from 1938 to 1956. Plaintiffs alleged they had been damaged by the defendants' conduct in the sum of $40,000,000 and prayed for recovery in the sum of $120,000,000. They also prayed that defendants be enjoined from continuing their wrongful acts and in strict accordance with Rule 38(b) of The Rules of Civil Procedure, they demanded a trial by jury "of all the issues tendered by the above and foregoing complaint, except the issue whether or not the plaintiffs are entitled to the equitable injunctive relief prayed."

The allegations of wrong done by defendants against plaintiffs are set forth in the complaint, mostly in paragraph ten,[2] in general and sweeping terms and without identification of times, places, persons or utterances.

Likewise the allegations as to diligent efforts made by plaintiffs to obtain money to construct and carry out the project, No. 1853, and as to institutions which "would willingly have furnished the funds to pay the cost of said proposed project" are merely general.[3]

[*Discovery Proceedings*]

Shortly after the complaint was filed and before any of the defendants answered it, certain defendants began discovery proceedings by means of written interrogatories and notices of depositions of the plaintiffs, but the interrogatories propounded and the answers and the notices gave rise to objec-

[2] Paragraph 10. "That since the organization of the plaintiff First Iowa Hydro Electric Cooperative in 1938, the defendants conspired to monopolize, monopolized, and attempted to monopolize the generation, transmission, distribution, and sale of electric light and power, in the area above described, and have unlawfully contracted, combined, and conspired to restrain trade and commerce among the several states in the distribution of electric light and power. These unlawful conspiracies to monopolize, and contracts and combinations, and conspiracies to restrain interstate trade and commerce in electric light and power have been and are being consummated by the following means and methods, among others:

"(a) Deliberate and continued attempts to prevent the issuance of a license to the plaintiff First Iowa Hydro Electric Cooperative and for the construction, operation and maintenance of the project originally known as the Cedar River Dam and later as Federal Power Commission Project #1853.

"(b) The agreement during the year 1948 reciting in substance their unalterable opposition to the proposed hydro electric project on the Cedar River in Muscatine County, Iowa; their agreement to pool their resources to oppose the construction of said project; and their further agreement that in the event said project should be built said defendants would not use any power from said generation facilities.

"(c) By threatening banks, bankers, financial institutions, their officers, brokers and or agents with boycott and loss of utility business on a national scale as well as the loss of future business from the members of the Iowa Utilities Association.

"(d) Carrying said agreement and conspiracy into effect by applying various persuasions, influences, threats, and intimidations to banks and banking and financial institutions solicited, requested, approached, and contracted in behalf of plaintiffs to assist in financing said project and thereby forcing and coercing said financial institutions to refuse to assist in the marketing of any securities to finance the cost of constructing said proposed project.

"(e) And otherwise hampering, interfering with, obstructing and impeding the financing of said project by divers and sundry means, methods and practices, the precise nature of which are unknown to these plaintiffs, but which proved nevertheless effective in thwarting and preventing the plaintiffs from obtaining the necessary funds to construct said project.

"(f) By various other unfair competitive practices designed to appropriate all of the electric light and power distribution in areas in Iowa, Illinois, Wisconsin, and Missouri hereinbefore referred to, all of which were designed to prevent plaintiff and other possible competitors from engaging in the generation and distribution of electric light and power in the area last above referred to."

[3] The allegations are mostly in paragraphs and paragraphs number 12 and 15 of the complaint state:

Paragraph 12. "That plaintiffs have at all times since receiving their certificate to do business as an association made diligent effort

tions and motions and on March 30th, 1954, thirty days after the complaint had been filed, Judge Riley, on whose docket the case pended, conducted proceedings relative to preparing the case for trial at which all parties were represented by attorneys of record. Judge Riley observed that the charges in the complaint were very general; that under the old rules there would have been a plethora of motions for more specific statements and to strike and everything else; that little time should be wasted on those methods because of discovery proceedings designed to obviate them. Judge Riley stressed the seriousness of the charges in the complaint and their generality and declared that the defendants had the right to find out through depositions of the plaintiffs what the plaintiffs claimed the facts were on which they based their accusations and claims. The Judge accordingly made suggestions that all counsel sit down and try to figure out and agree among other things upon how the taking of the depositions of the individual plaintiffs should be handled in an orderly way and made suggestions how it could be done without undue duplication but in fairness to each of the eleven defendants.

He did not however require the defendants to file answers to the complaint before carrying on their discovery proceedings.

Apparently he thought that the defendants could obtain the information, to which they were entitled, from the individual plaintiffs by the production of documents and by depositions of plaintiffs. He directed the defendants to proceed to obtain the production of the documents by the plaintiffs and the taking of depositions of the individual plaintiffs in accordance with Rule 20.

[*Answers*]

It resulted that on July 9, 1954, the Court was called on to consider motions on behalf of both plaintiffs and defendants with respect to interrogatories which had been propounded and the responses prior to any pleading filed by defendants or the cause being at issue. After consideration of that situation, the Judge concluded that it was necessary to have the issues joined before proceeding further with the discovery proceedings and directed that defendants plead to the complaint within twenty days. At the same hearing he also entered an order to compel plaintiff Harry J. Strong to make and file a written oath to the effect, *i.e.*, that he is secretary treasurer of the plaintiff cooperative, that the answers to interrogatories to which his signature was attached were made by him in that capacity as such officer for and on behalf of plaintiff [co-operative] and that his answers were true, etc., and that "failing this, plaintiff will be subject to sanctions under Rule 37."

A separate answer for each defendant was accordingly filed in due time, the answers being similar in respect to general and particular denials of all charges and each set up a number of specific defenses. But the generality of the pleadings left the defendants under the same necessity as before to find out through depositions of the plaintiffs what the plaintiffs claimed the facts were on which they based their charges and the court declared that its rulings on certain motions that had been filed were without prejudice to defendants' right to obtain by deposition the information they had sought by interrogatories.

[*Court Orders*]

Following the proceedings before Judge Riley on July 9, 1954, defendants were unable to compel the production of documents or the taking of depositions of the individual plaintiffs throughout the rest of the year 1954. Plaintiffs did not commence the production of the documents called for until January 18, 1955, and additional production was compelled by order of Judge Riley on March 24, 1955. The taking of the depositions of the individual plaintiffs which Judge Riley had declared to be the right of the defendants in his order of July 9,

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to finance and construct said project, and they, together with various other individuals interested in the construction of said project and in the resulting generation, transmission, distribution and sale of electric light and power on reasonable terms in the territory adjacent thereto in the State of Iowa and adjoining states, began negotiations with various banks and financial institutions in New York City, Chicago, and elsewhere to arrange for the sale of bonds and other securities to pay for the cost of constructing said project."

Paragraph 15. "That but for the threats, intimidation, coercion and other activities of defendants hereinbefore described the financial institutions above referred to would have willingly furnished the funds to pay the cost of said proposed project."

[Footnote 4 did not appear in the text of the opinion. CCH.]

1954, was delayed longer. Efforts to enter upon the taking of depositions by agreement failed and it was not until the 16th of May, 1955, about fifteen months after commencement of the action, that motions of certain defendants were sustained to the extent that the Court ordered that one of the defendants (Union Electric Power Company) should proceed to take the deposition of plaintiff Harry J. Strong on the sixth day of June, 1955, and named Commissioners to take the testimony and specified the place and hour. The Court directed the plaintiff Strong to present himself as the first witness and subject himself to examination as a witness until his deposition was concluded.

[*Special Master*]

Afterwards on May 23, 1955, an order was entered by the Court which recited that it appeared from the record and from the statements of counsel that it would expedite the taking of depositions and be in the interest of justice to appoint a Special Master in connection therewith. Mr. Wayne G. Cook was appointed as Special Master to supervise the conduct of the taking of said depositions, to rule on objections and to rule on all applications for relief which may be made by any party. He was to have "such other powers as the Court may by order later prescribe" and the order appointing him provided that his compensation was to be paid by the defendants participating in the depositions.

[*Plaintiffs' Expenses*]

The order for the appointment of Mr. Cook was made with the consent of all parties but before the taking of depositions began under it, plaintiffs moved to have the expense of plaintiffs' attorneys incidental to their attendance at the depositions assessed upon the defendants.

The motion was denied on June 4th, 1955.

[*Deposition*]

The deposition of Strong was accordingly begun pursuant to the Court's order on June 6, 1955, before the appointed Master and was carried on with some intermissions for fifteen days and until June 24, 1955.

Strong's testimony showed that he had originally conceived the idea of the formation of the plaintiff cooperative. He had been its general manager since its formation, was its secretary-treasurer and handled its funds, kept the records and devoted his time to its affairs since 1938. The allegations and charges of the complaint were based largely on the information he furnished to the attorneys and all of the other individual plaintiffs who testified corroborated that Strong was at all times the guiding force of the cooperative. He could apparently have disclosed what basis he had for each of the charges made against defendants of wrong doing in paragraph 10 of the complaint, but he reiterated day after day of his examination in response to inquiries as to whether he had disclosed all the facts on which he relied in respect to such allegations in substance, "I am sure that there are more * * * I can't recall them."

On the last few days of his examination, commencing on June 21, 1955, counsel began inquiring about the financial affairs of the cooperative. As the cooperative had no capital and proposed to obtain the millions necessary to pay for promotion expense, construction costs and commencement of operations from borrowing through the sale of bonds to be issued by it, the inquiry as to the handling of its financial affairs was relevant to the issue as to what caused the cooperative to fail, as to what transactions it had engaged in and as to damages.

Strong testified that the cooperative had never had a bank account in its own name and its funds were carried into his personal bank account; that he had "no way of knowing" how much of the $133,029.59, reflected in a certain report of the cooperative of August 9, 1952, to January 1, 1954, had gone through his personal account. He was asked how he accounted for a difference between the amount of money collected for the cooperative and the amount he showed had been spent and he replied, "I have no answer for it." He stated that he would not produce his personal records for defendants to hash over and stated; "It is none of your business."

[*Production of Bank Records*]

On June 22, 1955, Strong's attorney objected to further questioning of Strong regarding the finances of the cooperative, but counsel for the defendant taking the deposition, moved that the Master require Strong to produce his bank records because the

personal and cooperative funds were shown to be commingled in those records. On examining the transcript and hearing the arguments, the Master ordered the production of the bank records. Thereupon the plaintiffs made charges against the Master, Mr. Cook, to the effect that he was disqualified to act as Master and they obtained a delay of the deposition until July 11, 1955, in consequence of the charges.

Strong was advised by the counsel examining him for the defendants that on resumption of his deposition there would be further questioning concerning the finances of the project.

The parties convened before the Master on July 11, but there was no examination of Strong until the morning of July 12th, when he submitted to questioning on matters other than finances. With exception of the questioning on that morning, Strong practically terminated the taking of his deposition on June 22, 1955, at the time when the Master heard the motion for production of his bank records and ruled that they should be produced. Strong prevented defendant Union Electric Company from completing its examination of him and none of the other defendants ever had an opportunity to examine him.

[*Refusal to Testify*]

A number of continuances of his deposition applied for and granted at the instance of the plaintiffs or their attorneys contributed to the delay, but final action of the Court dismissing the action followed upon the absolute refusal of Strong to testify on October 20, 1955, his further refusal on November 18th, 1955, and again on December 20th, 1955, and upon the absolute refusal to testify by plaintiff Gillmor on January 10th, 1956.

As to Strong's refusal on October 10th, the record shows that at 11:00 o'clock on that day he came into the hearing room before the Master and all counsel pursuant to the order of the Court and notice duly given him and announced that he would not testify. The Master urged him "for his own good" to testify but he walked out of the room. Strong appeared again before the Master and all counsel on November 18th pursuant to the orders of the Court and of the Master and notice given him and when the question was raised whether he still refused to testify he departed from the hearing room. Again on December 20th, Strong appeared before the Master and attorneys pursuant to order and notice and asked to be excused from testifying. The Master declined to excuse him and admonished him that the consequence of his refusal to testify would be the entry of an order of dismissal. Strong said he would chance the dismissal and persisted in his refusal to testify.

The plaintiff F. A. E. Gillmor was the President of the Cooperative and the order of the Court for the taking of his deposition contemplated that it should follow after the completion of Strong's deposition. After that deposition was finally broken off by Strong's refusal to continue to testify and on December 22nd, 1955, the Master ordered Gillmor's deposition to commence on January 10th, 1956, and on that date Gillmor appeared before the Master and the attorneys of record for the parties. On being called on to take the oath he read a prepared statement and asked to be excused from testifying. The Master denied the request and Gillmor stated that he refused to testify and left the hearing room.

Thereafter the depositions of the three other individual plaintiffs were taken before the Master. They were generally to the effect that Strong was the one who devoted all of his time to the affairs of the cooperative. He had organized it and was the moving force and negotiated and took care of its business affairs, its records and its finances and "by and large was the man running the show." He made reports to the others and they had confidence in him and relied on him to carry on.

The Special Master duly reported to the Court the action of Strong and of Gillmor in refusing to testify. He also sustained motions made by defendants to dismiss the action because of the refusal but the Court treated that action of the Master as merely a recommendation and the judgment of dismissal here appealed from is based on the findings and conclusions made by the Court.

[*Master's Fees*]

As to the refusal of plaintiffs to make deposit for Master's fees, Judge Riley evidently thought the pre-trial proceedings which were manifestly necessary to define the issues and get the case ready for the

jury trial which had been demanded would be speedily accomplished through the cooperation of the attorneys. He at first merely appointed persons to act as amanuenses in the taking of depositions of individual plaintiffs, but after the lapse of nearly fourteen months without a single deposition having been taken, he appointed Mr. Cook Special Master with powers to supervise the conduct of the taking of depositions of the five individual party plaintiffs "including the length thereof," as above stated, and both sides invoked the powers of the Master in the course of the taking of Strong's deposition before him. After Mr. Cook ruled that Strong's bank records should be produced the plaintiffs made complaint against him before Judge Riley and although the Court, after hearing, found there was no cause for Cook's removal as Master, his resignation was accepted on September 21, 1955, and Mr. Edward A. Doerr was appointed Special Master in his place.

[*New Master—Powers*]

The original order appointing Mr. Cook as Master provided that the Master should have "such other powers as the Court may by order prescribe" and in the order appointing his successor, Mr. Doerr, the powers were broadened to include "all powers authorized by Rule 53 of The Federal Rules of Civil Procedure" and "these powers he shall exercise until otherwise limited by order of this Court."

In his order appointing Mr. Doerr as Master, Judge Riley recited that extended discovery proceedings had been in progress and that they awaited resumption pursuant to order of Court and that there were controversies between plaintiffs and their counsel awaiting solution as to which Strong had requested disposition as soon as possible; that depositions were pending to preserve testimony and that the variety and number of the problems presented, the complicated nature of the issues involved, the best interests of all persons and parties affected and the interests of justice demand that "these proceedings" (evidently meaning the discovery proceedings) may be carried forward to their conclusion with the utmost dispatch.

The order appointing Mr. Doerr (the second Master) and prescribing his duties and powers conferred no powers in respect to the jury trial that had been duly demanded by the plaintiffs by endorsement on their complaint under Rule 38b and Judge Riley later declared that "the appointment of the Special Master does not and cannot deprive plaintiffs of their right to a jury trial, nor does it empower the Special Master ultimately to hear and determine the issues between the parties upon a trial of this cause." Mr. Doerr was never called on to perform any function in the case beyond discovery proceedings and in the matter of the attorney controversy, all preliminary to and in preparation for the jury trial on the merits.[5]

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[5] The order appointing Mr. Doerr contained the following recitals:

"There are eleven named defendants, ten of whom are alleged to be private corporations engaged in the business of producing, selling and distributing electrical power in Iowa, and the eleventh to be an unincorporated voluntary association, including ten named defendants among its members.

"The issues are complicated beyond those normally to be found in the usual action. There are extended discovery proceedings in progress since June 6, 1955, and now awaiting resumption on October 3, 1955, pursuant to order of Court. Controversies have arisen between plaintiffs and their counsel since August 29, 1955, which await solution, in respect of which plaintiff Harry J. Strong, has requested disposition as soon as possible; depositions are pending to preserve testimony and other factors urge the action herein ordered to be taken."

"The present engagements of the court to which commitment had been made long prior to this date require continuous absence of the judge from this division for regular terms of the court, commencing on Sept. 26, 1955, in the Southern Division, Oct. 3, 1955, in the Western Division, Oct. 17, 1955, in the Ottumwa Division, Oct. 24, 1955, in the Central Division, and Nov. 28, 1955, in the Eastern Division of this District.

"The variety and number of the problems presented in this action, their complicated nature, the issues involved, the best interests of justice combine to demand that these proceedings may be carried forward to their conclusion with the utmost dispatch. The court recognizes that the expense consequent to the appointment of a master with general powers should make it the exception rather than the rule and has weighed the cost incident thereto against the benefits to be derived by all concerned, it is firmly persuaded that the circumstances described and involved and the peculiar urgency of the many and complex problems require departure from the rule of avoiding the appointment of special masters where possible."

"Accordingly, the court must find it to be advisable and necessary in the premises that a reference shall be made to a special master who shall have and exercise all powers permitted to masters under Rule 53 of the Federal

[*Deposit—Master's Fees*]

Coincident with its order appointing Mr. Doerr, on September 21, 1955, the Court ordered "the deposit forthwith into the registry of this court the sum of $2500.00 by plaintiffs and the sum of $2500.00 by defendants, to defray the fees and disbursements of the Special Master"[6] and on September 26, 1955, the plaintiffs moved the Court to "defer the requirements of the depositing of the sum of $2500.00 as ordered by this Court under its order dated September 21, 1955." The Court gave full consideration to the motion and denied it and thereupon ordered the plaintiffs to make the deposit of $2500.00 forthwith as a condition of going forward with their action.[7] Although the plaintiffs were fully able to comply with the order, they refused to make the deposit.

[*Deliberate Refusals*]

There was no question in the trial court and there is none here that when Strong refused to continue his deposition and when Gillmor refused to testify and when all the plaintiffs refused to make the deposit for costs ordered by the Court, each and all of them acted deliberately with full understanding that their refusals were in violation of the orders of the Court. They asserted a right to disobey the court as they did on the ground that they had lost confidence in their attorneys about the first of August, 1955. Their claim was that from that time on they were without the assistance of counsel of their own choosing.

[*Relations with Attorneys*]

They first called Judge Riley's attention to a quarrel between themselves and their local attorneys by a so-called petition to intervene presented by four of the individual plaintiffs on September 2, 1955, in which they made charges against their attorneys and alleged that they had obtained an agreement from other attorneys of record and that the attorneys of record had agreed but had later declined and had moved to quash the entry of appearance made by Bell, Farrar and Scott.

When the motion of the local attorneys of record to quash the appearance of Bell, Farrar and Scott was brought up for hearing, Bell, Farrar and Scott withdrew their appearance for plaintiffs and the Court accepted the withdrawal. The Court therefore found that the proceeding to quash the attorneys' appearance had become moot leaving nothing before the Court for hearing and that a so-called petition of the individual plaintiffs in the case to intervene in the moot proceedings if regarded as filed, should be, and was stricken.

Accordingly all of the plaintiffs joined ten days later, on September 16, 1955, in filing a motion "by Harry J. Strong, Secretary-Treasurer," for leave to remove their attorneys of record as attorneys for plaintiffs herein. The motion set forth numerous and serious charges made by the plaintiffs against their local attorneys of record and prayed leave to dismiss them.

The pendency of this motion was an important factor in Judge Riley's decision to appoint Mr. Doerr as Special Master some five days after the motion had been filed. In the order relieving Mr. Cook as Master, the Court stated in reference to this motion: " * * * and matters having recently arisen which make it desirable and in fact necessary, in the opinion of the Court, to

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Rules of Civil Procedure and such additional specified powers as later may be conferred upon and delegated to him in that capacity."

"* * * and that this entire cause be referred to him for such proceedings as may be necessary, to hear the evidence, to take testimony on any issue herein, to pass on disputed claims, to pass on applications of the parties and to make where necessary special findings of fact and conclusions of law thereon and to report the same to the court, and these powers he shall exercise until otherwise limited by order of this court."

[6] "It is further ordered, that the fees and disbursements of the master shall be allowed by the court from time to time and that for the purpose of assuring the payment of his fees and disbursements as related to the services of the special master except as directed by Paragraph IV of the order of May 23, 1955, (defendants' discovery depositions were to be charged to defendants) there shall be forthwith paid into the registry of this court, $2500.00 by the plaintiffs and $2500.00 by the defendants, which sum shall be paid out to the Special Master upon the order of the court for the allowance of fees and disbursements, and that said sum shall be subject to increase from time to time as the necessities of the situation may require."

[7] The order required the deposit for costs by plaintiffs because the plaintiffs were the moving parties in making charges against their attorneys of record and asking for speedy hearing of their evidence to support their charges. The costs of the master as to all discovery depositions taken by defendants remained chargeable to defendants only.

immediately appoint a Master with broader powers." It was contemplated that the attorney dispute would be promptly presented to, passed upon and reported by Mr. Doerr. The defendants had nothing to do with the quarrel between plaintiffs and their attorneys of record, but the existence of that quarrel was a cause of delay and continued pendency in Court of the claim for $120,000,000 against the defendants, after the claim had already been held in Court for a year and a half. Judge Riley did not evince unwillingness to try the attorney controversy himself, but specified official obligations that would delay his doing so. Upon the appointment of Mr. Doerr as Master with full power to hear and report on the attorney controversy, Strong wrote to Doerr, as Special Master, explaining that the matter of removing plaintiff's attorneys of record had been assigned to him (Doerr) and requesting that an early hearing be had on the matter. Strong also requested in the letter that postponement of discovery proceedings be granted to enable new counsel to become informed and to prepare and proceed in the case.

Accordingly, Mr. Doerr as Master, within a few days after receiving the letter from Strong, entered an order setting the plaintiff's motion to remove attorneys and any response to it for hearing before him on October 3rd, 1955, and directed that plaintiffs be represented on the hearings by counsel of their own choosing.

The attorneys of record for plaintiff filed a motion in resistance to the motion of plaintiffs to remove them as their attorneys and also sought affirmatively to compel plaintiffs to turn over to them some ten thousand dollars on account. Other parties who had advanced money to plaintiffs sought to intervene in the proceedings for removal of attorneys and to impress a trust upon the money advanced. These parties were denied relief and do not appeal.

[*Receivership*]

Creditors also brought involuntary bankruptcy proceedings against the plaintiff cooperative which were heard before Judge Riley and a jury. In the course of the proceedings a receiver was appointed for the cooperative and Strong was ordered to turn the assets over to the receiver. The date of the turn over order was some months after the plaintiff had been ordered to make the deposit for costs and had made their refusal to comply.

[*Hearing—Attorneys*]

On October 3, 1955, the day appointed for the hearing of the attorney controversy before the Master, the plaintiffs wilfully absented themselves from the hearing and on their failure to appear in person or by attorney, the Master adjudged them in default. The attorneys of record accordingly introduced their evidence and the Master found upon the evidence that there was no cause for discharging the attorneys; that they had faithfully and loyally performed their services for plaintiffs which were of great value, to wit: $200,000; that the attorneys recognized their continuing obligation to serve the plaintiffs and that there was no reason in plaintiffs' relationship with their attorneys for postponement of proceedings in the cause. The Master held that the plaintiffs had the right to discharge the attorneys but only on the condition of the payment of the fees and disbursements of the attorneys to the extent of the means possessed by plaintiffs and that it was left open to plaintiffs in spite of their default to show inability to comply with the conditions imposed. The conclusions of the Master were declared orally on October 3rd, and his opinion and order in writing were issued October 5th, 1955.

[*Petition for Mandamus*]

On the day of the hearing before the Master (October 3rd, 1955), Strong was in St. Paul, Minnesota, and there applied unsuccessfully to this Court in person for himself and the other plaintiffs for leave to file a petition for mandamus and injunction and for an order staying proceedings in this case.

[*Affidavit of Bias*]

A few days later, on October 10th, 1955, he filed an affidavit of bias and prejudice against Judge Riley in the District Court alleging that Judge Riley had a personal bias and prejudice against "our project, a hydro electric development on the Cedar River," and among other things that Judge Riley has issued orders in the case that were biased and prejudiced; that the Special Master (Doerr), appointed by Judge Riley, had in turn issued orders which carry out the bias and prejudice and that the biased

and prejudiced orders were merely a furtherance of defendants' strategy to completely break the plaintiffs so they could not pursue their cause of action. He also alleged that unless Judge Riley was removed as judge in the matter and all orders entered therein since September 2, 1955, were stricken, he and his associates would be denied a fair trial. He also stated in a "certificate" signed by him accompanying the affidavit of prejudice that it was filed because he felt it was the only means to hasten the trial of the cause.

On October 14, 1955, Judge Riley ordered a hearing on the affidavit on October 21st, 1955, and on that date having inquired into the timeliness and sufficiency of the affidavit of bias and prejudice he adjudged that it was not timely filed and was insufficient to meet the requirements of 28 U. S. Code, since the bias was charged "against our project" and not against the plaintiffs or either of them and furthermore the affidavit was not accompanied, as required by the statute, by a certificate of counsel.

It is undisputed that Judge Riley's ruling was in accord with the statute and the proceedings in the case were properly continued "as though the affidavit had not been filed."

[*Motions to Dismiss*]

On January 20th, 1956, Judge Riley proceeded, after notice and with the consent of all parties, to hearing of the several motions made by defendants to dismiss the case for infractions of the Rules and failure to prosecute, the objections of plaintiffs to the reports of the Master Doerr, a motion by plaintiffs, filed on January 19, 1956, to vacate the order appointing Doerr as Master and to set aside all of his acts thereunder, and a motion by defendants to strike said motion to vacate, and on January 25, 1956, after a hearing, the Court filed its memorandum of decision upon all motions and objections then pending and its order for judgment. It set forth step by step all of the motions, hearings and rulings that had been had in the case and found no error prejudicial to the plaintiffs and no controversy undetermined as to any facts in issue. The Court found the plaintiffs to be represented by their local attorneys of record and that the firm of attorneys appearing for them on this appeal, also appeared of counsel. It was further found:

"The complaint seeks recovery of $120,000,000 in treble damages and equitable relief under the antitrust laws. The period of time covered by the complaint extends from 1938 to 1954. There are ten defendants, whose separate answers pose evidentiary and procedural problems of great magnitude. The issues in this action involve engineering, financing, economic and other technical problems of vast complexity. The discovery proceedings, still in their early stages, have resulted in volumes of testimony and documents. The record discloses many difficult problems pertaining to marketability of power, project design, economic and engineering feasibility, financing methods and expectations, costs of construction and power, additional and numerous expert witnesses, and other discovery proceedings requiring continued supervision to prevent oppression or hardship to any party. The documents which plaintiffs have voluntarily produced in response to defendants' interrogatories and which plaintiffs have produced under order of court and order of the Master are detailed and voluminous. For example, the transcripts of the Federal Power Commission hearings exceed 5,000 pages."

"I find that the issues are complicated and that the reference was not only proper but necessary in the interest of justice. This action, peculiarly and appropriately, requires the appointment of a Special Master."

The court said as to the refusals of Strong and Gillmor to testify:

"The deposition of Harry J. Strong was begun under an order of this Court, and its resumption was ordered both by this Court and by the Special Master. On September 28, 1955, the Special Master, upon the informal request of the witness, postponed the resumption date to October 10, 1955. On October 19, 1955, Harry J. Strong expressly refused to testify, although instructed twice by the Special Master to testify. The witness left the hearing room while one of the defendants was attempting to advise him that sanctions would be sought under Rule 37(d), should he persist in his refusal to testify. Despite such conduct, the Special Master gave the witness a final chance to testify and ordered his deposition to resume on December 6, 1955. In his order, which was entered on November 21, 1955, the Special Master found that the witness' refusal to testify was flagrant, wilful and

without justification or excuse and had the necessary effect of disrupting orderly procedure and hampering defendants in making their defense. The witness was, and is, secretary, treasurer, director and general manager of plaintiff First Iowa Hydro Electric Cooperative. The order provided that, if the witness again refused to testify, the action would be dismissed as to plaintiff Harry J. Strong and First Iowa Hydro Electric Cooperative. The order was served on all of the named plaintiffs and on their attorneys of record. At the request of plaintiffs through their attorneys of record, the resumption date was postponed until December 20, 1955. On December 20, 1955, the witness was again present and again expressly refused to testify. He stated that he would take his chances on a dismissal of the action."

"I find that plaintiff, Harry J. Strong, was secretary, treasurer, director and managing agent of plaintiff First Iowa Hydro Electric Cooperative. I find that the refusal of the witness to testify was flagrant, wilful, and without justification or excuse and had the necessary effect of disrupting orderly procedure and was prejudicial to the defendants in making their defense. I find that, under the circumstances, there was no necessity for according this witness another chance to testify. As with Strong, the conduct of the Witness Gillmor was contumacious, his attitude defiant, his reasons for refusing to testify invalid. The (disrespect) which these parties exhibited toward judicial process is the proper subject of sanctions sought by defendants."

[*Judgment of Dismissal*]

The final judgment of dismissal of the action provided that the dismissal should operate as an adjudication of the merits.

On this appeal taken to reverse the judgment of dismissal of the case with prejudice, the appellants are represented by the firm of Washington attorneys which appeared of record, as of counsel, on the complaint in the action.[8]

[*Arguments for Reversal*]

The points argued for reversal of the judgment are to the effect (1) that the reference to Special Master Doerr was unlawful and all orders issued in connection therewith and all acts under it were void; (2) that it was arbitrary and unlawful to dismiss the action for failure of plaintiffs to make the $2500. deposit and for failure of Strong and of Gillmor to testify; (3) and that plaintiffs were erroneously denied the right to be represented by counsel of their choice.

1. As to the Reference to Master Doerr.

In their attack upon the District Court's appointment of Doerr as Master with "all powers authorized by Rule 53 of the Federal Rules of Civil Procedure" the appellants have relied mainly upon *Howes Leather Company v. LaBuy* [1956 TRADE CASES ¶ 68,261], 226 F. 2d 703, 7 Cir., affirmed as *LaBuy v. Howes Leather Company* [1957 TRADE CASES ¶ 68,585], 353 U. S. 249.

[*Howes Leather Case*]

That action, like the one at bar, was for the recovery of treble damages and equitable relief by reason of defendants, alleged violations and threats to violate the antitrust laws. After long preparation, the case came on for trial and thereupon the District Court, instead of entering upon the trial, referred the case to a Master for trial over the objections of all parties. The Master ruled that the cause would proceed to trial before him and it was at that stage of the case that defendants petitioned the Court of Appeals for the 7th Circuit for a writ of mandamus to compel the District Judge to vacate the order of reference of the trial to the Master and direct the trial of the cause to proceed before the court. Judgment awarding the writ was granted by the Court of Appeals and the Supreme Court affirmed. The Supreme Court held that the Court of Appeals was justified in finding that the order of reference for trial of the case was an abuse of the power of the District Judge under Rule 53(b) amounting to little less than an abdication of the judicial function and depriving the parties of trial before the court on the basic issues involved in the litigation. When the reference was made there was no such complicated issues present as required by Rule 53 to justify the reference to a Master.

[*Case Distinguished*]

The case at bar presents an entirely different situation. Instead of this case

[8] Mr. Wollenberg has in the meantime succeeded Mr. Schellenberg as a member of the firm.

being ready for trial or being turned over to a Master for trial on its merits, on basic issues between the parties, the case was "in an early stage" of preparation for trial when the Court made the reference to Mr. Doerr as Master.

At the time of the appointment on September 21st, 1955, more than a year and a half had elapsed since the action was brought and the pretrail proceedings for discovery were as found by the trial court, "still in their early stages."

[*Complication of Issues*]

The complications of the issues and exceptional circumstances blocking the preparation for trial on the merits of the case were arising in those proceedings and as declared by Judge Riley, it was his purpose in making the appointment to provide for supervision of discovery proceedings and to "prevent oppression or hardship to any party."

Simply stated, the plaintiffs through their pleading were claiming in general terms that Project No. 1853 was a sound project and that they had been entitled to receive and would have promptly received their federal license therefor and would have obtained the money to promote, construct and operate the project, save that defendants' wrongs prevented. We think the Court did not distort or exaggerate the complications of the issues to be anticipated in the discovery proceedings carried on to find out the facts, or claimed facts, on which plaintiffs were basing such a cause of action or in the trial thereof. There is no contention that Judge Riley erred in declaring the right of defendants to attempt such discovery and we find no error in his conclusion that the issues involved in it were complicated and the case was exceptional in presenting occasion and necessity for the services of a Master preliminary to trial such as seldom arises in litigation. There was obvious possibility of oppression and hardship unless the discovery proceedings were continuously supervised and kept in order through the services of a Master. The Court took pains to prevent any financial burden on plaintiffs except in respect to the matter of the discharge of their attorneys wherein they were the moving parties requesting action and the issues between them and the defendants were not involved.

They had no right to hold their $120,000,000 claim against defendants in court unless they were able to prosecute their case. Through no fault of defendants, their quarrel with their attorneys was disabling them from prosecuting their suit. The appointment of the Master Doerr was made in part to expedite settlement on that matter and they acted reasonably and with good sense when they acquiesced in the appointment of Master Doerr and wrote to him for a speedy hearing of their quarrel with their attorneys.

[*Powers of Master*]

It is true that in the order appointing Doerr after conferring upon him the powers authorized by Rule 53, the order reads "that this entire cause be referred to him for such proceedings as may be necessary, to hear evidence, to take testimony on any issue herein, to pass on disputed claims, to pass on applications of the parties and to make where necessary special findings of fact and conclusions of law thereon and to report the same to the Court, and these powers he shall exercise until otherwise limited by order of this Court."

Appellants have argued that by this wording the Court committed the trial of the case to the Master Doerr, but the order should not be so construed. The order was made "in the early stages" of discovery proceedings, the proceedings were expected to be extended and the difficulties to be met by the order were the exceptional complications in those proceedings.

Likewise the final clause directing the powers to be exercised "until otherwise limited by order of this Court," reflects that Judge Riley had only the Master's services preliminary to trial in mind as he declared in his order of January 9th, 1956.

Quite aside from any possible ambiguity in the order in respect to powers of the master that might have been asserted after the pretrial proceedings, the record shows that Doerr was never called on to exercise any such powers. All he had to do with what is here involved was the taking of discovery depositions and hearing the controversy over the discharge of attorneys.

The appointment of a Master to take depositions of plaintiff was agreed to by all parties and Strong gave his testimony before the Master without any objection

until the Master ordered the production of the bank records.

If there had ever been any ground for the plaintiffs to question the delegation by the Court of the taking of the discovery depositions, it had been fully and completely waived by the plaintiffs long before the plaintiffs committed the acts of disobedience that caused the dismissal.

[*Appointment Proper*]

We think the ruling of the Supreme Court against referring the final trial of the case to a Master in the *LaBuy* case has no application to the order of the Court appointing Doerr as Master for the complicated and exceptional issues in the preliminary stages of this case.

The ruling of the Court appointing a Master is fully supported. *Smith v. Brown*, 5 Cir., 2 F. 2d 926; *Coyner v. United States*, 7 Cir., 103 F. 2d 629; *Graffis v. Woodward*, 7 Cir., 96 F. 2d 329; *Hart v. Williams*, App. D. C., 202 F. 2d 190; *Tendler v. Jaffee*, App. D. C., 203 F. 2d 14, cert. denied, 346 U. S. 817. As this court recently stated:

> "Beyond the provisions of Rule 53, Federal Rules of Civil Procedure, 28 U. S. C. A., for appointing and making references to Masters, a Federal District Court has 'the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.' *Ex Parte Peterson*, 253 U. S. 300, 312, 40 S. Ct. 543, 547, 64 L. Ed. 919; *Weschester Fire Ins. Co. v. Bringle*, 6 Cir., 82 F. 2d 262, 263. While reference should be the exception and not the rule in judicial administration, the Court may, in its discretion, make appointment of a Master to assist in any of the incidents of a proceeding before it, whether civil or criminal, so long as there is no infringement upon the right of trial by jury or any prejudice to other substantive right." *Schwimmer v. United States*, 8 Cir., 232 F. 2d 855, 865.

Although the plaintiffs entered objections to the appointment of Master Doerr when they appeared before him on certain occasions, they did not present such an objection to Judge Riley until January 19th, 1956.[9] Long before they filed the motion shown in the footnote, the master had held numerous hearings and entered numerous orders and plaintiffs had frequently invoked his jurisdiction.

We emphasize again that the proceedings before the Special Master had not reached the trial stage. The Court in its order of January 9, 1956, clearly indicated it was not its intention that the case should be heard upon its merits before the Special Master, stating [Appellees' Supplemental Record, p. 125]:

> "It is further ordered, to permit all interested parties to be advised, that the order of September 21, 1955, appointing the Special Master does not and cannot deprive plaintiffs of their right of trial by jury if their request therefor has been seasonably made, nor does it empower the Special Master ultimately to hear and determine the issues between the parties upon the trial of this cause, but does empower the Special Master to proceed in respect of legal questions to be ruled upon, subject to the court's approval, and to have such other powers, not including trial of the issues, as are described in Rule 53(c) of the Federal Rules of Civil Procedure, or otherwise stated in the order of appointment of September 21, 1955, and not inconsistent with this order."

The Court was legally empowered to appoint a master to carry out the functions actually performed by the master in this case.

[*Waiver*]

Under the circumstances, Judge Riley's ruling that plaintiffs waived any error that may have been committed in the appointment of Master Doerr was not erroneous.

[9] Their motion filed on January 19, 1956, reads:

"Come now the plaintiffs and their attorneys of record, in behalf of plaintiffs and in behalf of their attorneys of record, and move the court to make an order vacating and setting aside the order made by this Court on Sept. 21, 1955, appointing Edward A. Doerr Special Master in this cause, for each and all of the reasons set forth in the petitions for review of the orders of the Special Master which were filed in this cause with respect to the orders made by the Special Master on Dec. 22, 1955, and Jan. 16, 1956, and the grounds stated in the objections and exceptions to the report of the Special Master which was filed January 4, 1956, and to the supplemental report which was filed Jan. 17, 1956, and the objections urged and interposed orally in the record by these parties prior to each hearing and proceeding before said Special Master and said reasons, grounds and objections are hereby incorporated herein by reference thereto and made a part as fully as if set forth at length, herein, in support of this motion."

Failure to make timely objection to the appointment of a Master either at the time of the order or promptly thereafter constitutes a waiver of error and objections made only to the Master are unavailing.

[*Validity of Orders*]

Appellants' contention that the proceedings and orders of the Master were nullities is without merit. In any event there is no basis for the contention of appellants that the reference to the Master was entirely void and that his proceedings and orders were nullities. The power to refer is conferred in positive and unequivocal terms by Rule 53 and mere error in the exercise can only be corrected in direct proceedings. *Hart v. Williams*, 702 F. 2d 190; *Coyner v. United States*, 7 Cir., 103 F. 2d 629; *Smith v. Brown*, 5 Cir., 3 F. 2d 926; *Flanders v. Coleman*, 249 F. 2d 757, (rev'd on other grounds), 250 U. S. 223.

2. As to the Dismissal.

It is contended for appellants that they "were not contumacious" and that "their motives were not contumacious" in refusing to testify and in refusing to make the deposit for costs ordered by the court and that "dismissal was a harsh and unjustified penalty to impose upon confused laymen," but there is no claim that the individual plaintiffs did not fully understand that they were disobeying the order of the court when they refused to testify and when they refused to make the deposit or that their disobedience was other than wilful and deliberate.

Under Rule 37(d) and Rule 41(b) of the Federal Rules of Civil Procedure as well as in the exercise of its inherent power the District Court is authorized to dismiss the action of any individual plaintiff who wilfully disobeys a proper order of the court to compel the giving of security or the giving of testimony on deposition and to dismiss the action of a corporation plaintiff whose managing agent so offends. We think the contention that dismissal was unduly harsh or unjustified is without merit. It was the right of the plaintiffs to prosecute the action for the recovery of $120,000,000 against the defendants regardless of the burden it imposed on defendants, but only in the orderly course and in obedience to proper court orders. The Court would not have been justified in granting leniency or indulgence to the plaintiffs at the expense of the defendants. We find there was no abuse of discretion in the application by the Court of the sanction that was authorized by the Federal Rules of Civil Procedure, and by the inherent powers of the Court.

3. As to Denial of Right of Counsel.

It was strenuously urged that the plaintiffs were erroneously denied the right to be represented by counsel of their choice and many cases are cited to the effect that the right is held to be a fundamental one and the denial of it prevents according a fair trial.

The record shows that on the occasions when Strong and Gillmor refused to testify and when all plaintiffs refused to deposit the ordered security for costs, they asserted that they were without counsel of their choice and they based their disobedience to the Court's order on that claim. The trial court found that it was not in accord with the facts because there was no claim or showing that the firm of attorneys appearing on the complaint as of counsel (who now appear for them on this appeal) were not available to them and because they had requested and had been given opportunity to show any reason they had for distrusting and discharging their attorneys of record and they wilfully absented themselves from the hearing and that matter set by the Master and refused to afford proof of any reason for their alleged distrust. Upon their default it was found from the evidence adduced that they had no such reason for distrust and their attorneys were available to them. They took no steps to have the default entered against them set aside or the order entered by the Master vacated by the Court and the record does not indicate that they had any ground for such relief. It was necessary that the questions of their representation by counsel be settled in order for them to proceed with the case against defendants and it was so settled. It was their own conduct which prevented a change of attorney relationship and the fact that they were dissatisfied did not entitle them to disobey the court's orders or to block disposition of the case.

It is true the charges they made against their local attorneys were serious and if they had proven them when they were

given the opportunity to do so, no doubt the attorneys would have been unconditionally discharged. But their mere accusations without proof conferred no right and supplied no excuse to plaintiffs for their disobedience of the Court orders.

The plaintiffs were not entitled as of course and without cause to an order unconditionally substituting other counsel for the attorneys of record employed by them and it was within the discretion of the Court or Master to require that the attorneys be paid or secured as a condition to granting the request for substitution of new counsel.[10] *Doggett v. Deanville Corp.*, 5 Cir., 148 F. 2d 381 and cases cited therein. *Woodbury v. Andrew Jergens Co.*, 2 Cir., 62 F. 2d 49.

The record shows that after plaintiffs had refused to offer any proof of cause of their claimed distrust of their local attorneys of record and had defaulted at the hearing of that matter, Mr. Strong and in some instances the other individual plaintiffs with him, filed motions and other papers in the case assuming to represent the corporation or themselves or both in invoking Court action. But such filing was in conflict with the provisions of Rules 11 and 7(b)(2) of the Federal Rules of Civil Procedure and would, if permitted to stand, have had the effect of nullifying the orders that had been made by the Court in respect to the attorney controversy and depositing security. Although appellants complain of the action of the Court in striking the filings which were made contrary to the provisions of the Rules, we do not find the ruling was erroneous.

[*Affirmed*]

Our conclusion on consideration of the whole record and all contentions is that appellants were accorded fair and just treatment by the trial court and that their own refusal to proceed in accord with Rules of Procedure and wilful and deliberate disobedience of the orders of the Court necessitated and justified the dismissal of the case with prejudice.

Affirmed.

[¶ 68,727] First Iowa Hydro Electric Cooperative, F. A. E. Gillmor, Harry J. Strong, Carl J. Mitzner, Harry Imel, and P. H. Naber, Plaintiffs, and James D. France, Xavier C. Nady, James R. McManus and Allan R. Shepherd, and each of them, as Attorneys of Record for Plaintiffs and in their own behalf v. Iowa-Illinois Gas and Electric Company, Iowa Power and Light Company, Iowa Southern Utilities Company, Interstate Power Company, Union Electric Power Company, Kansas City Power and Light Company, Iowa Electric Light and Power Company, Northwest Light and Power Company, Wisconsin Power and Light Company, Iowa Public Service Company, and Iowa Utilities Association.

In the United States Court of Appeals for the Eighth Circuit. No. 15,549. Dated May 24, 1957.

Appeal from the United States District Court for the Southern District of Iowa. RILEY, District Judge.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Appeal and Error—Appeal by Attorneys Who Represented Plaintiffs—Right To Appeal. —An appeal by attorneys who represented plaintiffs in a private antitrust action, which was dismissed with prejudice, was dismissed on the ground that the attorneys were not parties to the action, and, therefore, had no right to appeal. Also, the plaintiffs had not authorized the appeal, and the attorneys had no interest in the cause of action by reason of their contingent fee contract with the plaintiffs. There was no substantial evidence that the plaintiffs assigned any part of their claim for damages to the attorneys, and the contract to pay a contingent fee out of any recovery did not operate as such an assignment.

[10] On the evidence before him it appeared to the Master that the services the attorneys had performed were of the value of $200,000.00 but he held it open to plaintiffs notwithstanding their default to be heard on the question of the terms of the condition upon the discharge of the attorneys.

The provisions of Section 4 of the Clayton Act provide for the recovery of an attorney fee in addition to treble damages; however, the right accrues to the party injured and not to his attorney.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.725, 9015.

For the appellants: James R. McManus (Allan R. Shepherd, Xavier C. Nady, and James D. France were with him on the brief).

For the appellees: Harry E. Wilmarth (Charles D. Waterman, W. B. Waterman, James J. Lamb, Charles D. Waterman Jr., Larned A. Waterman, Donald H. Sitz, Howard A. Steele, W. Z. Proctor, Harris N. Coggeshall, Llewellen E. Slade, Robert Valentine, Robert W. Greenleaf, R. W. Colflesh, Maxwell A. O'Brien, Clement F. Springer, Robert W. Bergstrom, E. Marshall Thomas, Francis J. O'Connor, Robert H. Walker, W. Logan Huiskamp, Joseph A. Concannon, V. Craven Shuttleworth, Tyrrell M. Ingersoll, Byron L. Sifford, Byron Spencer, Joseph J. Kelly, Jr., Earl Smith, Frederic M. Miller, Joseph Brody, Val Schoenthal, and Sherwin J. Markman were with him on the brief).

For a related opinion of the U. S. Court of Appeals, Eighth Circuit, see 1957 Trade Cases ¶ 68,726.

Before WOODROUGH, VOGEL, and VAN OOSTERHOUT, Circuit Judges.

[*Nature of Appeal*]

WOODROUGH, Circuit Judge [*In full text*]: This appeal in No. 15,549, has been taken to obtain reversal of the same judgment which we considered and have this day affirmed in *First Iowa Hydro Electric Cooperative v. Iowa-Illinois Gas and Electric Company et al.*, No. 15,548, [1957 TRADE CASES ¶ 68,726] *supra.* The appellants herein include all those named as appellants in No. 15,548 and in addition, James D. France and Xavier C. Nady, James R. McManus and Allan R. Shepherd. The additional appellants are the attorneys who appeared for and represented the plaintiffs, First Iowa Hydro Electric Cooperative and its five members, F. A. E. Gillmor, Harry J. Strong, Carl J. Mitzner, Harry Imel, and P. H. Naber in the action for treble damages under the antitrust laws, which resulted in the judgment dismissing the action of the plaintiffs, the dismissal to operate as an adjudication on the merits. The four named attorneys undertake to prosecute this appeal from that judgment on behalf of the cooperative and the individuals who were the plaintiffs in the action in the District Court, and said attorneys also undertake to prosecute the appeal on their own behalf on the ground that they have an interest in the subject matter of the litigation by reason of the nature and effect of their contingent fee contract of employment, and the time, work and effort they have expended on the case. They filed a notice of appeal in the District Court to which they sign their names in one column as "attorneys of record for plaintiffs and in their own behalf as such attorneys of record," and in a parallel column they sign the notice of appeal again as "attorneys for plaintiffs-appellants."

[*Motion To Dismiss*]

The eleven corporations which were the defendants in the action in the District Court and are named as defendants-appellees here have moved to dismiss this appeal on the grounds that:

(1) The four attorneys here attempting to appeal in their own behalf were not parties to the record and judgment in the Court below and do not have the right to appeal under Rule 73 of the Federal Rules of Civil Procedure;

(2) they do not have as attorneys an interest in the subject matter of this lawsuit entitling them to appeal;

(3) and (4) all of the appellants except one individual have another appeal pending and this appeal is not authorized.

We have before us the records brought up in No. 15,548 and in No. 15,549, and the briefs and have heard the arguments of counsel and hold that the motion to dismiss this appeal should be sustained on each of the grounds presented.

[*"Parties" May Appeal*]

(1) Under the Federal Rules of Civil Procedure, appeals cannot be taken from final judgments of the District Court otherwise than by parties to the judgment. Rule 73 provides that "a party may appeal from a judgment by filing with the District Court

a notice of appeal." The four attorneys were not parties and they neither asked nor obtained leave to become parties. We know of no appeal by non-parties. The question thus raised was reviewed in *United States v. Seigle,* App. D. C., 168 F. 2d 143, 144-146, which case has been frequently cited with approval. *Maritime Com'n v. California,* App. D. C., 204 F. 2d 70, 71; *In Re Central States Electric,* 4 Cir., 206 F. 2d 398, 403; *Commanding Officer, U. S. Army Base, v. United States,* 6 Cir., 207 F. 2d 499, 501. The law was the same prior to the Federal Rules of Civil Procedure. In *United States ex rel. Louisiana v. Jack,* 244 U. S. 397, 402, the court said:

> "With exceptions not even remotely applicable to a case such as we have here it has long been the law, as settled by this court that 'no person can bring a writ of error [an appeal is not different] to reverse a judgment who is not a party or privy to the record,' *Bayard v. Lombard,* 9 How. 530, 551, and in *Ex Parte Tobacco Board of Trade,* 222 U. S. 578, it was announced, in a per curiam opinion, as a subject no longer open to discussion that 'one who is not a party to a record and judgment is not entitled to appeal therefrom,' * * *."

[*Contingent Fee Contract*]

(2) The attorneys argue that they have an interest in the cause of action by reason of their contingent fee contract but the Special Master and the District Court found that they had no such interest. There was no substantial evidence that the cooperative assigned any part of its claim for damages to the attorneys and their contract to pay a contingent fee out of any recovery for the services they were employed to perform did not operate as such assignment.

[*Clayton Act*]

The provisions of the Clayton Act (15 U. S. C., Section 15) provides for recovery of an attorney fee in addition to treble damages but the right accrues to the party injured and not to his attorney. *32 West Randolph Corporation v. Blackman,* 7 Cir., 222 F. 2d 54; *Strickland v. Sellers,* D. C. Texas, 78 F. Supp. 274. The law of Iowa therefore controls the decision on the question whether the contingent fee contract the four attorneys had with the plaintiffs created a power coupled with an interest in the lawsuit in them permitting them to maintain an action in their own behalf. We have not been cited to any Iowa decision supporting their claim to such an interest in the lawsuit and the following cases are to the contrary. *Boardman & Brown v. Thompson,* 25 Iowa 487, 489-506; *Kauffman v. Phillips,* 154 Iowa 542, 134 N. W. 575; *Tone Brothers v. Shankland,* 110 Iowa 525, 81 N. W. 789, 791; *Keehn v. Keehn,* 115 Iowa 467, 88 N. W. 957, 958-59; *Foss v. Cobler,* 105 Iowa 728, 75 N. W. 516; *Ward & Lamb v. Sherbony,* 96 Iowa 477, 65 N. W. 413; *Brown v. Morgan,* D. C. Iowa, 163 F. 395; *Falcone v. Hall,* App. D. C., 235 F. 2d 862; *Sellman v. Bankers Trust,* 2 Cir., 6 F. 2d 799, 800.

[*Appeal Not Authorized*]

(3) and (4). The appeal in No. 15,548 presented and this court has considered the sufficiency of the proceedings and judgment in the action of the District Court and the affidavits of the individual plaintiffs have established here without dispute that the plaintiffs have not authorized this appeal. We think the plaintiffs may not be made appellants against their will. *Tolzoff v. May,* 186 Iowa 520, 172 N. W. 446; 7 C. J. S. 913.

[*Dismissal*]

The motion to dismiss the appeal is accordingly sustained and the appeal is dismissed at the costs of the four attorneys.

[¶ 68,728] Jesse B. Hess, Pete Prandini, Jess Allen, Ray Zozaya, Andy Carey, James Roggero, Paul Municha, R. W. Akers, Edward W. Akers, Arnold Calderwood, Reno Marchetti, Clyde McGill, Adolph Limi, Louie Limi, Antonio Azevedo, Angelo Maggenti, H. H. Costersion, Fred Sandrini, Aldo Sandrini, Carl W. Massey, Nick Agone, Joe Munis, John Lusarreta, Manual Garcia, Lawrence H. Baldwin, and Herluff Fries, on behalf of themselves and all others similarly situated v. Anderson, Clayton & Co., California Cotton Oil Co., Coberly-West Company, Producers Cotton Oil Company, Kingsburg Cotton Oil Company, S. A. Camp Ginning Co., J. G. Boswell Company, Doe One Through Doe Forty.

In the United States District Court for the Southern District of California, Northern Division. No. 1708 ND Civil. Dated May 24, 1957.

Clayton and Sherman Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Who May Bring Suit —Class Actions—Common Fund Theory—Allegation of Damage.—A "spurious" class action which was brought by 22 (26 originally) growers of cotton on behalf of themselves and approximately 8,000 other cotton growers in a specified area who had sold cottonseed to the defendants, owners of all of the non-cooperative gins in the area, and which charged that the defendants unlawfully conspired to fix the prices to be paid to each of the growers for cottonseed, was dismissed as a class action. In a "spurious" class action as well as other types of class actions, the court must be satisfied that the persons before the court will "fairly insure adequate representation of all." In view of the record in the instant action showing the diversity of interests in the group and the numerical inadequacy of the plaintiffs, the growers who were before the court did not and could not insure the adequate representation of all of the growers of cotton in the area. Four of the original plaintiffs in the action had expressed their desire to withdraw, 2038 persons had stated that they did not desire to be represented by the plaintiffs, and no other member of the class had sought to join as a plaintiff or had intervened or interpleaded. It was apparent from the variety of operations and contracts of the growers and other factors that no single decree of the court could possibly determine a damage ratio that would apply to all of the growers. The court rejected the plaintiffs' theory that they could establish the alleged price fixing and the damages per ton of cottonseed sold, and that, thereafter, other growers could come into court and, by merely proving the amount sold at the alleged depreciated price, could recover damages. The court would have no power to enter such an "interlocutory" judgment, and, in a "spurious" class action, a separate judgment must be entered as to each of the plaintiffs. Also, the complaint in the action was insufficient because it failed to allege specifically the actual damage suffered by each of the plaintiffs. While the plaintiffs may aggregate the amount for which each sues, the complaint should state specifically the amount which each claims to be the actual damage suffered. A defendant should be appraised of the claim which is asserted against him.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.20, 9009.275.

For the plaintiffs: W. A. McGugin, Fresno, Cal.; Walch & Griswold, by Roger R. Walch and Lyman D. Griswold, Hanford, Cal.; Vizzard, Baker & Sullivan, by James Vizzard, Bakersfield, Cal.; and Allen C. Wait, Firebaugh, Cal.

For the defendants: Fulbright, Crooker, Freeman, Bates & Jaworski, by Leon Jaworski and J. Bradshaw, Houston, Tex.; and Coleman & McDonald, by Ray J. Coleman and Edwin A. McDonald, Los Angeles, Cal., for Anderson, Clayton & Company. Musick, Peeler & Garrett, by Harold F. Collins and J. R. O'Malley, Los Angeles, Cal., for California Cotton Oil Company. Jack Bradley, Bakersfield, Cal., for Coberly-West Company. Wild, Christensen, Barnard & Wild, by M. K. Wild, M. Gordon Wild, and Robert Barnard, Fresno, Cal.; and Docker & Docker, by Frederick W. Docker, William F. Docker, and James H. Perkins, Fresno, Cal., for Producers Cotton Oil Company. Avery, Meux & Gallagher, by Kenneth G. Avery, Fresno, Cal., for Kingsburg Cotton Company. O'Melveny & Myers, by Pierce Works, Los Angeles, Cal.; and Parker, Milliken & Kohlmeier, by Frank W. Clark, Jr., and Charles H. Chase, Los Angeles, Cal., for S. A. Camp Ginning Company. Whitney & La Prade, by Louis B. Whitney, Phoenix, Ariz.; and James G. McCain, Corcoran, Cal., for J. G. Boswell Company.

Introductory Statement of Facts

[*Complaint*]

LEON R. YANKWICH, Chief Judge [*In full text*]: On May 10, 1957, Jesse B. Hess and twenty-five other persons on behalf of themselves and others similarly situated, filed this civil action to recover damages for violation of the anti-trust laws. More specifically, the Complaint alleged:

"The plaintiffs complain on behalf of themselves and all other cotton growers and persons, all of whom are hereinafter referred to as growers, who have sold cottonseed to any one of the above-named defendants in the San Joaquin Valley, State of California, and for cause of action allege:

"I

"This action arises under the Sherman Anti-Trust Act of July 2, 1890, Chapter

647, 26 Stat. 209, U. S. C. A. Sections 1 to 7, 15 U. S. C. A., Sections 1 to 7 as amended, and under the Clayton Anti-Trust Act of October 15, 1914, Chapter 323, 38 Stat. 730 U. S. Code, Title 15, Section 12, *et seq.*, amended, all as hereinafter more fully appears. That each of said defendants is to be found and each has an agent in the above-named district."

[*Corporate Capacity of Defendants*]

The following facts appear as to the corporate capacity of the defendants:

The defendant Anderson, Clayton & Co., is a Delaware corporation authorized to do business in California. During the time mentioned in the Complaint, it was to be found in the Southern District of California, Northern Division, with an agent who resides in Los Angeles, California. California Cotton Oil Company and Coberly-West Company, during the same time, were California corporations with their principal place of business at Los Angeles, California. Defendants Producers Cotton Oil Company, Kingsburg Cotton Oil Company, S. A. Camp Ginning Company, and J. G. Boswell Company, during the times alleged in the Complaint, were California corporations, each with its principal place of business within the district.

[*Class Action—Unity of Interest*]

Before giving a full summary of the allegations of the Complaint, it is well to reproduce fully Allegation IV of the Complaint, which attempts to set forth the unity of interest of the plaintiffs and other growers and the alleged basis for instituting this as an action not only on behalf of the twenty-six named plaintiffs, but on behalf of some 8,000 growers in the San Joaquin Valley. The allegation reads:

"IV

"The above-named plaintiffs assert rights herein on behalf of themselves and each of said other growers in respect of or arising out of a series of transactions in which common questions of law and common questions of fact arise and are involved. The said transactions involve sales of cottonseed by said plantiffs, growers and persons identical in all material matters and respects, for successive cropping season, each involving cottonseed to be grown and grown in the San Joaquin Valley in the State of California; that the issues and facts stated in this action and the questions herein to be litigated, both of law and fact, are of common and general interest to all cotton growers in the San Joaquin Valley; State of California; that said common question of law and fact affect the rights of each of said growers, and each of said growers has a cause of action against said defendants; that said growers are so numerous, amounting to many thousand persons, that it is impractical to bring all of said growers before the Court as individual plaintiffs; that said growers, and each of them, have a cause of action against the defendants named herein and each of them based upon said common questions of fact and law; that this action will prevent a multiplicity of actions. That the amount of cost and work in actions of this type is great and the amount of damages due the individual growers would not justify the cost and work involved in separate action, and that, therefore, these plaintiffs sue for themselves and for the benefit of all of said growers within said valley.

"That in 1933, the Legislature of the State of California enacted Sections 951 and 952 of the Agricultural Code of said State, making all counties within said San Joaquin Valley within which cotton was grown a one-variety district and making it unlawful to plant, process for planting, pick, harvest, or gin any variety or species of cotton other than that variety or species of cotton known as 'ACALA': that only that variety of cotton has been grown in said Valley since 1933; that at all times herein mentioned the methods of cultivation and harvesting cotton by growers was uniform throughout said Valley; that during the various times involved in this action, the same types of gins and ginning methods were used to gin said cotton grown in said Valley; that the quality and value of cottonseed grown in various areas, or by various growers, varies substantially from that grown in the same or other areas or by other growers; that the percentages of fatty-acids, moisture and other substances contained in cottonseed varies and affects the quality and value thereof; that regardless of said differences in quality and value of said seed a fixed and uniform price per ton was paid to said growers by said defendants, and each of them, for said seed during all times involved herein.

"That said San Joaquin Valley at all times herein mentioned contained large areas of land suitable in texture, fertility, composition, drainage, irrigation, location, climate, and transportation facilities for the successful raising of cotton containing

cottonseed; that said cottonseed is suitable for processing into cottonseed oil and cottonseed meal v thin the confines of said Valley; that at all times herein mentioned said growers have had farm machinery, equipment, tools and supplies, personnel, labor, organization, and knowledge adequate for said production of cottonseed suitable for processing into cottonseed oil and cottonseed meal; that during all the successive crop years hereinafter described said growers planted said areas in said Valley in cotton and raised and produced cotton containing large amounts of cottonseed suitable for said purposes."

[*Production of Cottonseed*]

The remainder of the Complaint states in substance the following facts:

The rights of each of the thousands of growers are based upon and are affected by a common question of law and fact. The growers are numerous and each has a small interest in this controversy. One variety of cotton has been produced by use of uniform methods of cultivation and harvest. Although the quality and value of the cottonseed has varied, every one of the growers has, nevertheless, been paid the same fixed uniform price for his seed, regardless of the difference.

The soil and climate are suitable for the production of cottonseed suitable for the production of cottonseed oil and meal, and the growers produced such cottonseed. The growing, harvesting, ginning, processing of the seed and the refining of the oil, and the shipping and sale of the oil, meal, hulls, and linters in interstate commerce are each a part of a continuous, inseparable course of conduct which affects commerce between the States.

"Seed cotton" is defined and it is stated that there is no market for it as such for there is only a market for the lint and seed after the two have been separated by ginning. The growers delivered large quantities of cottonseed each year to the defendants. It is heavy and bulky and must be ginned close to the place where it was grown. The seed-cotton was removed from the trailers and ginned. The lint of each grower was weighed and kept separate from all others. Neither the seed nor debris of any one of the growers was ever weighed. The seed of each grower was inextricably intermingled with that of every other grower without weighing it. Defendants credited each grower in their books with an amount substantially less than the true amount of his seed.

The total amount deliverd by all growers was more than the total amount *all* growers were credited with or paid for and then there was pro-rating among the growers in proportion to the total number of bales of cotton ginned for each grower. The amount of money received by a grower for his seed depends on two factors,—weight and price.

The defendants, including Doe One through Doe Forty, owned all the non-cooperative gins in the Valley and no other gins existed within any other available area. Cottonseed must be ginned before it or its components of lint and seed can be sold. The defendants control all available gins and the growers must deal with them or not at all.

Cottonseed is not sold in open markets as other farm products are, but it is sold by the growers to large processors to whom the grower had delivered his seed cotton, as his agent, for the purpose of ginning it and for the purpose of selling his lint and seed.

The cottonseed was hauled away from the gins of the defendants day by day as it was ginned and taken to the processing plants of the defendants. No grower could have sold his share of the intermingled seed to anyone but the defendant who ginned it, for it was trucked away as fast as it was ginned. The grower must have his seed cotton ginned before he can sell it at all. The defendants have all of the available gins. As fast as the seed is ginned, it is intermingled with that of other growers and trucked away. The grower has no choice except to sell his seed to the defendant who ginned it for him at both a weight and price arbitrarily fixed by the defendants. Cottonseed is too bulky to transport long distances and cannot be safely stored.

A large portion (almost two-thirds) of seed cotton consists of cottonseed. The only use therefor, except a small amount of planting seed, is the manufacture of cottonseed oil, meal and linters by defendants who own all the available processing plants therefor. The defendants process more than 90% of all seed grown in the Valley. The remaining 10% is processed by an agricultural non-profit cooperative for its members. The cooperative did not buy cottonseed from growers but processed on a non-profit

basis only. The defendants constituted the only practical market for cottonseed in the Valley,—there being no other outlet or market or use for the growers' cottonseed there.

There follow direct allegations to the effect that the defendants named therein own all available gins in the Valley; that the seed of each grower was intermingled with that of all other growers and immediately hauled away so the grower had no alternative but to sell to the defendants and that the growers paid all costs of ginning.

It is then alleged that the growing of cotton is a costly matter. A large part of the growers are financed by the defendants and through these financing transactions, the defendants gain control over the grower and the cottonseed.

Many persons are affected by the growing of cotton in the Valley and the illegal fixing of the price of cottonseed directly and substantially affects interstate commerce.

The number of gins and processing plants owned by each of the defendants in the Valley is alleged and that there are no other gins, or processing plants there. All cottonseed sold in the Valley must be sold to the defendants named. There is no other market for such seed and the defendants have a complete monopoly of the market for cottonseed there and of interstate commerce of such seed and of the purchase and processing of such seed as well as of the sale of the products of such seed in interstate commerce. The acts of the defendant set out in the Complaint violated the Anti-Trust Acts and injured each of the growers in his business and property.

[*Alleged Conspiracy*]

It is then stated in Paragraph XII that, at a time unknown to plaintiffs, the defendants "entered into a conspiracy, plan, scheme, and course of conduct with each other to regulate, fix and determine the price" of cottonseed and to force the growers to sell the seed to them at that price by each paying the same price for seed at all times. For that purpose, "the defendants agreed, confederated and conspired with each other to fix and determine a single and common price to be offered and paid to each of the growers for cottonseed delivered by him to any one of the defendants." Each of the defendants did from time to time, regulate and adjust its price so that all defendants offered and paid the same price at all times.

All the defendants posted and paid the same price for cottonseed at all times. The price was changed at times, sometimes by lowering it, sometimes by raising it, and all the defendants made the same changes at the same time. All raised and lowered their price to the same extent at the same time, and all defendants followed this practice during the years therein mentioned.

Other allegations are herein summarized:

Defendants did illegally make and enter into a conspiracy, confederation and agreement to unlawfully monopolize interstate commerce and to unlawfully fix prices paid the growers for seed, all in violation of the Anti-Trust Laws.

Each defendant agreed to fix, adjust and regulate the price of seed and each agreed to and did charge the same price for ginning.

By concerted action, each defendant did *offer* and *pay* the same price for seed at all times. Each did raise and lower the price on various occasions in the same amount at the same time.

This agreement and practice as to price-fixing affected each and every one of the growers to the same extent. "No one grower can recover without proving this common question of law and fact". These and other allegations are directly to the effect that there was an agreement between the defendants and that they followed a common course of conduct by actually posting and paying the same price for seed at all times, regardless of many factors that would normally tend to cause their prices to differ.

Defendants no longer competed with each other for the purchase of cottonseed or for ginning business on a price basis and regardless of the factors, such as differences in distances and costs of transportation of seed, varying efficiencies and costs of ginning, the relative prices defendants received for their products, and all other factors, every one of the defendants paid the same price per ton for seed.

The prices agreed upon and paid by the defendants were not the reasonable value or the actual or market value thereof. Such prices were $12.00 per ton less than the market value thereof and each grower has been damaged to that extent. During the

time involved, all growers delivered 2,400,000 tons of seed and have been damaged in the amount of $28,800.00.

In a final paragraph, it is alleged that the identity of every grower and the amount of cottonseed credited to each grower is contained in the books and records of the defendants; that the exact amount of cottonseed delivered to defendants, the time it was processed and sold in interstate commerce are all known by the defendants but are unknown to plaintiffs and that the amount, price and quality thereof was directly affected by the conspiracy.

And finally, as a summation, it is stated that the acts of the defendants illegally affected interstate commerce, the price of seed was illegally fixed and a monopoly established in the Valley.

[*Damages Sought*]

The foregoing summary adequately summarizes the Complaint. Indeed, it is taken, *with slight variations as to language,* from the plaintiffs' own summary contained in the brief filed in this case. Just as we reproduced in full some of the introductory paragraphs in the complaint showing the nature of the action and the reason why it is claimed to be a proper class action, we believe that, in the light of the discussion to follow, the Prayer of the Complaint should also be reproduced in full. It reads:

> "Wherefore, on behalf of themselves and all others similarly situated, plaintiffs pray judgment for damages in the total amount of $28,800,000.00 and for treble damages in the amount of $86,400,000.00, and that said damages be distributed among said growers in accordance with the number of tons of cottonseed each of said growers delivered to said defendants during said years; that each of plaintiffs and each of said growers have judgment for the sum found to be due him, and that the amount so found due be trebled; and that said plaintiffs, and each of them, and each of said growers, have judgment for their own costs herein involved, together with attorneys' fees in such sum as the Court may deem reasonable; and that plaintiffs and each of said growers have such other and further relief as may be deemed fit and proper in the premises."

[*Defendants' Motions*]

Each of the defendants filed Motions to Strike and to Dismiss. The Motion to Strike related to certain paragraphs which were alleged to be inflammatory. They were disposed of in open court and have no particular significance in a published opinion. A more important Motion to Restrict Recovery to a date subsequent to January 7, 1953, was conceded to be correct in view of the fact that actions prior to that date would be barred by the Statute of Limitations of the State of California. [§ 338(1), California Code of Civil Procedure] The Order at the end of the Opinion so limits any claim to be asserted in any amended Complaint to be filed.

[*Issues*]

The Opinion which follows concerns itself with two main problems:

First: Whether this action was properly instituted as a class action under Rule 23(a)(3) of the Federal Rules of Civil Procedure. In this respect, the motion filed by the Chief Defendant, Anderson, Clayton & Co., correctly summarizes the grounds for the contention that it was not. In substance, it stated:

The Complaint should be dismissed insofar as it purports to present claims on behalf of any parties other than the named plaintiffs, in that it does not constitute a proper class action under the applicable Federal Rules of Civil Procedure for the following reasons:

> (1) As affirmatively appears from the affidavits of growers of cotton and cottonseed in the San Joaquin Valley of California, which have been filed with this motion, and the affidavits of an additional large number of such growers filed with the motions of other defendants in this action, the named plaintiffs in this action do not, as alleged in the complaint, sue on behalf of all members of said purported class.
>
> (2) The persons whom the named plaintiffs purport to represent do not constitute a class as required by Federal Rule 23(a), Federal Rules of Civil Procedure.
>
> (3) It does not appear that the named plaintiffs fairly insure the adequate representation of all parties whom they purport to represent. On the contrary, it affirmatively appears from the Complaint and from the affidavits filed by this defendant and the other defendants, that the named plaintiffs do not insure adequate representation of all such parties.
>
> (4) As appears from affidavits filed, and the allegations of the Complaint, the

questions of law and fact presented in this action are not common to all members of the purported class.

(5) As appears from affidavits, many transactions involving the sale of cottonseed by numerous persons included in the class were not identical with or comparable to the transactions involving sales made by other members of the purported class, but, on the contrary, there were material differences and distinctions between the various types of transactions involved.

Second: As to the Motion to Dismiss for failure to state a claim upon which relief may be granted [Rule 8, Federal Rules of Civil Procedure], the most succinct statement of the grounds is contained in the Motion of another defendant which states that the action should be dismissed

"because the complaint fails to state a claim against the defendants upon which relief can be granted for the reason that the amount of damages each named plaintiff individually sustained is not alleged in said complaint."

[*Affidavits*]

It would serve no useful purpose to attempt to even summarize the hundreds of pages of affidavits which have been filed by the defendants in this case. Suffice it to say that the affidavits show (1) that since the institution of the action, four of the plaintiffs, Manuel Garcia, John Lusaretta, Pete Prandini and Andy Carey, have announced their desire to dissociate themselves from the action, and (2) a total of 2038 other growers have announced their opposition to participation in the action and their unwillingness to be represented by the named plaintiffs.

In contrast, *no one* in the unnamed group of 8000 growers has expressed a desire or willingness to join the plaintiffs or to intervene or interplead in the action on their side.

Opinion

[*Motions*]

YANKWICH, Chief Judge (After stating the facts above): The two motions, (1) to dismiss the complaint as a class action and (2) to dismiss it for failure to state a claim as to the individuals joining as plaintiffs, are interrelated. Whether the complaint before us be considered as an action by several plaintiffs on their own behalf or as representing themselves and others similarly situated, the fundamental principles of law—those relating to the practices alleged to be in violation of the antitrust laws of the United States, from which the injuries to plaintiffs are alleged to flow—are the same. Procedurally, there is fundamental difference between stating a claim or cause of action on behalf of several persons who join as individuals and seek recovery for injuries caused to them alone and stating a claim for injury by a small group on behalf of a large class. Because the harm of which complaint is made—whether the action be considered from one aspect or another—is the same and stems from the interdictions contained in the antitrust laws, it is well to begin the discussion with a statement of some of the fundamental principles underlying antitrust legislation and jurisprudence.

I

The Aim of Antitrust Legislation

The Congress of the United States, in 1890, enacted the Sherman Antitrust Act.[1] The Act followed attempts by various states to deal with the problem of monopoly, which the rapid industrialization of the country following the Civil War had brought on. The trend has been characterized by a writer as "the nationalizing of business," which was very prominent in the period between 1878 and 1898. Large trusts arose: The Standard Oil Company, The American Sugar Refining Company, and the amalgamation of tinplate companies. Opposition to them began at state level, and many states instituted prosecutions under state laws before the Sherman Act became law.

In 1888 fourteen antitrust bills were introduced in the House of Representatives. In the same year Senator John Sherman introduced his first bill,

"To declare unlawful trusts and combinations in restraint of trade and production."

Senator Sherman's name was attached to the Bill, although historians state that other senators were more instrumental in the final framing of the Act than he.[2] The Act was signed by President Harrison on July 2, 1890. The statute remained un-

[1] 15 U. S. C. A., §§ 1-7.

[2] See the writer's article, Competition, Real or Soft, 1952, 14 F. R. D., 199, 201-202.

changed until 1914, when the Clayton Act was adopted.[3]

The Sherman Act condemned certain practices and their results. The Clayton Act condemned the same practices in their incipiency. There have been other acts since, such as the Robinson-Patman Act, prohibiting certain discriminatory practices in commerce.[4] They are not involved in this litigation. Mr. Chief Justice Hughes has called the Sherman Act "a charter of freedom."[5]

Mr. Justice McReynolds, speaking in 1919 for an unanimous court, gave this as the aim of the Sherman Act:

> "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade."[6]

The same aim has been stressed repeatedly since by the court. In fact, there is no break of continuity between the old and new cases in this respect.[7]

The Congress has provided two means for enforcing the Act through Governmental agencies. It declared certain practices a misdemeanor.[8] It also provided for a civil action in equity to enjoin them.[9]

The Congress has also provided for a private civil action:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[10]

The object of this section is to allow persons who are injured by the prohibited acts to bring civil actions for treble damages, *not as a penalty or as a means of private enrichment,* but as an aid to the enforcement of the antitrust laws. For this reason the judgment in a criminal proceeding or in a civil action instituted by the Government is made *prima facie* evidence of the existence of the condemned practices, to the same extent as persons would be bound under the doctrine of estoppel, but a consent decree is not given such effect.[11]

II

The Nature of the Treble-Damage Suit

The Congress, by allowing private actions, in aid of enforcement of antitrust policy, did not intend to allow a person representing himself or a group to bring an *unlimited* action for an unspecified amount, upon the bare allegation that a conspiracy exists. Congress intended to confine the remedy to persons who are *actually* damaged in their business, and damaged in a measurable amount.

The Court of Appeals for the Seventh Circuit, in a noted case, made this statement:

> "Injury 'in his business or property' is a prerequisite to a person's right to maintain an action for treble damages."[12]

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[3] 15 U. S. C. A., §§ 12-13, 14-21, 22-27, 44.

[4] 15 U. S. C. A., §§ 13, 13(a), 13(b), 21(a). The Federal Trade Commission Act empowers the Commission to prohibit discriminatory practices in commerce as unfair competition and enter orders prohibiting persons engaged in interstate commerce from practicing them. (15 U. S. C. A., § 45 *et seq.*) Under this power, monopolistic practices denounced by the Anti-Trust Law may be stopped by the Commission. (*Federal Trade Commission v. Morton Salt Co.,* 1948 [1948-1949 TRADE CASES ¶ 62,247], 334 U. S. 37; *Federal Trade Commission v. Ruberoid Co.,* 1952 [1952 TRADE CASES ¶ 67,279], 343 U. S. 470.)

[5] *Appalachian Coals, Inc. v. United States,* 1933 [1932-1939 TRADE CASES ¶ 55,025], 288 U. S. 344, 360.

[6] *United States v. Colgate & Co.,* 1919, 250 U. S. 300, 307.

[7] *Standard Oil Co. of New Jersey v. United States,* 1911, 221 U. S. 1, 58; *Ramsay Co. v. Associated Bill Posters of U. S. and Canada,* 1923, 260 U. S. 501, 512; *United States v. American Linseed Oil Co.,* 1923, 262 U. S. 371, 388; *Paramount Famous Lasky Corp. v. United States,* 1930, 282 U. S. 30, 42-43; *Sugar Institute, Inc. v. United States,* 1936 [1932-1939 TRADE CASES ¶ 55,107], 297 U. S. 553, 597-598; *Apex Hosiery Co. v. Leader,* 1940 [1940-1943 TRADE CASES ¶ 56,039], 310 U. S. 469, 495-498; *Fashion Originators' Guild v. Federal Trade Commission,* 1941 [1940-1943 TRADE CASES ¶ 56,101], 312 U. S. 457, 465-466; *Associated Press v. United States,* 1945 [1944-1945 TRADE CASES ¶ 57,384], 326 U. S. 1, 12; *Standard Oil Co. of California and Standard Stations v. United States,* 1949 [1948-1949 TRADE CASES ¶ 62.432], 337 U. S. 293; *United States v. Du Pont & Co.,* 1956 [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 385-391.

[8] 15 U. S. C. A., § 2.

[9] 15 U. S. C. A., § 4.

[10] 15 U. S. C. A., § 15.

[11] 15 U. S. C. A., § 16.

[12] *Peller v. International Boxing Club,* 7 Cir., 1955 [1955 TRADE CASES ¶ 68,202], 227 F. 2d 593, 595.

This expresses the attitude of all courts. The Court of Appeals for the Fifth Circuit has said, in effect, that the purpose of the treble damage action is not to make a private person the *vindicator* of the antitrust laws of the United States, but merely *to aid* the Government in the enforcement of these laws:

"The main purpose of those laws was to protect the public from monopolies and restrain of trade, and the private right of action for treble damages was incidental and subordinate to that main purpose. * * * The grant of a claim for treble damages to persons injured was for the purpose of multiplying the agencies which would help enforce the antitrust laws and therefore make them more effective. * * * The very foundation of the right of a private suitor to recover 'threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee' is the violation of public rights prohibited by the Act and, indeed, made criminal offenses. * * *

"Public injury alone justifying the threefold increase in damages and being an indispensable constituent of a claim for violation of the antitrust laws, *a general allegation of such injury is not sufficient. It is essential that the complaint allege facts from which it can be determined that the conduct charged to be in violation of the antitrust laws was reasonably calculated to prejudice the public interest by unduly retricting the free flow of interstate commerce.*" [13] (Emphasis added)

The Circuit Courts of Appeals have been very careful to note that the persons suing, either for themselves or on behalf of a class must show that they are of the type to be *directly* injured by the conspiracy and *not only indirectly*.

The Court of Appeals for the Ninth Circuit in sustaining a judgment on the pleadings entered by our colleague, Judge Wm. C. Mathes, in a case,[14] upon the ground that the complaint did not state a cause of action either on behalf of the persons individually or as the members of a class, made this pertinent statement:

"A conspiracy may have many purposes and objects; the conspirators may perform an almost indefinite variety of acts in furtherance of the conspiracy; but in order to state a cause of action under the antitrust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. *He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the antitrust laws.*" [15] (Emphasis added)

All courts agree that the damages of which the section speaks are not the type of general damages that are recoverable in an ordinary tort, but rather damages actually sustained, which are susceptible of measurement. The Court of Appeals for the Ninth Circuit has so stated:

"The next issue is whether the appellant has stated a recoverable claim under the alleged conspiracy.

"Recovery in a private civil antitrust action is based upon actual damage. * * * As stated in *Harrison v. Paramount Pictures, supra*, 115 F. Supp. at page 316:

'Injury * * * implies violation of a legal right.'

"* * * this plaintiff 'owns' the building, but her 'property' in it consists entirely of the right to the reversion after the expiration of the lease, plus the rights which she has retained by the leases in respect of it. There is no such thing as a conspiracy against a building, and the plaintiff's injury, if any, can only arise from a violation or impairment of such rights in the property as she has." [16]

In proving damage in a civil antitrust suit there are several methods of approach. One is the rule laid down in the motion picture cases in which the courts have held that

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[13] *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 7 Cir., 1954 [1954 TRADE CASES ¶ 67,822], 214 F. 2d 891, 893. And see, the writer's opinion in *Fanchon & Marco v. Paramount Pictures*, D. C. Cal., 1951 [1950-1951 TRADE CASES ¶ 62,909], 100 F. Supp. 84, 88.

[14] *Conference of Studio Unions v. Loew's, Inc.*, 9 Cir., 1951 [1950-1951 TRADE CASES ¶ 62,953], 193 F. 2d 51.

[15] *Conference of Studio Unions v. Loew's, Inc.*, *supra* Note 14, p. 54.

[16] *Steiner v. 20th Century-Fox Film Corp.*, 9 Cir., 1956 [1956 TRADE CASES ¶ 68,304], 232 F. 2d 190, 193-194. This is necessarily so because in a private action for treble damages, the right of recovery does not depend upon the mere existence of the conspiracy, but *upon the injuries resulting to the particular defendant* from it. (*Foster & Kleiser Co. v. Special Site Sign Co.*, 9 Cir., 1936 [1932-1939 TRADE CASES ¶ 55,135], 85 F. 2d 742, 750; *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.*, 9 Cir., 1950 [1950-1951 TRADE CASES ¶ 62,714], 185 F. 2d 196, 208; *Karseal Corp. v. Richfield Oil Corp.*, 9 Cir., 1955 [1955 TRADE CASES ¶ 68,020], 221 F. 2d 358, 362-364)

where one is complaining of restrictions practiced against the exhibition of motion pictures, damages may be proved by showing the loss of receipts resulting from the operation of the restrictions.[17] It may also be done by showing the profits of theatres similarly situated, to which pictures were released earlier.[18]

When we are dealing with other commodities the rule of proof may be different. The plaintiff may show that he was deprived of a commodity, that he could have handled it and sold it, and what profit he would have made.[19] This method was used in a recent trial before me in which the plaintiffs were allowed to show that their product (an automobile wax and polish) was excluded from certain gasoline stations, what other competitive products were sold to these stations, and what profit the plaintiff-manufacturer would have made if allowed to sell in competition. Another method is to show that the plaintiff suffered loss because he was compelled to sell his product below his cost of production.[20]

Whichever method is used, the defendant has the right to contest with *each* of the plaintiffs the *amount of damage.* The *Mandeville* case, which counsel for the plaintiffs claim to have used as a model for their complaint,[21] indicates clearly that whether there be one defendant or several, damage must be alleged in the terms of actual loss to each individual plaintiff, in a manner that is ascertainable and can be proved. In that case, the court, after stating that the issue as to what damage the plaintiffs were entitled to and whether the damage should be based upon the difference between certain prices and the prices fixed by the Secretary of Agriculture was not being decided, makes the observation that

> "Petitioner Mandeville Island Farms prayed judgment for $315,043.80; petitioner Zuckerman for $112,192.14." [22]

So it is quite evident that in a case of this character no complaint should go before a court or jury unless it pleads adequately: (1) violation of antitrust law. As to this, the allegations of the complaint must be taken as true and are, in the man, sufficient. It must then be shown (2) that the violation affected the plaintiff and injured him in "his business or property" [23] and (3) the actual damages he suffered.

In a class action of this character, while the plaintiffs may *aggregate* the amount for which each sues, the complaint should state specifically the amount which each claims to be the actual damage suffered. This is not only in conformity with the law, but accords also with the principle that should prevail in all lawsuits, i. e., that they should *apprise* the defendant what the claim against him is. If this be true in the case of a single defendant, it is truer in the case of a group of defendants, such as we have here, whose relationship to the plaintiffs may not be the same.

Some defendants may have no contractual relations with the plaintiffs. How are they to know what they are required to answer or where the facts should come from? The fact that all are charged with conspiracy does not give each defendant an opportunity to answer the specific charge as to the manner in which his activities injured any particular plaintiff.

The basis of our jurisprudence is that the judge should determine litigation according to the allegations made and proved:

> *"Judex debet judicare secundum allegata et probata."*

This can only be done if the defendants are in a position to know how to meet a particular charge. This had bearing not only on the sufficiency of the complaint as an action by individuals, but also on its sufficiency as a class action, because even in a true class action the defendants are entitled to *know* who the members of the class are who might be expected to benefit by the judgment.

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[17] *Bigelow v. RKO Radio Pictures, Inc.*, 1946 [1946-1947 TRADE CASES ¶ 57,445], 327 U. S. 251, 262-263.

[18] *Fanchon & Marco v. Paramount Pictures*, D. C. Cal., 1951 [1950-1951 TRADE CASES ¶ 62,909], 100 F. Supp. 84. The judgment was for the defendant, but the plaintiffs used the comparative earning method in attempting to prove damages.

[19] *Eastman Kodak Co. v. Southern Materials Co.*, 1927, 273 U. S. 359, 376-378.

[20] *Story Parchment Co. v. Patterson Co.*, 1931, 282 U. S. 555, 561-564.

[21] *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 1948 [1948-1949 TRADE CASES ¶ 62,251], 334 U. S. 219.

[22] *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., supra* Note 21, p. 227.

[23] 15 U. S. C. A., § 15.

III

The Common Fund Theory

I believe that counsel for the plaintiffs have misconceived the theory upon which this type of class action may be brought. They have stated frankly that they thought that the small group they represent could establish (1) the price fixing and (2) the damages per ton of seed sold. Then other persons could come in and, by merely proving the amount sold at the depreciated price,[24] recover damages. But the difficulty with this line of thinking is that the courts, including the Court of Appeals for the Ninth Circuit, have held, as will appear more fully further on in the discussion, that the judgment in a class suit of this type, commonly known as the "spurious" type, *is not* binding on those who do not join before trial.[25] So nothing final could be determined in a suit by this limited number.

Only a Government judgment or decree has the effect of establishing *prima facie* violation. A judgment in a private suit, at the behest of a small number, *can* have that effect only as to those before the court.

There is no authority in any case that I am familiar with for the proposition that you can establish by a judgment the violation and the median damage per ton and then ask those not before the court to come and collect damages on the basis of proof of tonnage of seed sold.

Human cupidity makes it certain to assume that with such decree in effect *everyone* will wish to come in. But there is no power in this court to establish by a decree, at the behest of 22, the fact of violation and of median damage and then allow thousands of others to join and *claim their damage* according to the established formula.

The rules of interpleader[26] and intervention,[27] liberal though they are, allow no joinder of this character after judgment. In case a jury trial is demanded, to which the plaintiffs and the defendant are entitled, would the jury be kept in session after the "interlocutory" judgment until all other growers have joined, or would they be recalled from time to time, as new plaintiffs join, to determine the amount due them? More, any judgment declaring (1) violation of antitrust laws and (2) basic damage will not affect anyone who is not before the court at time judgment is rendered.

To sum up: Counsel's contention that an "interlocutory" judgment could be entered that would establish a violation of antitrust laws, fix a pattern of damage and then allow additional parties to come in, finds no justification in any principle of law with which I am familiar. As stated before, such an assumption would give this court the power to enter a decree that would have greater effect upon litigants in a private lawsuit than the Congress has given to a judgment or decree in actions by the Government. More, it disregards the fact, to be treated more fully hereinafter, that in a "spurious" class *action a separate judgment must be entered as to each of the plaintiffs.*

IV

The Class Action

We now consider other reasons which stand in the way of entertaining this action as a class action.

Class actions are allowed under our Federal Rules of Civil Procedure. The Rule governing them reads:

> "Rule 23. Class Actions.
>
> "(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> "(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> "(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> "(3) several, and there is a common question of law or fact affecting the several rights and a common belief is sought."[28]

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[24] *Story Parchment Co. v. Patterson Co., supra* Note 20.

[25] *McGrath v. Tadayasu Abo,* 9 Cir., 1951, 186 F. 2d 766, 770.

[26] Rule 22, F. R. C. P.

[27] Rule 24, F. R. C. P.

[28] Rule 23, F. R. C. P. The principle embodied in this rule is as old as equity jurisprudence itself, as applied in the federal courts. Indeed, one of the most interesting statements of the rule, in which the nucleus of the distinction between the three types of class actions

I am of the view that *in any one of the three forms* of actions allowed, (1) the "true" form of class action, (2) the "hybrid" form or (3) the "spurious" class action, the court must be satisfied that the persons before it will *fairly insure adequate representation of all.*

In one of the oldest cases on the subject the Supreme Court, after referring to the fact that class actions are exceptions to the rule which requires that an action be instituted only on behalf or against persons who are *actually* before the court and referring to the three types of class actions long recognized in equity jurisprudence, states that it is the function of the court to insure that the persons before the court *truly* represent the rights to be adjudicated:

> "In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, *care must be taken that persons are brought on the record fairly representing the interest or right involved,* so that it may be fully and honestly tried." [29] (Emphasis added)

So when the makers of the Rule under discussion referred to "adequate representation" it must be assumed that they had in mind this long-established and recognized equitable principle which applied to all three kinds of class representation cases. And the courts which have had occasion to apply the rule have so held. In a leading case on the subject, the Court said that in the case of "spurious" class actions, the court *should* consider the question, and held that in determining whether there is an assurance of proper representation a representation by a small number (two jobbers) in an action allegedly brought on behalf of 900 is a question of fact to be considered by the court. The Court also ruled that, aside from any other questions, the simple matter of numerical inadequacy was sufficient to order the dismissal of the action as a class action, saying:

> "It seems to us that this is a case, which, upon the foregoing facts, falls within the first category of discriminatory action. There is room for the play of discretion by the trial judge. The facts and the inferences are not free from dispute. There are numerous possibilities which are real and substantial as distinguished from conjectural or possible, from which different individuals might reach different judgments. The District Judge concluded that the plaintiffs had not shown their ability to insure adequate representation of the absent members of the class. The evidence justified Judge Igoe's conclusion.
>
> "If this question had not been presented to him first, and we were exercising our judgment, a like conclusion would be reached." [30]

The Court of Appeals for the Ninth Circuit has referred to the case just cited and has stated that the judgment in a "spurious" class case is not binding upon any persons except those who actually *become parties before judgment.* After stating that Subdivision (3) of the Section under discussion covers cases where each plaintiff has a right to recover damages for the wrong done all,

> "even though the amount of damages recoverable differs for the different plaintiffs," [31]

they add:

> "The same principle was stated by the Seventh Circuit in *Weeks v. Bareco Oil Co.*, 7 Cir., 125 F. 2d 84, 88." [32]

In another case in which the action was of the second type, called "hybrid", the Court insisted that the problem of representation is *a question of fact* to be determined by the trial court. In that case there was a fund against which all claimed. The Court held that 49 investors *should not* be allowed to bring suit on behalf of 13,000 investors who may have a claim to the fund.[33]

In a case from the Third Circuit in which an action was brought by a member of a local union, this statement occurs:

> "It is true, as the plaintiff argues, that the membership of an unincorporated la-

is found, is in *Smith v. Swormstedt et al.*, 1854, 16 Howard 288, 301-302. And see, *Supreme Tribe of Ben-Hur v. Cauble*, 1921, 255 U. S. 356, 363-364; *Martinez v. Maverick County Water Con. & Imp. Dist. No. 1*, 5 Cir., 1955, 219 F. 2d 666, 671-672. And the old Equity Rule 38 embodied most, if not all, of the features of the present rule.

[29] *Smith v. Swormstedt et al., supra* Note 28, p. 302.

[30] *Weeks v. Bareco Oil Co.*, 7 Cir., 1941 [1940-1943 TRADE CASES ¶ 56,173], 125 F. 2d 84, 94. And see, *Troup v. McCart*, 5 Cir., 1957, 238 F. 2d 289, 294-296.

[31] *McGrath v. Tadayasu Abo, supra* Note 25.

[32] *Ibid.*, p. 770.

[33] *Pennsylvania Co. etc. v. Deckert*, 3 Cir., 1941, 123 F. 2d 979. And see, *Farmers' Co-Op. Oil Co. v. Socony-Vacuum Oil Co., Inc.*, 8 Cir., 1942 [1940-1943 TRADE CASES ¶ 56,249], 133 F. 2d 101, 104-105; *Knowles v. War Damage Corp.*, U. S. App. D. C. 1948, 171 F. 2d 15, 18.

bor union may constitute a class on whose behalf representatives may bring a true class suit to vindicate the common rights of the members as such. But Federal Civil Procedure Rule 23(a), 28 U. S. C. A., provides that the representatives of the class who bring the suit must be such 'as will fairly insure the adequate representation of all.' Here the affidavits upon which the court acted make it perfectly clear that the membership of Local 103 is sharply divided on the very question involved in this case, the expulsion of the plaintiff and his associates. Indeed a majority of the members who voted on the question at a membership meeting held on January 11, 1950 voted to sustain their expulsion." [34]

Then follows a statement which has a very decisive bearing on the case before us in which *2038 persons say that they do not wish this suit continued in their behalf:*

"With a class thus *sharply divided in opinion,* it would be absurd to say that the leader of one faction in the internecine struggle could adequately represent the whole membership. The finding of the district court on this point must be set aside as clearly erroneous." [35] (Emphasis added)

The trial court having allowed the case to proceed, its Order was set aside as clearly erroneous. A later case from the Seventh Circuit does not propound a different doctrine. The court merely held that *in the particular instance there was assurance of adequate representation;* significantly, however, insisting that the judgments would have to be several as to each of the plaintiffs.[36] One other observation is in order. Rule 23 must be read with another Rule which uses similar wording.[37] Rule 23 states as to a "spurious" class action, that it may be brought when the interests are

"several, and there *is a common question of law or fact affecting several rights and a common relief is sought."* [38]

This is nothing more than "permissive joinder". The same language occurs in Rule 20, which states:

"(a) Permissive joinder: All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any *question of law or fact common to all of them will arise in the action.* All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. The plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

"(b) Separate trials. The court may make such orders as will prevent a party

[34] *Giordano v. Radio Corporation of America,* 3 Cir., 1950, 183 F. 2d 558, 560.

[35] *Giordano v. Radio Corporation of America, supra,* Note 34, p. 560. The following language from a later case from the Fifth Circuit is also very appropriate:

"In this record, there is no proof to sustain the allegation that there are many others besides complainant, too numerous to make parties, having the identical status and possessing the necessary qualifications for admission to the same college and courses. Certainly there can be no such all-inclusive injunction covering all members of an alleged class without proof that the others desire to be so represented in substantial numbers or have requested plaintiff so to represent them. Such facts cannot be assumed." (*Board of Supervisors, etc. v. Tureau,* 5 Cir., 1955, 222 F. 2d 714, 719.)

[36] *Kainz v. Anheuser-Busch, Inc.,* 7 Cir., 1952 [1952 TRADE CASES ¶ 67,221], 194 F. 2d 737, 741-742. As it is claimed that this case teaches a different doctrine than is here expounded, it is well to reproduce the following paragraph from the Opinion:

"At any rate, the law of this circuit, by virtue of *Weeks v. Bareco Oil Co., supra,* is that where the tort complained of by each plaintiff is the same and is claimed to have damaged each of the plaintiffs in the same manner, plaintiffs may join under Rule 20(a) or maintain the suit as a spurious class suit under Rule 23(a)(3), *though the judgments are several and no one is bound unless he is present."* (p. 742) (Emphasis added)

A later case from the same circuit approves the principle that separate judgments must be entered:

"Here we are dealing with a spurious class action, containing common elements of fact and law, but based upon separate and individual claims growing out of the same transaction. *Hughes v. Encyclopedia Britannica,* 7 Cir., 199 F. 2d 295; *Kainz v. Anheuser-Busch, Inc.,* 7 Cir., 194 F. 2d 737. ***In such an action,*** *separate judgments are entered 'and no one is bound unless he is present.' Kainz v. Anheuser-Busch, Inc.,* 194 F. 2d, p. 742." (*Hurd v. Illinois Bell Telephone Company,* 7 Cir., 1956, 234 F. 2d 942, 944) (Emphasis added)

[37] Rule 20, F. R. C. P.

[38] Rule 23(a)(3), F. R. C. P.

from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice." [39] (Emphasis added)

Those who criticize the courts that have held it to be their function to determine, in advance of trial, whether there is adequate representation under Rule 23, overlook a very significant matter, i.e., that under Rule 20, in permissive joinder cases, the court, in the interest of justice, may order separate trials. Ultimately, the "spurious" class action, so called, is *nothing more than permissive joinder.* And so it is quite evident that, just as under Rule 20, when there is joined a large number of parties who have only *one question of law or fact in common,* the court can spare litigants the difficulty and expense of a joint trial, so, *by parity of reasoning,* in "spurious" class action, the court has the same right, upon a showing that *there would be no true representation.* This can be done by compelling the plaintiffs to (1) either name all the persons in the class for whose benefit the action is brought, or (2) dismiss it as a class action as to all except those who appear as plaintiffs.

As a matter of fact, I am of the view that our power under Rule 23 is even greater than under permissive joinder, because under permissive joinder, the judgment as to the common question would be binding upon the parties joined, while the courts have held that in "spurious" joinder, even when the representation is adequate, the judgment is not so binding.[40]

The Court of Appeals for the Ninth Circuit has stated:

"Appellant Hinst and twenty-five other individuals brought this action for damages arising out of the loss of their employment. The complaint purports to have been brought on behalf of 2,000 other individuals similarly situated but, since each plaintiff's claim is individual and several, and no specific property can be affected by the action, the action is a 'spurious class suit' under Rule 23(a)(3) of the Federal Rules of Civil Procedure, 28 U. S. C. A. Such a suit is merely a permissive joinder device in which the right and liability of each individual plaintiff is distinct and no member of the 'class' is bound by a judgment who does not join as plaintiff or intervenor." [41]

This succinct statement sums up the basic reason for the view that the rights in a class action of the "spurious" type *are no greater than the rights under permissive joinder.* As stated by the same court in a prior case:

"We agree with the Second Circuit that the relief attained in class suits under Rule 23(a)(3) extends only to the named plaintiffs actually becoming parties before judgment. *York v. Guaranty Trust Co. of New York,* 2 Cir., 143 F. 2d 503, 529." [42]

Summary and Conclusion

To conclude:

The complaint in this case shows inadequacy in numbers. The 26 original plaintiffs, whose number has been reduced to 22, seek to recover $28,800,000 on behalf of some 8,000 growers. This it is sought to treble to an astronomic total of $86,400,000. Two thousand and thirty-eight persons, who are allegedly within the same class, have stated that they do not desire to be represented by the plaintiffs. The action has been pending since November 14, 1956, and *no other* member of the class has sought to join as plaintiff or has intervened or interpleaded. On the contrary, four of the original plaintiffs have expressed their desire to withdraw. No counter-affidavits have been filed claiming coercion or compulsion of any of those expressing opposition.

It is also apparent that there is a variety of contracts. At least nine different types of growers and contracts have been identified in the affidavits: (1) Financed growers; (2) Non-financed growers; (3) Sharecroppers; (4) Corporations who do farming and who may be partially owned by other defendants; (5) Farmers who divide their business between various defendants; (6) Individuals who do farming and also have a stockholder's interest in one of the defendants; (7) Farmers who do business with the cooperative gins; (8) Persons who are inactive, but own a financial interest in partnerships engaged in the farming business; and (9) Cotton gins independently owned or operated by individuals or corporations and cooperatives and who com-

[39] Rule 20, F. R. C. P.

[40] See case cited in Notes 25 and 30.

[41] *Schatte v. International Alliance,* 9 Cir., 1950, 183 F. 2d 685, 687.

[42] *McGrath v. Tadayasu Abo, supra* Note 25, p. 770. See, *Dickinson v. Burnham,* 2 Cir., 1952, 197 F. 2d 973, 979, and cases cited in Note 3 of the case at last page indicated.

pete for the seed of the farmer at growers level.

It appears on the face of the Complaint, and is evident from the variety of operations and contracts, that there is no uniformity in the quality of cotton seed. In view of this and of the requirement for several judgments, no single decree of this court could possibly determine a damage ratio ton-wise, that would apply to all.

An added factor also is the attempt to join the cooperatives of which the growers themselves are members. I have always thought that cooperatives in the agricultural field in California have been the means of securing easier marketing and processing and a fair market for farm products. Cooperatives may well be an evil. But if they are, and participate in antitrust violations, they should be sued by name, so that they may come in and defend, *perhaps against their own grower members.*

There is no need to analyze in detail the various types of contracts described in the affidavits and already enumerated. One observation may, however, be made: The record shows that there are many financed contracts, i.e., contracts whereby the buyer becomes the grower's partner, or joint venturer, and finances or advances the money to the grower. In such type of contract the law would recognize the right to impose conditions as to marketing that could not be imposed on independent growers.

So it is quite evident to the court that it would be a grave injustice to allow 22 persons to represent the large number of cotton growers, unless they voluntarily joined as plaintiffs.[43]

The only claimed common question involved is price fixing. But, we have here as defendants a variety of buyers, ginners and processors, doing everything from buying the cotton to turning it into cottonseed oil and by-products, involving a great diversity of interests.

Assuming that the plaintiffs can comply with the requirement that the damage of each of them be set forth in, it is quite apparent on the face of this record that the 22 persons before the court do not *insure adequate representation.* A judicial order that would allow this case to remain *open further* until such other persons *as may be solicited* join as plaintiffs would be an abuse of discretion, and subject these defendants, *whose interests appear so diverse,* to unwarranted hardship. In our system, a person should be summoned into court only upon the basis of a claim or a cause of action for *which he is legally answerable,* and which is stated *specifically* in the complaint.

Disregarding as untenable in law the theory that a judgment determining the criterion of damage would allow others to come in after an interlocutory judgment, thus giving a greater force to the decree than a decree in a Government criminal action or equity suit,[44] the continuance of this suit as a class action would do violence to all the ideals of fairness and justice which should prevail in American courts.

Hence the following rulings:

1. An order will be entered dismissing the complaint as to all defendants *as a class action.* The order will direct the entry of a final judgment of dismissal

> "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."[45]

The judgment shall recite, in effect, that, in the opinion of the court, the record presented by the complaint, the affidavits, depositions, and other documentary evidence shows clearly and conclusively that because of diversity of interests in the group and numerical inadequacy of plaintiffs, *they do not and cannot* insure the adequate representation of all the growers in the valley.

2. The complaint will also be dismissed for failure to state a claim, because it does not allege specifically the actual damage suffered by each of the plaintiffs.

However, the plaintiffs will be given 30 days in which to file an amended complaint, limiting their claim to a joint action on

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[43] The discretionary power of the court in disallowing "spurious" class actions is well stated by the Court of Appeals for the District of Columbia in *Knowles v. War Damage Corp., supra* Note 33, p. 18:

"This type of action is spoken of as a 'spurious action'. The members' interests may be several and not interdependent, although the remaining requisites of the true class action must be met. Their joinder is a matter of economy and efficiency on the part of courts and parties,—an avoidance of a multiplicity of suits. Courts have possessed the power to afford and have afforded this remedy long before the adoption of the new Federal Rules of Civil Procedure: The joinder was and is a matter of discretion in the trial court."

[44] 15 U. S. C. A., § 16.

[45] Rule 54(b), F. R. C. P.

behalf of the named plaintiffs and any other persons who desire to join them against the named defendants, *excluding all fictitious persons.*

The prayer for relief will be limited to the period from January 7, 1953.

[¶ 68,729] Consolidated Packaging Machinery Corporation v. Richard J. Kelly, Executor of the Estate of Thomas C. Kelly, Deceased.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 56 C 344. Dated April 29, 1957.

Sherman Antitrust Act

Combinations and Conspiracies—Patent License—Agreement To Maintain Prices and Not To Manufacture Competitive Products—Legality.—An agreement under which a patentee granted a company an exclusive license to manufacture and sell a cotton stuffing machine under its patent, the patentee granted the company the right to manufacture machines under patents not owned by it for a commission, the patentee prescribed the prices at which the company might sell machines made under its patent and the other patents, and the company was required to confine its manufacture of machines exclusively to the machines of the patentee's type if the company failed to secure and maintain an exclusive license under the other patents was held, in a declaratory judgment action, invalid and unenforceable under the antitrust laws because of its price-fixing provision and because of its provision limiting the right of the company to manufacture and sell machines competitive with the patentee's machine. The illegal portions of the agreement were held to be integrated with all of the other portions of the agreement and therefore not severable.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.330, 2013.700; Private Enforcement and Procedure, Vol. 2, ¶ 9060.

For the plaintiff: Wilkinson, Huxley, Byron and Hume, Chicago, Ill.

For the defendant: J. Edgar Kelly and Wilfred S. Stone, Chicago, Ill.

Findings of Fact and Conclusions of Law

WIN G. KNOCH, District Judge [*In full text*]: Upon a consideration of the whole matter, the Court makes the following:

Findings of Fact

[*Declaratory Judgment Action*]

1. This was an action commenced by Consolidated Packaging Machinery Corporation against Richard J. Kelly, Executor of the Estate of Thomas C. Kelly, deceased, for declaratory judgment that a license agreement dated June 3, 1944, between Consolidated and Thomas C. Kelly was illegal and unenforceable, and that Consolidated had no duty or obligation thereunder to pay royalties or commissions or to assign any of its patents or patent applications to Richard J. Kelly, executor of the Estate of Thomas C. Kelly, or anyone in privity with him.

2. This Court has jurisdiction of the action and of the parties.

3. The matter came on to be heard upon the separate motions of Consolidated and of Kelly for summary judgment.

[*License Agreement*]

4. On June 3, 1944, Thomas C. Kelly, of Hinsdale, Illinois, entered into a license agreement with Consolidated, by which he gave Consolidated an exclusive license, under and in accordance with Kelly's United States Patent No. 2,171,572, to manufacture, use and sell "cottoners," i. e. machines designed to stuff a wad of cotton into the neck of a bottle or jar.

5. This said agreement, in paragraph 4 thereof, also recited that Kelly granted Consolidated the right to manufacture cottoners other than those manufactured under said Kelly patent No. 2,171,572; specifically those of a type known as "Lakso" cottoners

which were covered by United States Letters Patent Nos. 2,269,722 and 2,304,932; Consolidated being required to pay Kelly a commission of 7½% of the gross selling price of all said Lakso machines or parts thereof.

6. Kelly had no interest or right in said Lakso cottoners or in said Lakso patents; said Kelly machine and said Kelly patent were unrelated to said Lakso machine or said Lakso patents; Kelly had no lawful right to prescribe the course of action of Consolidated with respect to said Lakso machine or said Lakso patents, and no lawful right to control or affect any other right of Consolidated with respect to said Lakso machine or said Lakso patents.

7. Said agreement further, in paragraph 9 thereof, prescribed the minimum and maximum prices at which Consolidated might sell cottoners made under either the Kelly or the unrelated Lakso patents thus constituting a fixing of prices by Kelly without patent or other statutory authorization.

8. Said agreement, in paragraph 12 thereof, further provided that if Consolidated failed to secure and maintain an exclusive license under said Lakso patents, it would be required to confine its manufacture of cottoners exclusively to machines of the Kelly type and to pay a royalty thereon in the amount of 15%.

9. Consolidated, in fact, did fail to maintain an exclusive license under said Lakso patents.

10. The recited provision of said paragraph 12 is a restriction on Consolidated's free right to manufacture and sell devices over which Kelly had no control and with respect to which he had no patent or other right.

[*Provisions Not Severable*]

11. Paragraphs 4 and 5 of said agreement providing for the payment to Kelly of commissions on the sale of the unrelated Lakso machines and of royalties on the Kelly machines; paragraph 6 requiring the assignment by Consolidated to Kelly of improvements of a patentable order on Kelly machines; paragraph 9 providing the price at which Consolidated might sell both Kelly machines and the unrelated Lakso machines; and paragraph 12 limiting Consolidated, in the event of its failure to maintain the Lakso license on an exclusive basis, to the manufacture and sale of Kelly machines, are integrated considerations for the license granted and are not severable.

Conclusions of Law

1. The pleadings (inclusive of a copy of said license agreement of June 3, 1944) and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that Consolidated is entitled to a judgment as a matter of law.

2. The agreement of June 3, 1944, because of its price-fixing provision and because of its provision limiting the right of Consolidated to manufacture and sell machines competitive with the Kelly machine, is invalid and unenforceable under the antitrust laws.

3. Consolidated has no duty or obligation of any nature under said agreement of June 3, 1944.

4. The illegal portions of said agreement of June 3, 1944, are integrated with all other portions and are not severable therefrom.

5. Said agreement of June 3, 1944, is of no force and effect and is herewith terminated.

6. Consolidated shall recover from Kelly its costs in this Court, to be taxed against Kelly by the Clerk of this Court.

[¶ 68,730] Richard J. Kelly, Executor of the Estate of Thomas C. Kelly, Deceased v. International Paper Company.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 56 C 357. Dated April 29, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Antitrust Law Violation as Defense—Suit for Inducing Breach of Patent Licensing Agreement—Illegality of Agreement.—A patentee could not maintain an action against a company for inducing the breach of a patent licens-

ing agreement which the patentee had with another party, since the agreement was illegal under the antitrust laws. The objectionable portions of the agreement, unenforceable under the antitrust laws, were an integral part of the agreement and not severable. Under the agreement, the licensee was required to confine its manufacture of cotton stuffing machines to the patentee's type of machine and to sell machines produced under the patent and other patents not owned by the patentee at specified prices.

See Private Enforcement and Procedure, Vol. 2, ¶ 9041.350, 9041.450.

For the plaintiff: J. Edgar Kelly and Wilfred S. Stone, Chicago, Ill.

For the defendant: Wilkinson, Huxley, Byron and Hume; James P. Hume; and Patrick H. Hume, all of Chicago, Ill. John Vaughan Croner and James D. Bock, New York, N. Y.

Memorandum and Order

[*Summary Judgment*]

WIN G. KNOCH, District Judge [*In full text*]: This matter came on to be heard on defendant's motion for summary judgment in its favor. The Court has had the benefit of argument of counsel on briefs, has studied the pleadings and the authorities to which counsel refer, and is fully advised in the premises.

It appears to the Court that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law.

[*Action Barred*]

Apart from defendant's assertion of privilege as a stockholder, it is the conclusion of the Court that no action lies for inducing breach of plaintiff's contract here because the contract itself is unenforceable.

[*Contract—Antitrust Laws*]

The identical contract was the subject of action for declaratory judgment as to its invalidity in *Consolidated Packaging Machinery Corporation v. Richard J. Kelly, Executor of the Estate of Thomas C. Kelly, Deceased,* Case No. 56 C 344, wherein this Court found for the plaintiff [1957 TRADE CASES ¶ 68,729].

The Court found that under this identical contract Consolidated Packaging Machinery Corporation (herein alleged to have been induced by International Paper Company to breach the contract) was required to secure and maintain an exclusive license under patents wholly unrelated to that of this plaintiff's decedent Kelly, on loss of which license, Consolidated was to confine its manufacture exclusively to machines of the Kelly type and to pay him higher royalties; the contract prescribed prices not only for machines of the Kelly type, but also for the machines made pursuant to the unrelated patents and provided (in effect) for royalties to be paid the decedent on both types.

The Court also found that the objectionable portions of the contract, unenforceable under the antitrust laws, were an integrated part of the contract and not severable.

[*Judgment*]

It is ordered, adjudged and decreed that summary judgment be entered in favor of defendant, with costs.

[¶ 68,731] United Grocers' Company v. Sau-Sea Foods, Inc. and Ernest Schoenbrum and Abraham Kaplan, doing business as Shore Distributors.

In the United States District Court for the Southern District of New York. Civil No. 114-365. Filed May 17, 1957.

Robinson-Patman Price Discrimination and Sherman Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Complaint—Judgment of Dismissal—Motion to File Amended Complaint.—A plaintiff was permitted to file an amended complaint where a motion to dismiss the original complaint had been granted and the judgment of dismissal did not reserve to the plaintiff the right to plead over. The judgment of dismissal was reopened on the plaintiff's motion to amend the judgment; therefore, the judgment of dismissal was vacated and the plaintiff could

move for leave to file an amended complaint. Also, the deficiencies found in the original complaint were held to be cured by the amended complaint. The fact that the plaintiff may not be able to prove the allegations of its amended complaint cannot preclude the plaintiff's right to have its day in court.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785; Price Discrimination, Vol. 1, ¶ 3505.585; Private Enforcement and Procedure, Vol. 2, ¶ 9009.600, 9013.100.

For the plaintiff: Manes, Sturim, Donovan & Laufer (Arthur M. Laufer, of counsel), New York, N. Y.

For the defendants: Louis G. Greenfield, New York, N. Y.

For prior opinions of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,661 and 68,639.

Memorandum

[*Amended Complaint*]

SIDNEY SUGARMAN, District Judge [*In full text*]: Judge Dimock on March 22, 1957 granted the defendant's motion to dismiss the complaint herein but he did not reserve to the plaintiff the right to plead over. A judgment of dismissal was thereupon entered. The plaintiff moved for an order "to amend the judgment entered herein on March 22, 1957 to provide that plaintiff may have leave to serve and file an amended complaint . . ." Judge Dimock granted that motion on April 11th, stating that the judgment was "reopened" so as to permit plaintiff to move for leave to file an amended complaint." Judge Dimock in citing *Markert v. Swift & Co.*, 173 F. 2d 517 (2d Cir. 1949), studiously employed the word "reopened making particular reference to page 519 of the *Markert* decision, whereon is found the observation that "technically the judgment of dismissal should be reopened before an amendment to the complaint is granted." I construe Judge Dimock's disposition of the plaintiff's motion "to amend the judgment" by the employment of the words "judgment reopened" as a ruling by him that the judgment of dismissal entered on March 22nd was vacated and the parties were thus in the position that they were when he granted the motion to dismiss except that the road was kept open for the plaintiff "to move for leave to file an amended complaint."

The plaintiff has now done so and I am persuaded that the deficiencies found in the complaint dismissed by Judge Dimock have now been cured by the plaintiff by it proposed amended complaint.

The extended argument in the answering affidavit that the plaintiff will ultimately be unable to *prove* the allegations of the amended complaint, as evidenced by certain quotations from depositions and prior affidavits in this case, cannot preclude the plaintiff's right to have its day in court. That the defendant may ultimately prevail must remain for a trial of the issues. Accordingly, the instant motion by the plaintiff for leave to file an amended complaint, in the form of the proposed amended complaint submitted by it on this motion, is granted. Defendants will have twenty days from the date of this order to answer.

It is so ordered.

[¶ 68,732] Colgate-Palmolive Company v. Elm Farm Foods Company, No. 71402. Colgate-Palmolive Company v. Stop & Shop, Inc., No. 71403. Colgate-Palmolive Company v. Star Market Company, No. 71404. Colgate-Palmolive Company v. Food Center, Inc., d.b.a. New England Food Fair, No. 71405. Colgate-Palmolive Company v. Tedeschi's Super Market, Inc., No. 71406. Colgate-Palmolive Company v. Supreme Markets, Inc., No. 71415.

In the Massachusetts Superior Court, Suffolk County, In Equity. Dated March 27, 1957.

Massachusetts Fair Trade Act

Fair Trade—Indirect Methods of Price Violation—Trading Stamps and Cash Register Receipts—Discounts for Cash Payment.—In fair trade enforcement actions, the trial court found that a discount for the payment of cash is to insure or encourage prompt payment

of accounts in order to enable the seller to have a minimum of expense in connection with credit expenses; that retail stores which extend credit have ascertained that this costs them 3 to 4 per cent; that trading stamps, redeemable cash register receipts or tapes, and other devices of similar nature are typical discounts for cash at the retail level; and that the issuance of trading stamps and redeemable cash register receipts or tapes is one form of institutional or store promotion device and that it does not have any economic effect upon the individual product brand sold by the retailer or its good will. The question of whether the issuance of such stamps and receipts with fair traded products constitutes a violation of the Massachusetts Fair Trade Act was reserved for determination by the Massachusetts Supreme Judicial Court.

See Fair Trade, Vol. 1, ¶ 3294.

For the plaintiff: Withington, Cross, Park & McCann, Boston, Mass., for the Colgate-Palmolive Co.

For the defendants: Samuel M. Lane and Edward H. Bennett, Jr. (Sullivan & Worcester), Boston, Mass., for Elm Farm Foods Co.; Sherin & Lodgen, Boston, Mass., for Stop and Shop, Inc.; George A. Brown and Thomas M. Joyce, Boston, Mass., for Star Market Co.; E. J. McGrath, Brockton, Mass., for Food Center, Inc.; Lester E. Callahan, Randolph, Mass., and E. J. McGrath, Brockton, Mass., for Tedeschi's Super Market, Inc.; and Sherin & Lodgen, by Arthur L. Sherin, Boston, Mass., for Supreme Markets, Inc.

Findings of Fact, Rulings of Law and Report of Case for the Consideration of the Supreme Judicial Court

[*Stipulation*]

REUBEN L. LURIE, Justice [*In full text*]: These cases were tried before me upon a stipulation of facts and oral testimony. The oral testimony was introduced in accordance with a reservation in the stipulation (page 1) "that other evidence may be offered by the parties and that all reasonable inferences consistent with the agreed facts may be drawn from said agreed facts and any evidence introduced."

[*Definitions*]

From this oral testimony I find the following facts relative to the nature of discounts in trade practices:

By Trade Discount is meant an adjustment of price made by the manufacturer and consisting of a specified percentage deducted from a catalogue trade price or other established price which is offered to all customers. This is distinguished from a Discount to the Trade, which is a discount to a particular class or group, such as a discount given to interior decorators by furniture dealers. This latter discount does not depend upon when or how payment is made.

By Quantity Discount is meant a discount when a customer buys or orders a certain quantity. This is allowed in order to encourage placement of large orders. It has no reference to how or when payment is made and is concerned only with the size of the order.

By Quota Discount is meant a discount allowed by a manufacturer or wholesaler to a dealer who must take a fixed amount of merchandise within a limited period in order to get the discount. This also has nothing to do with terms of payment.

A Discount for Payment of Cash is to insure or encourage prompt payment of accounts in order to enable the seller to have a minimum of expense in connection with credit departments, bookkeeping and accounting expenses. The reduction of bad debt losses is obvious.

[*Trading Stamps*]

The trading stamp, the redeemable cash register receipt or tapes, and other devices of similar nature, are typical discounts for cash at the retail level.

Cash discounts are also given in connection with credit terms. The usual terms, 2% off if bills are paid in 10 days, is a classic example.

Upon the testimony of a leading certified public accountant, I find as a further fact that retail stores which extend credit have ascertained that this costs them 3% to 4% in well managed establishments, and a higher percentage in others.

Where trading stamps are used, a term "breakage" describes the amount for which the customer receives no stamp. If, for example, an article is purchased for forty cents, the customer receives four stamps. If for thirty-five cents, he gets three stamps.

It is obvious that redeemable cash register receipts or tapes have no "breakage."

Massachusetts has long recognized the trading stamp as a discount for cash.

Sperry and Hutchinson v. Director, 307 Mass. 408, 415; *Merchants Legal Stamps v. Murphy,* 220 Mass. 281, 283; *Commonwealth v. Sisson,* 178 Mass. 578.

I find as fact that redeemable cash register receipts or tapes as described in the present cases are discounts for cash.

[*Promotional Devices*]

Upon the testimony of a leading professor of marketing and advertising, I find as further fact that there are two broad classifications of promotional devices in selling merchandise at the retail level. There is Product Promotion, which is any form of retail sales promotion related to and designed to sell a particular product. There is Institutional or Store Promotion, which is any form of retail sales promotion related to and designed to promote increased patronage at a given store or mercantile establishment. Institutional or store promotion is not limited to specific products but extends to all products offered by the store and is offered not for specific merchandise but for all purchases within the store. I find as further fact that the issuance of trading stamps and redeemable cash register receipts or tapes as issued by the defendants here is one form of institutional or store promotion and that it does not have any economic effect upon the individual product brand sold by the retailer, or its good will.

[*Fair Trade Law Violation*]

If, upon the stipulation and the facts as further found, the issuance of trading stamps and redeemable cash register receipts or tapes by defendants with plaintiff's products is in violation of the Fair Trade Law, I find that plaintiff is entitled to the injunctive relief prayed for in its bills of complaint; otherwise the bills are to be dismissed.

Plaintiff has orally waived its prayers for assessment of its damages.

As to whether, upon the stipulation and the facts as further found, the issuance of trading stamps and redeemable cash register receipts or tapes by defendants with plaintiff's products is in violation of the Fair Trade Law, so-called, General Laws (Ter. Ed.) c. 93, ss. 14A-14D, as amended, I make no ruling, reserving these cases for determination by the Supreme Judicial Court in accordance with General Laws (Ter. Ed.) c. 214, s. 31.

[¶ 68,733] General Electric Company v. Philip Klein, trading as Phil's Distributors.

In the Court of Chancery of the State of Delaware, in and for New Castle County. Civil Action No. 450. Dated December 28, 1956.

Delaware Fair Trade Act

Fair Trade—Enforcement of Fair Trade Prices—Permanent Injunction—Right To Seek Modification—Issuance of Trading Stamps with Fair Traded Products.—A retailer who had been permanently enjoined from selling a fair trader's products below their established prices was entitled to produce evidence with respect to his motions (1) To vacate the injunction on the ground that the fair trader had failed to take reasonable steps to prevent competitors of the retailer from giving trading stamps in connection with the sale of the fair trader's products or (2) to construe the injunction so as to permit him to offer trading stamps with his sale of the fair trader's products. The retailer was permitted to produce evidence which was not reasonably available at the time that the injunction issued. The fact that the retailer had been adjudged guilty of contempt of the injunction and the fact that the retailer did not raise the trading stamp issue at the time of the entry of the injunction did not preclude the retailer from making the above motions.

See Fair Trade, Vol. 1, ¶ 3294, 3366.

For the plaintiff: H. James Conaway, Jr., of Morris, James, Hitchens and Williams, Wilmington, Del.

For the defendant: David N. Snellenburg, II, of Killoran and VanBrunt, Wilmington, Del.

For a prior decision of the Delaware Supreme Court, see 1956 Trade Cases ¶ 68,541, affirming a decision of the Delaware Chancery Court, New Castle County, 1956 Trade Cases ¶ 68,406; for an earlier opinion of the Delaware Supreme Court, see 1954 Trade Cases ¶ 67,774.

Opinion

[*Fair Trade Injunction*]

SEITZ, Chancellor [*In full text*]: Subsequent to the entry of a permanent injunction restraining the defendant from violating plaintiff's fair trade program, the defendant filed two motions in the action. The first seeks to have the court vacate the existing permanent injunction on the ground that defendant's competitors are giving trading stamps in connection with the sale of plaintiff's products; that plaintiff is paying a portion of the cost of so advertising; that such action constitutes a concession in violation of the Act and amounts to a discount; that the injunction prohibits the defendant from giving similar discounts; that in consequence the injunction should be lifted because it renders defendant subject to an unwarranted competitive disadvantage.

Plaintiff's answer denies the essential allegations of defendant's motion and raises certain affirmative defenses.

Subsequently, defendant filed a second motion asking that the permanent injunction be construed to permit him to offer trading stamps and/or U. S. savings stamps in connection with his sale of plaintiff's fair traded products. Once again plaintiff filed an answer denying the essential allegations of the motion.

[*Issues*]

The parties subsequently stipulated that the motions and answers gave rise to three questions. Because the first two questions challenged defendant's right to obtain decisions on the merits of his applications, they agreed that the court should initially decide those questions. This then is the decision on the following two questions:

1. Having been adjudged guilty of contempt of the permanent injunction, is the defendant equitably entitled to move to have the same vacated, modified or construed, in accordance with the prayers of the motions filed herein?

2. Having failed to show that the practice of offering and giving trading stamps in connection with sales of the plaintiff's fair-traded products in Delaware did not exist prior to and at the date of the permanent injunction entered herein, is the defendant therefore estopped by the said permanent injunction to pray its vacation, modification or construction so as to permit such practice on the defendant's part?

Plaintiff recognizes the power of the Court, in the exercise of its sound discretion, to vacate, modify or construe a permanent injunction.

[*Right to Seek Relief*]

I first consider whether defendant is precluded from seeking the relief requested because he has been adjudged guilty of contempt.

Plaintiff narrates at length the numerous twists and turns of the defendant during the long period between the granting of the permanent injunction and the filing of the motions in question. They show many vigorous attempts by defendant to further his own interests. But, basically, plaintiff's defense is based on the fact that defendant has been found guilty of contempt arising out of a violation of the very permanent injunction which he here seeks to have vacated, modified or construed. See *State v. Klein*, (Del. Ch.) [1956 TRADE CASES ¶ 68,406], 123 A. (2) 740, aff'd. *Klein v. State and Gen. Electric*, (opinion dated November 21, 1956) [1956 TRADE CASES ¶ 68,541].

Is defendant to be forever foreclosed from seeking relief with respect to the permanent injunction because of his contempt? We commence the analysis with a realization that this is the type of permanent injunction which has a continuing effectiveness. In consequence, defendant must tread softly in his future actions or run the risk of a second contempt. It must be assumed, moreover, that the defendant has been appropriately punished for his contempt. There is nothing to suggest that the contempt is continuing. Indeed, the filing of these motions indicates a determination to pursue the proper course of conduct.

Plaintiff points out that defendant is the moving party and that he comes into court with unclean hands. In this connection plaintiff cites 2 Pomeroy's *Equity Jurisprudence* (5th ed.), § 398 for the proposition

that a Court of Equity will shut its doors against a party seeking relief where it appears that such party has violated conscience, or good faith or other equitable principles in his prior conduct. There can be no quarrel with the wisdom and vitality of the principles announced by Pomeroy. They deal with a different stage of litigation. The repentant sinner, especially where he has been duly punished, is not unwelcome in equity. The religious connotation of many of the equitable principles mentioned by Pomeroy militates against a determination that a party in contempt who is duly punished, is forever an outcast in equity.

I conclude that, under the circumstances, the defendant's contempt does not bar him from seeking the relief requested in his motions.

[*Estoppel*]

I next consider plaintiff's contention that the defendant is estopped to raise the questions incorporated in his motion because he has failed to allege that the practice of offering and giving stamps did not exist as to plaintiff's products prior to and at the date of the permanent injunction. I pass over any pleading problem.

Plaintiff's argument goes like this: Since defendant does not allege to the contrary, it must be assumed that the practice of giving trading stamps in connection with the sale of plaintiff's products by defendant's competitors existed at and before the entry of the permanent injunction here involved; this being so, the defendant is not now entitled to relief with respect thereto because in order to obtain the relief here sought he must show that the practice commenced after the entry of the injunction. Otherwise stated, plaintiff claims that defendant is estopped to raise the questions because he could have done so at the time of the entry of the injunction. Plaintiff relies upon the analogy of estoppel by judgment.

The parties agree that the permanent injunction now outstanding against defendant in effect follows the provisions of the Delaware Fair Trade Act. The defendant is by that injunction prohibited from taking any action which would violate the Act. Thus, defendant is enjoined from giving stamps, if to do so would violate the Act. But the question of the legality of giving stamps under the Act has not been decided in Delaware and is not free from doubt. It would therefore seem clear, without regard to what other merchants may have done, that the defendant is entitled to be told for the future whether the giving of stamps would violate the injunction and thus place him in contempt once again. I do not view this as a frivolous request and plaintiff does not so suggest.

The defendant was presumably not interested in giving stamps at the time the injunction was issued and thus had no interest in raising the issue of its legality under the Act. I must now presume that it is of importance to him. It is therefore no answer to defendant's application for a construction of the injunction to say that defendant knew when the injunction issued that stamps were being given by his competitors in connection with the sale of plaintiff's fair traded products. This is so because defendant is entitled to know whether his contemplated acts will violate the Act and thus run afoul of the injunction.

I conclude that defendant is entitled to have the injunction and the Act construed.

[*Evidence*]

Defendant argues in effect that even if the Act and thus the injunction be construed to prohibit the giving of stamps, the plaintiff should not be permitted to enforce the injunction because plaintiff has not "policed" the marketing of its own products, and indeed has itself participated in the illegal activity. Plaintiff vigorously denies this.

If the Act prohibits stamp plans, in whole or in part, then evidence, such as that alleged by defendant, would be material. This is so because of plaintiff's duty to take reasonable steps to police its market and abide by the Act if it seeks to secure its benefits. Compare *Lionel v. Klein,* (Del. Ch.) [1955 TRADE CASES ¶ 68,085], 114 A. (2) 652. However, as plaintiff points out, defendant should not now be permitted to use for this purpose evidence which was reasonably available to him when the injunction was issued. Otherwise, defendant could assert his defenses piecemeal.

To the extent, if any, that the Act prohibits the giving of stamps it, and therefore the injunction, will be enforced unless defendant can produce appropriate evidence,

not reasonably available at the injunction date, tending to show that plaintiff has failed to take reasonable steps to police its market or has itself participated in activities which are contrary to the statute. Subject to the foregoing limitation the plaintiff's second objection to the defendant's motions is without merit.

Order on notice.

[¶ 68,734] Wm. H. Wise Company, Inc., et al. v. Federal Trade Commission.

In the United States Court of Appeals for the District of Columbia Circuit. No. 13647. Decided June 6, 1957.

On Petition to Review an Order of the Federal Trade Commission.

Federal Trade Commission Act

Unfair Practices—Use of Fictitious Trade Name in Collecting Past-Due Accounts—Misrepresenting Collection Agency as Independent Organization—Validity of FTC Order. —A Federal Trade Commission order directing two companies engaged in the mail order business to cease and desist from "using fictitiously any trade or corporate name in collecting past-due accounts," and "from implying that such fictitious collection agency is an independent organization engaged in the business of collecting past-due accounts" was affirmed.

See Unfair Practices, Vol. 2, ¶ 5085.21, 5089.15, 5167.10.

For the petitioners: Thomas B. Scott, with whom Lawrence J. Simmons was on the brief.

For the respondent: James E. Corkey, Attorney, Federal Trade Commission, with whom Robert B. Dawkins, Assistant General Counsel, Federal Trade Commission, was on the brief.

Affirming a Federal Trade Commission cease and desist order in Dkt. 6288.

Before EDGERTON, Chief Judge, and WILBUR K. MILLER and BASTIAN, Circuit Judges.

[*FTC Order Affirmed*]

PER CURIAM [*In full text*]: The Federal Trade Commission's order directs the petitioners to cease and desist from "1. Using fictitiously any trade or corporate name in collecting past-due accounts; 2. Implying that such fictitious collection agency is an independent organization engaged in the business of collecting past-due accounts." We find no error.

Affirmed.

[¶ 68,735] American Crystal Sugar Co. v. The Cuban-American Sugar Co.

In the United States District Court for the Southern District of New York. Civil No. 108-55. Filed June 6, 1957.

Clayton Antitrust Act

Acquisitions of Stock or Assets—Stock Acquisitions—Cane Sugar Refiner's Acquisition of Stock of Beet Sugar Refiner—Legality.—A holding company, which had a wholly-owned subsidiary engaged in the production of cane sugar, violated Section 7 of the Clayton Act by acquiring approximately 23 per cent of the voting stock of a refiner of beet sugar. The two refiners were in competition with each other in the sale of sugar in a ten-state area, and they constituted major competitive factors in the sale of sugar in the area. The holding company, in purchasing the stock, had the objective of bringing about a closer connection between the two refiners, it continued to hold to this objective and was in a financial position to continue buying such stock, and it continued to demand representation on the board of directors of the beet sugar refiner. Therefore, there was a reasonable probability that, unless enjoined, the holding company would continue to buy such stock with a

view to the acquisition of control of the beet sugar refiner and the eventual merger or other joint operation of the refiners, and that the effect of such joint control would be substantially to lessen competition in the sale of sugar in the ten-state area. The company did not purchase the stock solely for investment, and it was using the stock to bring about a substantial lessening of competition. The beet sugar refiner was threatened with loss or damage, and, therefore, it was entitled to injunctive relief.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4206.

Acquisitions of Stock or Assets—Stock Acquisitions—Cane Sugar Refiner's Acquisition of Stock of Beet Sugar Refiner—Line of Commerce—Section of Country—Relevant Market.—In ruling that a holding company, which had a wholly-owned subsidiary engaged in the production of cane sugar, violated Section 7 of the Clayton Act by acquiring approximately 23 per cent of the voting stock of a refiner of beet sugar, the court found that the line of commerce in which both refiners were in competition was the sale of refined sugar, that the refiners marketed substantial quantities of sugar in a ten-state area, and that this contiguous area comprised a relevant market. The relevant product was refined sugar in view of evidence that there was a high degree of interchangeability between beet and cane sugar. They were sufficiently interchangeable to be classified within the same market for the purpose of determining the competitive effects of a merger between a beet and a cane sugar refiner.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4206.

Acquisitions of Stock or Assets—Stock Acquisitions—Cane Sugar Refiner's Acquisition of Stock of Beet Sugar Refiner—Purchase for Investment.—A holding company, which had a wholly-owned subsidiary engaged in the production of cane sugar, did not purchase approximately 23 per cent of the voting stock of a beet sugar refiner solely for investment. The holding company's stock purchases were designed to facilitate a closer relationship between the two refiners, either by common control or by merger. Almost all of the securities owned by the holding company related to its sugar subsidiaries and other affiliates, the beet sugar refiner's stock enjoyed a very thin market and did not possess the liquidity desirable in an ordinary investment, and the holding company's purchases represented a majority of the stock traded on the stock exchange.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4206.250.

Acquisitions of Stock or Assets—Stock Acquisitions—Cane Sugar Refiner's Acquisition of Stock of Beet Sugar Refiner—Substantial Lessening of Competition—Reasonable Probability.—In ruling that a holding company, which had a wholly-owned subsidiary engaged in the production of cane sugar, violated Section 7 of the Clayton Act by acquiring approximately 23 per cent of the stock of a beet sugar refiner, the court found that there was a reasonable probability that the company, unless enjoined from purchasing the beet sugar refiner's stock, would continue to buy such stock with a view to the acquisition of control of the refiner and the eventual merger or other joint operation of the refiners, and that the effect of this joint control would be substantially to lessen competition in the sale of refined sugar in a ten-state area. While the stock acquisitions had not resulted in a lessening of competition, the objective of the acquisitions was to bring about a merger or a closer association between the refiners. A determination as to whether a merger would result in substantially lessening competition necessitates a consideration of not merely the competition between the two refiners, but also the competitive situation of the industry. The record in the instant case established that common control of the beet and cane sugar refiners would not only extinguish competition between them but also would lessen competition in the sale of refined sugar in the ten-state area. To the extent that a union of the refiners would produce a stronger entity, it is true that the new company would be a greater rival of other sugar refiners; however, it does not follow that competition in the industry would thereby be increased. Also, the court noted that the evidence indicated that no new sugar refiners could be anticipated in the industry, which was tending toward increased concentration with no significant countervailing pressures.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4206.140, 4206.225, 4206.275.

Acquisitions of Stock or Assets—Stock Acquisitions Under 1950 Amendments to Section 7 of Clayton Act—Test of Legality.—Under Section 7 of the Clayton Act, as amended in 1950, the test of the legality of an acquisition is whether the effect of the acquisition of the whole or any part of the stock of another corporation may be substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the country. No longer is the elimination of competition between the companies themselves the test. When the statute prohibited the acquisition of not merely the whole but also any part of the stock of another corporation, it obviously envisioned a situation where less than control of a competing corporation might be sufficient to be a violation of the section. In the instant action, a holding company, which had a wholly-owned subsidiary engaged in the production of cane sugar, acquired approximately 23 per cent of the voting stock of a beet sugar refiner; and the court noted that this is an amount of stock which in many situations would be deemed "working control." The amendments permit the courts to forestall activities in the beginning rather than waiting until events proceed to such a point that there is an actual violation of the Sherman Act. Thus, the section may be invoked when one company acquires any part of the stock of another company.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4206.140, 4206.210.

Acquisitions of Stock or Assets—Stock Acquisitions—Private Enforcement of Prohibition Against Acquisitions—Injunctive Relief—Threatened Loss or Damage—Divestiture.—Where a holding company, which had a wholly-owned subsidiary engaged in the production of cane sugar, was held to have violated Section 7 of the Clayton Act by acquiring approximately 23 per cent of the voting stock of a refiner of beet sugar, the court directed that a permanent injunction be issued enjoining the holding company from voting any shares of stock of the beet sugar refiner at any meeting of the beet sugar refiner's stockholders, from acquiring any representation on the board of directors of the refiner, and from acquiring additional stock of the refiner. The holding company was not required to divest itself of the stock in view of the fact that the issuance of the above injunction constituted an appropriate remedy so that divestiture was not necessary. The beet sugar refiner was threatened with loss or damage by reason of the holding company's unlawful acquisition of the stock. The beet sugar refiner would be subjected to antitrust actions brought by the Department of Justice; the disclosure of business plans of the beet sugar refiner to the holding company which would result if the holding company succeeded in obtaining representation on the refiner's board would be harmful, and the effectiveness of the refiner in representing the views of American beet sugar interests on a sugar council would be limited.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4208.15; Private Enforcement and Procedure, Vol. 2, ¶ 9022.50, 9024, 9026.15.

For the plaintiff: Cahill, Gordon, Reindel & Ohl (Marshall P. Madison, San Francisco, Cal.; Donald S. Graham, Denver, Colo.; and Robert G. Zeller, New York, N. Y., of counsel), New York, N. Y.

For the defendant: Appell, Austin & Gay (Cyrus Austin and Robert L. Loeb, New York, N. Y., of counsel), New York, N. Y.

For prior decisions of the U. S. District Court, Southern District of New York, see 1956 Trade Cases ¶ 68,514, 68,473, 68,417, and 68,348.

[*Acquisition—Injunction Sought*]

DAWSON, District Judge [*In full text*]: This is an action for a permanent injunction brought by the plaintiff under § 16 of the Clayton Act, 15 U. S. C. § 26, in which plaintiff alleges that it is threatened with loss or damage because of the alleged violation by defendant of § 7 of the Clayton Act (15 U. S. C. § 18) in that defendant has acquired a substantial block of stock in the plaintiff corporation.

Plaintiff asks the Court to grant an injunction whereby defendant's officers, directors and agents, and all others acting in its behalf, will be: (a) enjoined from voting shares of stock at any meeting of plaintiff's stockholders, (b) enjoined from acquiring representation on plaintiff's board

of directors, (c) enjoined from acquiring additional stock of plaintiff company and (d) required to divest themselves of plaintiff's stock in such amounts and under such terms and conditions as the Court may prescribe.

[*Preliminary Injunction*]

Immediately after filing the complaint, plaintiff moved for a preliminary injunction granting the same relief *pendente lite,* except for divesture. This motion was denied by Judge Cashin on the ground that the court was not convinced "of immediacy of harm to the plaintiff." [1956 TRADE CASES ¶ 68,473], 143 F. Supp. 100 (S. D. N. Y. 1956).

[*Issues*]

Thereafter pretrial conferences were held pursuant to Rule 16 of the Federal Rules of Civil Procedure and the issues to be tried were formulated as follows:

1. Are the parties in competition with each other in any line of commerce in any section of the country? If so, to what extent and in what section are they in competition?

2. Whether the effect of the acquisition of plaintiff's shares made by the defendant has been such as to substantially lessen competition in any line of commerce in any section of the country. Whether the effect of such acquisition or any acquisition to be made in the future may be substantially to lessen competition in any line of commerce in any section of the country.

3. If the defendant's acquisition of the plaintiff's stock is in violation of the antitrust laws, is the plaintiff threatened with loss or damage thereby?

4. Whether the defendant in purchasing the stock of the plaintiff purchased it solely for investment.

5. Whether the defendant in purchasing such stock and owning it is not using the same by voting or otherwise to bring about or attempting to bring about a substantial lessening of competition.

A trial having been held and concluded, the Court makes the following findings of fact and conclusions of law on the issues formulated in the pretrial order.

Issue I

Are the parties in competition which each other in any line of commerce in any section of the country? If so, to what extent and in what section are they in competition?

1. American Crystal Sugar Co. (hereinafter referred to as "Crystal") is a corporation organized and existing under the laws of the State of New Jersey, with its principal office in Denver, Colorado. Plaintiff's principal business is the manufacture of sugar from sugar beets and the sale of such sugar. Plaintiff owns and operates ten factories: four in Minnesota, two in California and one each in Montana, Colorado, Nebraska and Iowa. The beets processed in such factories are purchased from growers in surrounding areas under contracts giving the grower a percentage of the selling price of the sugar produced; the sales of such sugar are made in interstate commerce and principally in the midwestern and southeastern parts of the United States.

2. The Cuban-American Sugar Co. (hereinafter referred to as "Cuban-American") is a corporation organized and existing under the laws of the State of New Jersey, maintaining its principal office in New York, N. Y. It transacts business and is found within the Southern District of New York.

3. The defendant is a holding company and does not directly engage in the manufacture, sale or distribution of sugar. Defendant's wholly owned subsidiary, Colonial Sugars Company (hereinafter referred to as "Colonial") is a New Jersey corporation owning and operating a cane sugar refinery at Gramercy, Louisiana, which imports raw cane sugar from Cuba or obtains it from Puerto Rico, Hawaii, the Phillipine Islands and the State of Louisiana; and which markets the refined sugar in interstate commerce in the midwestern and southeastern parts of the United States.

4. Both plaintiff and defendant's wholly owned subsidiary, Colonial, are engaged in interstate commerce. In addition, both Crystal and Cuban-American are listed on the New York Stock Exchange.

5. The parties stipulated in the pretrial order that: "Plaintiff and defendant's wholly owned subsidiary, Colonial Sugars Company, are to some extent in competition in a line of commerce in certain parts of the country."

6. The line of commerce in which both plaintiff and Colonial are in competition is the sale of refined sugar.

7. Plaintiff and Colonial market substantial quantities of sugar in a ten state area in the neighborhood of the Mississippi River, sometimes referred to as the "River Territory." These states are Arkansas, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, Oklahoma and Wisconsin.

8. The average amount of sugar by hundredweight, and the average dollar value of sugar sold by Crystal and Colonial in the ten state area, during the years 1951 through 1956, and in the year 1956, and the percentage by physical volume of each to the total quantity of sugar sold in the area for the same period are approximately as follows:

	1951-1956		
Plaintiff	$24,000,000	2,607,000 cwt.	7.3%
Colonial	19,000,000	2,059,000 cwt.	5.9%
Total	$43,000,000	4,666,000 cwt.	13.2%

	1956		
Plaintiff	$31,000,000	3,383,000 cwt.	8.8%
Colonial	18,000,000	1,939,000 cwt.	5.0%
Total	$49,000,000	5,322,000 cwt.	13.8%

9. Crystal and Colonial in the aggregate sell more sugar than any other marketer in the River Territory except Great Western Sugar Company, a beet processor.

10. In the year 1956 Crystal and Colonial sold in the States of Illinois, Iowa and Wisconsin approximately $26,900,000 of sugar, which constituted 13.1% of the total quantity of sugar sold in those three states in that area. Over the last six years the sales of these two companies in those three states aggregated approximately $22,700,000, which constituted about 13% of the sugar sold in those three states for that period.

11. The sales of sugar sold by Crystal and Colonial in the State of Iowa during the year 1956 aggregated approximately $4,500,000, being about 22% of the total sales of sugar sold in Iowa in that year; and in the preceding five years the aggregate sales of these two companies in the State of Iowa were approximately $4,900,000, constituting about 25% of the total sales of sugar sold in Iowa in that period.

12. Sales by Crystal and Colonial to customers in the ten state area who at any time during the period 1951 to 1955, inclusive, bought from both companies, were in the dollar amounts shown below, and such sales represented the indicated percentages of the total volume of sales of each of the two companies in the ten state area. Corresponding percentages in the States of Illinois, Iowa and Wisconsin are as follows:

	10-state area dollar volume	%	Ill.	Iowa	Wis.
Crystal	$34,830,658	30	53%	45%	33%
Colonial	$34,844,264	37	45%	70%	29%

13. Crystal made no sales in Arkansas until 1954, and no sales in Indiana, except a nominal amount, until 1953. Since starting to sell in those two states Crystal has been increasing its sales so that in 1955 and 1956 Crystal's sales were:

	1955	1956
Arkansas	$290,513	$379,146
Indiana	$392,606	$264,288

14. Colonial has been seeking to increase its customers in the ten state area over and above the present level of sales; and the testimony of C. W. Briggs, Vice President and General Sales Manager of Crystal, is that Crystal and Colonial are very competitive in the States of Iowa, Wisconsin and Illinois.*

15. During the past five years Crystal has increased its percentage share of the beet sugar sold in the River Territory from 13.8% to 20.4%; and plaintiff plans to increase its production of sugar in Nebraska, Colorado and Minnesota.

16. The list price of beet sugar is normally 20¢ per cwt. less than that of cane sugar, but a change in the price of one produces a prompt and corresponding change in the list price of the other. Except in rare instances industrial users buy beet and cane sugar on the basis of price.

17. As a general rule it is the beet sugar processors who are responsible for price reductions and the cane sugar refiners follow those price reductions. Sugar prices are lowest in that portion of the United States where the largest quantities of beet sugar are sold; over the years the price of cane sugar in the ten state area has been

* "Q. Now when you say that they are very competitive in these three states what do you mean, Mr. Briggs?

"A. I mean that they are making all efforts to obtain as much of the business as they can, and so are we.

"The Court: Do you cut prices sometimes to get business away from each other?

"The Witness: Your Honor, if necessary, we do."

(R. 410)

lower than in any other parts of the country, due to the large quantity of beet sugar sold in the area.

Conclusion

18. The parties are in competition with each other in the sale of sugar in the ten state area hereinabove defined, and they constitute major competitive factors in the sale of sugar in that area.

Issue II

Whether the effect of the acquisition of plaintiff's shares made by the defendant has been such as to substantially lessen competition in any line of commerce in any section of the country. Whether the effect of such acquisition or any acquisition to be made in the future may be substantially to lessen competition in any line of commerce in any section of the country.

1. Plaintiff is a publicly held corporation with 364,017 shares of common stock and 58,969 shares of preferred stock issued and outstanding. Both classes of stock have equal voting rights and both are listed on the New York Stock Exchange.

2. The defendant decided in 1948 or 1949 to get into the domestic beet sugar industry by buying into one of the three largest beet sugar companies, either The Great Western Sugar Company, Holly Sugar Corporation, or Crystal.

3. In 1951 defendant proposed to the executives of the plaintiff that plaintiff and defendant consider the possibility of a closer connection between themselves by merger or otherwise. Nothing came of this proposal.

4. In 1953 defendant attempted to work out a merger or closer connection with Holly Sugar Corporation but because of the capital structure of Holly and the provisions of its bank loan agreement no such arrangement could be worked out.

5. In January 1955 defendant began to purchase plaintiff's stock. By the end of that year 10% of Crystal's common stock had been purchased by Cuban-American. From time to time authorizations were made by the board of directors of Cuban-American to its officers to purchase up to a total of 100,000 shares of Crystal stock. At the time of trial the defendant owned 97,100 shares of stock of the plaintiff; this is about 23% of the voting stock of the plaintiff.

6. The Chairman of the Board of the defendant said that his ultimate objective in the purchase of the stock was to have "a joint business venture" between the two companies which might be accomplished by merger or common control, or otherwise. He stated that when the defendant started buying the stock of plaintiff company he had in mind that this might be a step toward this closer connection between the two companies.

7. Up to date defendant has not secured a majority of the stock of the plaintiff company and although the defendant has demanded representation on the board of the plaintiff company this demand has been rejected. There has been insufficient evidence to establish that defendant's present ownership of Crystal stock has substantially lessened competition in any line of commerce in any section of the country. Whether the effect of any acquisition to be made in the future may be substantially to lessen competition in any line of commerce in any section of the country depends, of course, upon how successful the defendant will be in securing voting control of the plaintiff company, either alone or in conjunction with other parties, or in securing representation on the board of directors of the plaintiff company.

8. Defendant's avowed objective is to purchase additional shares of stock of the plaintiff company and to endeavor to bring about this "closer connection" between the two companies, either by merger, or common control, or otherwise.

9. Defendant is close to being the largest single stockholder of the plaintiff at the present time. As of May 16, 1957 defendant owned about 23% of the plaintiff's voting stock. Defendant's Chairman of the Board, his immediate family and other persons likely to accept his advice, own more than another 11,900 shares of Crystal stock. The other stock of the plaintiff is rather widely scattered: its Chairman of the Board, together with his family and organizations in which he has some interest or with which he is associated, owns approximately 22% of Crystal's voting stock, while all other directors own less than another 1%. There do not appear to be any other significant holdings.

10. Defendant is in a financial condition to continue buying additional shares of plaintiff's stock.

Conclusion

11. Since the defendant, in purchasing stock of the plaintiff, had the objective of bringing about a closer connection between the two companies, whether by merger or otherwise, and since it appears clear that the defendant continues to hold to this objective and is in a position to continue buying stock, and continues to demand representation on the board of directors of the plaintiff, the Court concludes that there is a reasonable probability that unless enjoined defendant will continue to buy stock in plaintiff company with a view to the acquisition of control of plaintiff and the eventual merger or other joint operation of plaintiff and defendant, and the effect of this joint control would be substantially to lessen competition in a line of commerce—the sale of refined sugar—in a ten state area hereinabove defined.

Issue III

If the defendant's acquisition of plaintiff's stock is a violation of the anti-trust laws, is plaintiff threatened with loss or damage thereby?

1. A merger or common control of the plaintiff and the defendant companies would result in the lessening of competition between them and the effect would be to lessen competition in a line of commerce in a section of the country and therefore to violate the anti-trust laws.

2. It would appear clear that if defendant's acquisition of plaintiff's stock is a violation of the antitrust laws, plaintiff would be threatened with loss or damage thereby. If the acquisition of the stock and future acquisitions of the stock resulted in a merger or joint control of the two companies, in violation of the anti-trust laws, the parties would both be subject to anti-trust actions brought by the Department of Justice. Any such actions might well result in loss and expense to the plaintiff.

3. Plaintiff is taking steps to increase the amount of business which it does in certain states in the River Territory. Disclosure of any such plans and any similar future plans to any representative of a competitor would be harmful to plaintiff; and it may be assumed that such disclosure would become inevitable if defendant succeeded in getting control of plaintiff or in obtaining representation on the board of directors of the plaintiff.

4. For over twenty years federal legislation has established a limit on the United States marketings of the domestic beet sugar industry and all other sugar suppliers in the United States. To overcome this restriction each supplier has attempted over the years to increase its quota. Similarly, a conflict has arisen between the domestic beet sugar industry and those having an interest in the Cuban sugar industry since any increase in the quota of the former must come in large part from the quota of the latter. The defendant is a member of the United States-Cuban Sugar Council which, acting in close cooperation with the Cuban government and Cuban sugar mill owners, represents the Cuban sugar viewpoint. Until recent years this Council was in sharp and active conflict with the interests of the domestic beet sugar companies with respect to amendments to the Sugar Act of 1948. If plaintiff came under control of the defendant it would tend to limit the effectiveness of the plaintiff in representing the views of the American beet sugar interests.

Conclusion

5. If the defendant's acquisition of plaintiff's stock is a violation of the anti-trust laws, plaintiff is threatened with loss or damage thereby.

Issue IV

Whether the defendant in purchasing the stock of the plaintiff purchased it solely for investment.

1. At all times since the defendant began purchasing the stock of the plaintiff company the Chairman of the Board of the defendant company, and the principal stockholder therein, has recognized that the stock purchases were designed to facilitate a closer relationship between the two companies, either by common control or by merger. Therefore the purpose in acquiring the stock has not been "solely" for investment but rather with the aim of bringing about this closer relationship between the two companies.

2. Except for its Crystal stock, almost all the securities owned by Cuban-American relate to its sugar subsidiaries and other affiliates. Further negating investment is

the fact that plaintiff's stock enjoys a very thin market and does not possess the liquidity desirable in an ordinary investment. Defendant's purchases of plaintiff's stock between the Fall of 1954 and the institution of this suit represent a majority of this stock traded in such period on the New York Stock Exchange.

Conclusion

3. The defendant in purchasing the stock of the plaintiff did not purchase it solely for investment.

Issue V

Whether the defendant in purchasing the stock of the plaintiff and owning it is not using the same, by voting or otherwise, to bring about or attempting to bring about a substantial lessening of competition.

1. Beginning in May 1955, defendant has repeatedly demanded representation on the board of directors of the plaintiff. Defendant now asserts that it is entitled to such representation by virtue of its stock holdings.

2. Defendant by means of its substantial stock holdings has succeeded in persuading officers of the plaintiff to furnish to it interim financial statements not generally made available to the public or other stockholders.

3. Defendant, at the last two annual meetings of stockholders of plaintiff, has failed to vote its shares for the election of directors on the asserted ground that it had not been consulted in connection with the make-up of the board, indicating that it expects to be consulted about the composition of the board of directors of plaintiff company. The Chairman of the board of directors of the defendant has stated to officers of the plaintiff company that when defendant increases its ownership from 100,000 to about 150,000 shares plaintiff will not have to inquire about defendant's intentions because by that time plaintiff will know those intentions; this was a statement of purpose as well as a covert threat designed to bring about an arrangement whereby the defendant would have representation on the board of directors of the plaintiff company. Any such representation would give the nominee of defendant an opportunity to be thoroughly acquainted with the business and plans of the plaintiff company and thereby to limit the effectiveness of the competition between them.

Conclusion

4. Defendant in purchasing stock of plaintiff company and owning it, is using it to bring about or attempting to bring about a substantial lessening of competition between the companies.

Opinion

[*Clayton Act, Sec. 7*]

Section 7 of the Clayton Act as originally enacted, prohibited one corporation from acquiring the stock of another corporation where the effect may be substantially to lessen the competition between them.* The Act was amended on December 29, 1950 to prohibit a corporation from acquiring directly or indirectly "the whole or any part of the stock" of another corporation "where in any line of commerce in any section of the country" the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly.**

The purpose of the amendment can be derived from the legislative history. Senate Report 1775, 81st Cong., 2d Sess. (1950), in commenting on the proposed amendment, states in part:

> "The Committee wishes to make it clear that the bill is not intended to resort to the Sherman Act test. The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding." pp. 4-5.

[*Test*]

No longer is elimination of competition between the companies themselves the test. The standard now is whether the effect of the acquisition of the whole or "any part" of the stock of another corporation may be substantially to lessen competition or tend to create a monopoly "in any line of commerce in any section of the country." Therefore, to determine whether this section has been violated the Court must determine (1) the line of commerce, (2) the section of the country, and (3) whether, in the light of all the competitive factors in that line of commerce in that section of the country,

* 38 Stat. 731 (1914).

** 15 USCA § 18 (1951).

the particular acquisition of stock may have the effect of materially lessening competition or tending to create a monopoly. In this case the line of commerce—the sale of refined sugar—has been identified; the section of the country—the ten state area—has been defined. The remaining question is whether the effect of the acquisition of stock "may be" substantially to lessen competition in that area.

[*Effect Upon Competition*]

Certainly there has been no proof that defendant's acquisition of stock has so far resulted in a lessening of competition. The defendant so far has only a minority interest in the voting stock of the plaintiff company; it has been refused the privilege of naming even one director to the Board of the plaintiff. But admittedly the purchase so far of the stock is but one step in the program of the defendant. The ultimate objective of that program, as admitted by Mr. Keiser, is to bring about a merger between the corporations or a "closer association" between them.

When the statute prohibited the acquisition of not merely "the whole" but also "any part" of the stock of a competing corporation if the effect of such acquisition "may be" substantially to lessen competition, the statute obviously envisioned a situation where less than control of a competing corporation might be sufficient to be a violation of this section. This intent was expressed in the Reports of the Committees on the Judiciary which accompanied the bill when it was before Congress:

> "Acquisitions of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize." H. R. Rep. No. 1191, 81st Congress, 1st Sess. 8 (1949).

> "The words 'may be' have been in Section 7 of the Clayton Act since 1914. The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into fullfledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraint." S. Rep. No. 1775, 81st Cong., 2d Sess. 6 (1950).

[*Legality of Merger*]

We thus come to the question whether a merger or common control of these two large units in the sugar industry would, if consummated, be violative of the anti-trust laws; and, if so, whether the acquisitions of stock which have so far taken place have been steps toward such restraints on competition.

The natural consequence of the profit motive in a competitive society is to lead businessmen to explore the possibilities for greater profits which might be derived from an amalgamation of competitive units, with an anticipated reduction of costs, and the establishment of a position of leadership and power in an industry which will be relatively unaffected by the competitive rivalry of smaller firms. Economists have recognized that the vigor of a competitive system exerts a centripetal force which tends, for reasons of self-interest of the parties involved, to bring about an amalgamation or union of the competitive units. Against this centripetal force the anti-trust laws have interposed a centrifugal force designed to keep the units separate and distinct and to halt the tendency toward amalgamation and union which otherwise might exist, and which, if allowed to run an unrestrained course, might result in a cartelized industrial organization which would be destructive to that individual enterprise which is regarded by most Americans as a touchstone of progress.*

The 1950 amendments to Section 7 of the Clayton Act permit the courts to forestall such activities *in limine* rather than waiting until events proceed to such a point that

* Compare the formulation enunciated by Judge L. Hand:

"Throughout the history of the statutes [the anti-trust laws] it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *United States v. Aluminum Co. of America* [1944-1945 TRADE CASES ¶ 57,342], 148 F. 2d 416, 429 (2d Cir. 1945).

there has been actual violation of the Sherman Act. It is because the Act was designed to reach an "incipient restraint" that it may be invoked when one company acquires "any part" of the stock of another company where the effect of such acquisition "may be" substantially to lessen competition.

[*The Industry*]

A determination as to whether the merger of one company with another would result in substantially lessening competition in a particular section necessitates a consideration not merely of the competition between the two companies, but also the competitive situation of the industry.

Production, refining and distribution are the three coordinated operations involved in the complete marketing of sugar. There are two important sources of raw sugar: one is sugar cane, the other is sugar beets. While some sugar cane is grown in the South, by far the largest amount refined in the United States is imported from producing areas outside the continental United States. Foremost is Cuba, with other contributors being Puerto Rico, Hawaii and the Philippine Islands.[1] Sugar beets, on the other hand, are produced in the West and Far West.

Refining is the operation by which raw sugar is transformed into its familiar consumable form. While the manufacture of sugar can conveniently be broken down into two steps, sugar distribution is a more complicated process. Refiners themselves do not sell directly. Instead they sell through sugar brokers as agents.

While many levels of activity in the sugar industry can be identified, the conduct of sugar refiners in selling their product is here of prime relevance. To a large extent, the history of the refining industry over the last fifty years is reflected in litigation under the anti-trust laws.[2] Throughout this period there have been strong pressures prompting attempts at stabilizing the price of refined sugar. At first the dominant units in the industry attempted to form and maintain a private hegemony.[3] This effort eventually proved to be unsuccessful and was thereafter followed by an attempt at industry self-government.[4] Superimposing a broader solution to the problems of the whole industry, Congress initiated in 1934 a program of extensive regulation.[5] This legislation culminated in the Sugar Act of 1948 which is the basic statute controlling the whole industry.[6] In broad outline it provides that (1) for each year the Secretary of Agriculture set a limit on the amount of sugar which can be marketed; (2) this estimate of total consumption requirements is then allocated by the Secretary in accordance with statutory shares among domestic and various offshore producers; (3) the Secretary also assigns a production limit to each domestic grower and refiner; (4) an excise tax is collected from sugar refiners at the rate of approximately one-half cent for every pound marketed; (5) subsidies are paid to domestic beet and cane growers from the proceeds of this excise tax.

[*Members of Industry*]

Reference to the actual structure of the refined sugar industry indicates that three firms are now pre-eminent.[7] The American Sugar Refining Co. (hereinafter referred to as "American"), National Sugar Refining Co. (hereinafter referred to as "National"), and California and Hawaiian Sugar Refining Corp. (hereinafter referred to as "C & H") have long been leaders in the refining industry. Among the others are Crystal and Colonial which, on a national basis, rank eighth and eleventh, respectively, and which, if combined, would be about the fourth ranking unit in the whole industry. To some extent concentration in the industry has resulted from recent acquisitions instead

[1] 1956 U. S. Code Cong. & Ad. News, Part 10, p. 2460 (June 20, 1956).

[2] *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895); *United States v. Kissel*, 218 U. S. 601 (1910); *United States v. American Sugar Refining Co.* (1922), cited in COMMERCE CLEARING HOUSE, THE FEDERAL ANTITRUST LAWS With Summary of CASES Instituted by the U. S., 1890-1951, p. 85 (1952); *United States v. New York Coffee and Sugar Exchange*, 263 U. S. 603 (1924); *Utah-Idaho Sugar Co. v. FTC*, 22 F. 2d 122 (8th Cir. 1927); *United States v. Great Western Sugar Co.*, 39 F. 2d 149 (D. Neb. 1929); *Sugar Institute v. United States* [1932-1939 TRADE CASES ¶ 55,107], 297 U. S. 553 (1936).

[3] See the *E. C. Knight, Kissel* and *American Sugar Refining* cases cited *supra*.

[4] *Sugar Institute v. United States, supra.*

[5] The Jones-Costigan Act, 48 Stat. 670.

[6] 7 U. S. C. A. §§ 1100-1160 (1952), as modified and extended by the Sugar Act of 1956, 7 U. S. C. A. §§ 1100-1161 (1956 Pocket Part).

[7] For statistical data concerning industry position see Appendix.

of internal growth. Thus, in 1950 American's purchases made it the majority stockholder in Spreckels Sugar Company, an important California beet processor which as an independent had ranked about tenth on a national basis. In 1956 National purchased Godchaux, a prominent Louisiana refinery ranking about twelfth nationally. These acquisitions can in part be understood as resulting from the industry-wide quota system which places a heavy emphasis on historic production. Acquisition of an existing competitor provides an enterprise with an opportunity for growth which is not possible through construction of new productive facilities. Also, to the extent that Congressional legislation indicates that beet interests will be given an increasing share of the national market, it is advantageous for a cane company to diversify and stabilize its position in the industry through affiliation with a beet refiner. These reasons, along with certain anticipated operating economies, explain the attempt to affiliate Crystal with Cuban-American.

[*Relevant Market Areas*]

If accomplished, coordination of Colonial and Crystal would be of significance in a wide area. There are several relevant arenas in which to measure the resultant effect upon competition. The largest of these is the ten state River Territory. It is here that Colonial and Crystal concentrate their principal sales efforts. The evidence establishes that this contiguous area comprises a relevant market. Geographically the Mississippi River territory is bordered by cane refineries, including Colonial, at one end, and beet refineries, including Crystal, at the other. The demand for sugar in that area constitutes a natural locus of distribution for these refineries. For, to maximize profits sellers try to make heavy sales in the high return local area surrounding their plants, where freight is only a minor factor, and then dispose of the rest of their production by penetrating into more distant territories which are often the home areas of other competitors. Within this ten state territory there are other arenas of economic significance in which the effects on competition of a merger between Crystal and Colonial are of importance. The Illinois-Wisconsin-Iowa triangle is one of these markets. These markets are not mere legal abstractions but correspond to the commercial realities of the sugar industry. For the evidence establishes that the sales activity in each justifies an evaluation of the competitive factors of the merger in terms of its repercussions in these areas. Thus it is proper to take the ten state River Territory as one geographical market because the impact of freight rates on sugar prices separates this territory from adjoining areas. It is difficult for East and West Coast plants to participate in the ten state River Territory. Low cost transportation is not generally available from these locations.

On the other hand, Central Western beet as well as Gulf Coast cane refiners sell heavily in this area. The Gulf Coast cane refiners, such as Colonial, are able to penetrate into this area through the use of low cost transportation available in the form of barge and private truck shipments. Thus the ten state River Territory, being the natural selling area of Colonial and Crystal, is a proper section in which to determine the effects of a merger of these two refiners. Similar justifications exist for evaluating a merger in terms of its effects in the Illinois-Wisconsin-Iowa territory as Crystal's activity here has its greatest impact upon competition.

The evidence establishes that a union of Crystal and Colonial would produce a combination ranking second in the ten state River Territory. Great Western, the largest beet sugar refiner, would still rank first. In the three state Iowa-Wisconsin-Illinois territory a combination of Crystal and Colonial would have about the third largest share of the market.

[*Relevant Product*]

In terms of market the relevant product is refined sugar. The evidence clearly establishes the high degree of interchangeability between beet and cane sugar. To some extent cane sugar has a higher degree of consumer acceptance. The traditionally known brands are those of the dominant cane refineries. Thus National selling under the "Jack Frost" trade-mark and American using the "Domino" brand find a high degree of consumer acceptance. Similarly, for certain cane specialties, such as brown sugar, there are no beet counterparts. However, the evidence indicates that in those areas in which a determined effort has been made to market beet sugar consumer acceptance has been forthcoming and as a result

cane has been partly displaced. The contention that cane and beet are different products rests primarily upon the historic difference in list prices. Traditionally beet lists for 20¢ per cwt. under cane. This differential originated in the infancy of beet sugar when its quality failed to match that of first-rate cane. However, at the present time there is no quality difference between the two. Certainly as far as most industrial buyers are concerned cane and beet are interchangeable and are purchased on the basis of price, with no differential being accorded to one over the other.* The evidence did indicate, however, that certain purchasers who buy for resale to consumers would specify to the broker that they wanted quotations on either beet or cane. This testimony merely reflects that both products are often stocked side by side in the same store, so that it is natural for a grocer to replenish his supply of one or the other as it is diminished. To establish that for consumer purposes cane and beet are not interchangeable, it would be necessary to show that within a given range of prices consumers would not shift from one to the other. In summary it can be concluded that cane and beet are sufficiently interchangeable to be classified within the same market for the purposes of determining the competitive effects of a merger between a beet and cane refiner.

[*Price Competition*]

In determining the effect on competition of a merger, the behavior of other competitors in the industry is of prime importance. As established at trial, the three large cane companies do not engage in active price competition. Generally they sell at a price higher than that of other cane or beet refiners and lower their price generally only in response to price reductions by those other sellers. In contrast to American, National and C & H, Crystal and Colonial, like Great Western, are hard sellers, undercutting price where necessary to get desirable business. And, in fact, they sometimes find themselves rivals for the same business. To this extent the interchangeability between cane and beet is mirrored in the rivalry between Colonial and Crystal. These two companies manifest strong expansionistic tendencies and appear to lie athwart each other to the extent that Colonial has evidenced increasing tendencies to further penetrate into Crystal's local selling area.

To gauge the economic realities it is necessary to realize that Crystal and Colonial are prime forces in the price conscious industrial sugar market. This is an arena in which the impact of the three major companies is not as great as their relative size would warrant. To the extent that American, National and C & H concentrate their efforts on consumer sales upon which their well accepted brands return larger profits they have a commensurately smaller influence on non-consumer sales. Thus, so far as industrial sales are concerned, a significant contribution to competitive conduct is made by the independent decisions of Colonial and Crystal. While neither alone can set prices, each has an incentive to engage in aggresive price activity and frequently does. Coordination of the sales activities of these two companies would reduce this incentive without producing countervailing stimuli to engage in hard competition.

[*Contention—Increased Competition*]

In urging that a merger of Crystal and Colonial would not raise a reasonable probability of a substantial lessening of competition, defendant asserts that competition will be increased because Crystal and Colonial combined will be better able to compete with American, National, C & H and Great Western. Thus it is contended that a boost to a competitor of the preeminent firms in an industry is *pro tanto* a benefit to competition. Examination of this contention reveals that the term "competition" is therein used in two different, if not in fact adverse, ways. For, to the extent that a union of Crystal and Colonial would produce a stronger entity, it is true that the new firm would be a greater rival of other sugar refiners. It does not follow, however, that competition in the industry

* Illuminating confirmation of the rivalry between cane and beet is provided by a trade publication's analysis of a reduction in sales by Godchaux, a leading cane refiner:

". . . competition from beet sugar early in the year, resulting in abandonment of the Chicago and West market to beet sugar and more intense competition among the Gulf refiners for the remaining Southern market [reduced sales]."

Farr, Manual of Sugar Companies 1955/56, p. 72 (1957), Plaintiff's Exhibit Q-3.

would thereby be increased.* "Competition" is a descriptive term indicating the extent to which certain desirable types of market behavior occur.** A union of two units of economic significance fails to give rise to a presumption that competition is thereby promoted; in the abstract such a union is inimical to independent pricing policies, price flexibility and the dispersion of market power. It is relevant to note that the legislative history of the 1950 Celler-Kefauver amendment to § 7 of the Clayton Act indicates that Congress conceived that substantial additions to concentration would be, in general, detrimental to competition.*** Certainly to the extent that a reduction in the number of significant firms in an industry reduces the incentive to reap a short term advantage by independent action, economic analysis indicates that increased concentration is detrimental to competition. In any event, that Colonial and Crystal when merged would form a stronger competitor does not by itself thereby establish that competition in the industry would be intensified.

[*"New" Competition*]

In forecasting the effect merger will have upon competition it is important to determine the opportunity for new firms to enter the industry. For if there is reasonable access to an industry amelioration of market structure conditions is possible. The evidence indicates that no new sugar refiners can be anticipated. In the last thirty years no new firms have entered the industry. Currently the quota system is a staunch barrier to new entry. Furthermore, there are positive signs of deterioration of market structure conditions. In recent years several refineries have been acquired by competitors. Thus the over-all picture is of an industry tending toward increased concentration with no significant countervailing pressures.

[*Clayton Act Violation*]

This record leads to the conclusion that common control of Colonial and Crystal would not only extinguish competition between them but also lessen competition in the sale of refined sugar in a ten state section. Thus, violation of § 7 of the Clayton Act has been established. The purchase by the defendant of Crystal stock was undertaken, as was frankly admitted by Mr. Keiser, as a step toward bringing about the common control of the two companies; and the defendant apparently still has this objective in mind. Defendant is in a financial position to continue to purchase additional shares of the plaintiff company and is today the largest single stockholder in plaintiff company. The amount of stock which it holds in plaintiff company is an amount which in many situations would be deemed "working control" and unless restrained it may be anticipated that defendant will pursue its program until it secures actual working control of the plaintiff company. The purchase by the defendant of stock of the plaintiff company was accomplished with an illegal objective in mind. The acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of § 7 of the Clayton Act, ". . . whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce . . ." *United States v. E. I. du Pont de Nemours & Co.* [1957 TRADE CASES ¶ 68,723], 25 U. S. L. Week, 4343, 4345 (U. S. June 3, 1957).

Conclusion

[*Injunction*]

The Court directs that judgment shall be entered for the plaintiff as follows:

1. Adjudging that the defendant has violated § 7 of the Clayton Act.

2. That a permanent injunction be issued enjoining defendant from directly or indirectly voting any shares of stock of the plaintiff company which it may own or control, either directly or indirectly, at any meeting of plaintiff's stockholders, and from acquiring any direct or indirect representation on the board of directors of the plaintiff, and from acquiring additional stock of plaintiff.

[*Divestiture*]

So much of the complaint as seeks a decree directing the defendant to divest it-

* *Cf. Hamilton Watch Co. v. Benrus Co.* [1953 TRADE CASES ¶ 67,485], 114 F. Supp. 307 (D. Conn. 1953), aff'd, [1953 TRADE CASES ¶ 67,517] 206 F. 2d 738 (2d Cir.) (Acquisition preliminary to merger of two leading producers prima facie violates § 7 even though other competitors are more prominent).

** See Report of the Attorney General's National Committee to Study the Antitrust Laws, pp. 325-326 (1955).

*** See H. R. Rep. No. 1191, 81st Cong., 1st Sess. 2-3 (1949); S. Rep. No. 1775, 81st Cong., 2d Sess. 3-5 (1950).

self of stock of the plaintiff company which it may now own is not granted in view of the fact that issuance of the injunction as hereinabove directed constitutes an appropriate remedy so that divesture is not necessary.*

Let appropriate decree be submitted on notice. So ordered.

Appendix

The following tabulation (plaintiff's Exhibit YY) indicates rank and order of production upon a national basis in the sugar refining industry. Both parties have accepted the ranking shown, with counsel for Cuban-American expressing the view that Sucrest Sugar should not be listed independently but rather as part of the American Molasses Company which should appear close to tenth.

To the extent that assets appear as estimates they should be disregarded as the method by which such approximations were made was not established to be of sufficient reliability to merit acceptance.

* As to the propriety of divestiture consult Van Cise, *Limitations Upon Divestiture,* 19 Geo. Wash. L. Rev. 147, 151-153 (1950); Report of The Attorney General's National Committee to Study the Antitrust Laws, 353-358 (1955).

ANNUAL PRODUCTION, RELATED DOLLAR SALES AND RELATED ASSETS OF BEET SUGAR PRODUCERS AND CANE SUGAR REFINERS

Rank	Company	Type	Production 100 Lb. Bags	Related Dollar Sales	Related Assets	Fiscal Year Ended
1.	American Sugar Refining Co.	Cane	34,434,423	$308,837,059	$160,190,564	12/13/54
	Spreckles Sugar Co.	Beet	4,701,613	43,207,823 [2]	41,177,055 [5]	'54 Est.
			39,136,036	$352,044,882	$201,367,619	
2.	National Sugar Refining Co.	Cane	15,533,140 [1]	140,714,410	40,837,922	12/31/54
	Godchaux Sugar Reserve Plant	Cane	3,686,667 [1]	33,180,003 [4]	14,000,000 [7]	'55 Est.
			19,219,807	$173,894,413	$ 54,837,922	
3.	Cal. & Hawaiian Sug. Ref. Corp.	Cane	13,832,000 [1]	124,488,000 [3]	52,533,936 [6]	12/31/55
	Plaintiff-Defendant combined		9,571,393	76,373.644	73,910.903	
4.	Great Western Sugar Co.	Beet	7,145,823	72,732,661	71,001,677	2/28/55
	Northern Ohio Sugar Co.	Beet	391,637	3,599,144 [2]	462,500 [8]	'54 Est.
			7,537,460	$ 76,331,805	$ 71,464,177	
5.	Savannah Sugar Refining Corp.	Cane	7,231,520	66,554,204	14,285,883	12/31/54
6.	Revere Sugar Refinery	Cane	6,280,507 [1]	56,524,563 [3]	23,853,366 [6]	'54 Est.
7.	Holly Sugar Corp.	Beet	6,071,608	55,540,028	41,833,901	3/31/55
	Garden City Co.	Beet	141,614	1,301,433 [2]	1,240,266 [5]	'54 Est.
			6,213,222	$ 56,841,461	$ 43,074,167	
8.	American Crystal Sugar Co.	Beet	5,841,593	42,805,444	59,745,123	3/31/55
9.	Amalgamated Sugar Co.	Beet	4,649,708	46,739,800	34,396,655	9/30/54
10.	Utah-Idaho Sugar Co. (including Gunnison)	Beet	4,011,688	36,867,413 [2]	47,281,647	2/28/55
11.	Colonial Sugar Co.	Cane	3,729,800	33,568,200 [3]	14,165,780 [6]	9/30/54
12.	Imperial Sugar Co.	Cane	3,045,071 [1]	27,405,639 [4]	11,563,561	12/31/54
13.	South Coast Corp.	Cane	2,482,140	20,822,198	11,354,055	7/31/54
14.	Sucrest Sugar Div., Am. M. Co.	Cane	2,090,277 [1]	18,812,493 [3]	7.938,872 [6]	'54 Est.
15.	J. Aron & Co.	Cane	2,090,277 [1]	18,812,493 [3]	7,938,872 [6]	'54 Est.
16.	Union Sugar Div., Cons. Foods	Beet	2,006,393	18,438,752 [2]	6,437,701	6/30/54
17.	Henderson Sugar Refinery	Cane	1,567,707 [1]	14,109,363 [3]	5,954,151 [6]	'54 Est.
18.	Michigan Sugar Co., Inc.	Beet	1,031,547	9,619,980	9,706,987	9/30/54
19.	Southdown Sugars, Inc.	Cane	768,540 [1]	6,916,860 [3]	2,918,915 [6]	2/28/55
20.	Monitor Sugar Div.	Beet	378,846	3,481,595 [2]	3,317,960 [5]	'54 Est.
21.	Buckeye Sugars, Inc.	Beet	211,200	1,940,928 [2]	1,849,704 [5]	'54 Est.
22.	Franklin County Sugar Co.	Beet	194,260	1,785,249 [2]	1,701,342 [5]	'54 Est.
23.	Layton Sugar Co.	Beet	189,062	1,737,480 [2]	1,655,818 [5]	'54 Est.
24.	Lake Shore Sugar Co.	Beet	181,350	1,666,607 [2]	1,588,276 [5]	'54 Est.
25.	Menominee Sugar Co.	Beet	113,150	1,039,849 [2]	641,278	4/30/54
26.	National Sugar Mfg. Co.	Beet	68,780	632,088 [2]	1,319,995	8/31/54

[1] Production estimated. See related report Capacity and Production, Beet Sugar Plants and Cane Sugar Refiners for details of computation.

[2] Sales estimated by applying average realization of $9.19 per hundred pound bag of refined beet sugar. See Note 9 for details of computation of this average realization.

[3] Sales estimated by applying average realization of $9.00 per hundred pound bag of refined cane sugar. See Note 9 for details of computation of this average realization.

[4] Sales estimated by applying average cane sugar refiner's asset/sales ratio of 2.37. See Note 9 for details of computation of this ratio.

[5] Assets estimated by applying average sales/asset ratio of .953 for beet sugar plants. See Note 9 for details of computation of this ratio.

[6] Assets estimated by applying average sales/asset ratio of .422 for cane sugar refiners. See Note 9 for details of computation of this ratio.

[7] Sale price of $14,000,000 used as total asset valuation.

[8] Sale price of $462,500 used as total asset valuation.

[9] Complete sales, asset and production data which were published only for the following companies:

CANE SUGAR REFINERS	Dollar Sales	Total Assets	Production 100 Lb. Bags
American Sugar Refining Co.	$308,837,059	$160,190,564	34,434,423
National Sugar Refining Co.	140,714,410	40,837,922	15,533,140
Savannah Sugar Refining Corp.	66,554,204	14,285,883	7,231,520
South Coast Corp.	20,822,198	11,354,055	2,482,140
	$536,927,871	$226,668,424	59,681,223
BEET SUGAR PRODUCERS			
Great Western Sugar Co.	$ 72,732,661	$ 71,001,677	7,145,823
Amalgamated Sugar Co.	46,739,800	34,396,655	4,649,708
Holly Sugar Co.	55,540,028	41,833,901	6,071,608
American Crystal Sugar Co.	42,805,444	59,745,123	5,841,593
Michigan Sugar Co.	9,619,980	9,706,987	1,031,547
	$227,437,913	$216,684,343	24,740,279

From the above data the following relationships were derived:

CANE SUGAR

Average Realization—100 Lb. Bag $\dfrac{\$536{,}927{,}871}{59{,}681{,}223} = \$9.00$

Asset/Sales Ratio $\dfrac{\$536{,}927{,}871}{226{,}668{,}424} = 2.37$

Sales/Asset Ratio $\dfrac{\$226{,}668{,}424}{536{,}927{,}871} = 42.2\%$

BEET SUGAR

Average Realization—100 Lb. Bag $\dfrac{\$227{,}437{,}913}{24{,}740{,}279} = \$9.19$

Asset/Sales Ratio $\dfrac{\$227{,}437{,}913}{216{,}684{,}343} = 1.05$

Sales/Asset Ratio $\dfrac{\$216{,}684{,}343}{227{,}437{,}913} = 95.3\%$

[¶ 68,736] H. W. Martens and Robert A. Maurin, Jr. v. Carl F. Barrett, B. C. Purcell and The Texas Company.

In the United States Court of Appeals for the Fifth Circuit. No. 16450. Dated June 10, 1957.

Appeals from the United States District Court for the Eastern District of Louisiana. WRIGHT, District Judge.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Who May Bring Suit—Stockholders.—The sole stockholders of a "closed" corporation which owned and operated an automobile service station could not maintain a treble damage action since they were not injured in their business or property within the meaning of Section 4 of the Clayton Act. Where the business or property allegedly interfered with by practices forbidden by the antitrust laws is that of a corporation, the corporation alone, and not its stockholders, has a right of recovery, even though in an economic sense real harm may be sustained by the stockholders. While the business had been operated by the plaintiffs as individuals prior to the incorporation of the business, the operation of the business was carried on by the corporation after its incorporation by the plaintiffs. Also, the fact that the plaintiffs made purchases in their own name did not change the situation because corporations, especially small, closely held ones, frequently find that

persons dealing with them require personal guaranties of controlling stockholders. Furthermore, the defendants were not estopped from asserting that they were dealing with a corporation.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.85.

For the appellants: Amos L. Ponder, Jr., New Orleans, La.

For the appellees: Amzy B. Steed, New York, N. Y.; Hugh M. Wilkinson, New Orleans, La.; C. Ellis Henican, New Orleans, La.; and Milton Handler, New York, N. Y.

Affirming a decision of the U. S. District Court, Eastern District of Louisiana, 1956 Trade Cases ¶ 68,483.

Before BORAH, RIVES and BROWN, Circuit Judges.

[*Stockholder's Suit Dismissed*]

BROWN, Circuit Judge [*In full text*]: Because, to the District Court, it was uncontradicted that the operation of the service station was wholly that of the incorporated company M & M Corporation, and not that of its sole stockholders who sued as individual plaintiffs, the complaint for treble damages under the Anti-trust Acts jointly against The Texas Company, the Lessor-Seller and its local consignment distributor, was dismissed on summary judgment since the plaintiffs were not injured in their business or property whatever damage might the corporation have sustained.

We agree. And so doing, this makes it unnecessary to pass upon the contentions of The Texas Company that refusal to reconduct [1] the lease of its filling station for a third year, even though motivated, as alleged, as a reprisal for the plaintiffs' objecting to stocking and selling a particular manufacturer's line of TBA (tires, batteries and accessories) could not violate the Antitrust laws since a single manufacturer is entitled to select its customers or dealers as it alone sees fit,[2] or the contrary rival claim of plaintiffs that, in its operations, the lease was but a form of restrictive dealer restraints elsewhere condemned.[3]

[*Clayton Act*]

A claim for treble damages, as in this one, originates in Section 4 of the Clayton Act, 15 USCA 15. By it, this punitive sanction in enforcement of the statutory Antitrust policy, is limited to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." A corporation is a "person," 15 USCA 12. And it is universal that where the business or property allegedly interfered with by forbidden practices is that being done and carried on by a corporation, it is that corporation alone, and not its stockholders [4] (few or many), officers, directors, creditors or licensors, who has a right of recovery, even though in an economic sense [5] real harm may well be sustained as the impact of such wrong-

[1] The lease, effective June 1, 1952, covered a service station owned by The Texas Company at 311 West Thomas Street, Hammond, Louisiana. The term was for a period of one year ending May 31, 1953, "and thereafter, from year to year, subject to termination by either party at the end of the first year or any subsequent year on ten (10) days prior written notice." Absence of such notice in May 1953 reconducted, i.e., renewed it, for another year. On May 14, 1954, The Texas Company gave the notice terminating the lease May 31, 1954.

[2] The Texas Company and its distributor press heavily our cases: *Nelson Radio & Supply Co. v. Motorola*, 5 Cir. [1952 TRADE CASES ¶ 67,386], 200 F. 2d 911, cert. den. 345 U. S. 925, 97 L. Ed. 1356; *Hudson Sales Corp. v. Waldrip*, 5 Cir. [1954 TRADE CASES ¶ 67,694], 211 F. 2d 268, cert. den. 348 U. S. 821, 99 L. Ed. 648.

[3] The plaintiffs rely on *Standard Oil of California v. United States* [1948-1949 TRADE CASES ¶ 62,432], 337 U. S. 293, 93 L. Ed. 1371; *Richfield Oil Corp. v. United States* [1952 TRADE CASES ¶ 67,262], 343 U. S. 922, 96 L. Ed. 1334; *Lorain Journal Company v. United States* [1950-1951 TRADE CASES ¶ 62,957], 342 U. S. 143, 96 L. Ed. 162.

[4] *Peter v. Western Newspaper Union*, 5 Cir. [1953 TRADE CASES ¶ 67,408], 200 F. 2d 867, 872; *Coast v. Hunt Oil Co.*, 5 Cir. [1952 TRADE CASES ¶ 67,257], 195 F. 2d 870, cert. den. 344 U. S. 836, 97 L. Ed. 651; *Productive Inventions v. Trico Products Corp.*, 2 Cir. [1955 TRADE CASES ¶ 68,104], 224 F. 2d 678, 679, cert. den., 350 U. S. 936, 100 L. Ed. 818; *Gerli v. Silk Association of America*, D. C. N. Y., 36 F. 2d 959, 960; *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, D. C. N. Y., 30 F. Supp. 389, affirmed on opinion below 2 Cir., 113 F. 2d 114.

[5] To illustrate the status of the persons, e.g., officers, directors, creditors, landlords, licensors, etc., who have no individual right of action and the types of damages sustained by them through conspiracies affecting a corporation, e.g., lost profits, impairment of stock value, loss of

ful acts bring about reduced earnings, lower salaries, bonuses, injury to general business reputation, or diminution in the value of ownership.

[*The Corporation*]

And yet, on really undisputed facts, that is what Martens and Maurin sought below. To be sure, the lease and collateral sales contract with The Texas Company was with them as individuals and contained a condition forbidding assignment without consent (but which could not be unreasonably withheld). And, for our purposes, the operations from June 1, 1952 to September 15, 1952 may even be treated initially as a partnership activity. But on that date, under specific advice of competent Louisiana counsel who cautioned them that continued operations of this filling station and another business (garment factory) just recently acquired exposed them, and their personal estates, to unlimited and possibly spectacular liabilities, they created the Louisiana Corporation, M & M Corporation.

The articles of incorporation declaring the objects and purposes for which the corporation was "organized and the nature of the business to be carried on by it" specified with precision the purpose to operate a garment factory and, here important, "to own, lease or operate a General Service Station Business * * *." And, significantly, the registered office, required by Louisiana law, was described at "311 West Thomas Street, Hammond, Louisiana" which was, of course, the service station owned by The Texas Company and leased to the plaintiffs "* * * primarily for the operation of a gasoline service station and the sale of automobile accessories * * *."

When it was set up, everything was done to put the operation under the corporation. The inventory and equipment which Martens and Maurin had acquired from the predecessor lessee of the station was transferred at the original cost (approximately $3000) and credited to Martens' capital account against his stock subscription. Subsequently each contributed further cash in payment of their outstanding stock subscriptions totaling $11,000. The books of account reflect that such capital contributions were used to purchase and pay for current inventories, supplies and equipment for the service station and to finance the accounts receivable from the station's customers. Detailed accounting records show that all income from operations comprising sales of gas, oil, lubrication, candy and drinks, accessories, grease and mechanics' labor was attributed to the corporation. And offsetting such corporate income was the cost of inventory of gas, oil, candy, lubricants and accessories sold, and operating expenses, equally detailed, comprising labor, office supplies, bad checks, cash shortage, repairs, advertising, taxes, dues, utilities, telephone, licenses, insurance, bad debts, and the like. Of acute significance was the fact that the salaries and compensation for Martens and Maurin in the actual operation and supervision of the station was likewise paid by and treated as a corporate obligation.

[*Income Tax Returns*]

And, to cap all of this, adopting a fiscal year coinciding with the lease period (June 1 to May 31), the corporation, by sworn federal income tax return for each of the two years signed by its President Maurin "under the penalties of perjury", answered the inquiry on Form 1120 "Principal business activity" as "service station" and "filling station" respectively, and then reported all of the income and expenses of the service station as that of the corporation. Included as scheduled deductions was the compensation of the officers Martens and Maurin, depreciation on equipment including that transferred at time of incorporation and, the operating expenses detailed above, comprehending such vital operational matters as bad debts and bad checks. All of this was expressly related back to June 1, 1952, so that the parties, and their corporation, treated it as a corporate activity from its inception.

Keyed to this, though filed on a calendar year basis, were the personal federal income tax returns of Martens and Maurin which reported as income to each of them the

royalties, loss of sales, reduction in percentage rent, etc., the following are a few, out of many, cases: *Harrison v. Paramount Pictures, Inc.*, D. C. Pa. [1953 TRADE CASES ¶ 67,568], 115 F. Supp. 312, affirmed per curiam 3 Cir. [1954 TRADE CASES ¶ 67,721], 211 F. 2d 405, cert. den. 348 U. S. 828, 99 L. Ed. 653; *Loeb v. Eastman Kodak Co.*, 3 Cir., 183 Fed. 704; *Walder v. Paramount Publix Corp.*, D. C. N. Y., [1955 TRADE CASES ¶ 68,097], 132 F. Supp. 912; *Melrose Realty Co. v. Loew's Inc.*, 3 Cir. [1956 TRADE CASES ¶ 68,358, ¶ 68,423], 234 F. 2d 518, cert. den. 352 U. S. 890, 1 L. Ed. 2d 85.

compensation paid, or payable, by the corporation and deducted by it as an expense. Consistent with this pattern, no partnership return of any kind was filed and in no personal return did either of them take, as deductions, any of the operating expenses, depreciation, etc., claimed by the corporation.

[*Personal Dealings*]

And if, in the face of this staggering record, there were any possibility of contrary inferences, they were categorically destroyed by the articulate, positive admissions of the parties themselves, each an officer and director, the most emphatic[6] was the president himself.

The fact that in bank accounts, insurance policies, purchase accounts or the like, the name "M & M Service Station" might have been used is of no importance and raised no questions of fact. The trade name was, first, almost identical with the corporate name. But, in any event, when in all decisive respect, such as the treatment of income, expenses, determination of profits, losses, return and payment of taxes, the business was in fact conducted as a corporate entity, inaccuracy or carelessness, inadvertent or purposeful, in the description in the name of the business would be quite immaterial. The sale and delivery of petroleum products by The Texas Company or its distributor consignee and the insistence (assumed in testing summary judgment) that, notwithstanding the intervening incorporation, purchases would have to be billed to the two as individuals who would remain personally liable for them, adds nothing. A corporation may purchase its goods direct or through an agent (Martens and Maurin). Corporations, especially small closely held ones, frequently find that persons dealing with them require personal guaranties of controlling stockholders. The important thing was—what was done with the petroleum products? The answer to that is absolute: M & M Corporation, a corporation, sold them.

[*Basis of Suit*]

That disposes also of the contention that since the lease forbade assignment without consent, and Texas Company had never given such consent, it cannot assert that the operation was by a corporation. The controversy of this lawsuit was not the property rights under the lease, or whether it could or could not be assigned, or the effect of a *de facto* assignment. The lawsuit was that in the operation of the service station practices and actions of the defendants, monopolistic in nature and in restraint of trade, wrongfully damaged the *person* operating the station. And *who* was that person—whether Martens and Maurin individually or the corporation—depended not on the technical legal right of that person to possession but on the actual *fact* of the operation which is here uncontradicted.

[*Estoppel*]

Nor can this be twisted into some sort of estoppel as claimed.[7] For if The Texas Company knew of the intervening incorporation (it denied this), it took no action which either stopped the plaintiffs' activities or led them to change positions. Whether The Texas Company did, or did not, know, or knowing did or did not object, the bald fact remains that the actual operation by M & M Corporation, as a corporation, went uninterruptedly along with neither representation, reliance nor detriment, the essention ingredients of estoppel, *Sinclair Prairie*

[6] Maurin testified on pre-trial discovery:

"Q. * * * Every cent that either you or Martens got out of that service station business in those two years went into the corporation as receipts and came out of the corporation either as salaries or additional salaries, didn't it. Answer yes or no and if you have to explain, alright. Do you understand the question?

* * *

"A. What you say is true for the simple reason it shows right here.

"Q. Alright—I just want you to admit it, that's all.

"A. I mean I can't deny it for the simple reason I filed my income tax on that basis.

"Q. And without taking you over the items, item by item, can we agree on the proposition that in both years of the operation of that service station under the Texas Company's lease, that all receipts of the station eventually went into the consolidated balance sheets of the corporation, and all withdrawals by you or Martens came out of the receipts of the corporation and were charged as corporate deductions on the tax return?

"A. It shows up that way in the final analysis.

"Q. You admit that?

"A. Yes, how could we deny it."

[7] The plaintiffs rely strongly on: *Lever Bros. Co. v. Atlas Assur. Co.*, 7 Cir., 131 F. 2d 770; *White Star S. C. Co. v. North British & Mercantile Ins. Co.*, D. C. Mich., 48 F. Supp. 808; *Daly Bros. Shoe Co. v. H. Jacob & Sons*, D. C. Pa., 49 F. Supp. 118; *Hertz v. Record Pub. Co. of Erie*, D. C. Pa., 105 F. Supp. 200, affirmed, 219 F. 2d 397, cert. den., 349 U. S. 912, 99 L. Ed. 1247.

Oil Co. v. Campbell, 5 Cir., 164 F. 2d 907; *Unterweser Reederei Aktiengesellschaft v. Potash Imp. Corp.,* 5 Cir., 36 F. 2d 869.

[*Affirmed*]

The claim of the corporation was not before the court. All that was there presented and ruled on was the claim of Martens and Maurin individually. Since it was the corporation, if anyone, who had a claim, there was on this crucial issue no dispute whatsoever on the fact and summary judgment was clearly right. *Bruce Construction Corp. v. United States for Use of Westinghouse Electric Supply,* 5 Cir., [No. 16374 dated April 12, 1957], — F. 2d —.

Affirmed.

[¶ 68,737] Sperry Rand Corporation v. Nassau Research and Development Associates, Inc., and John C. McGregor.

In the United States District Court for the Eastern District of New York. Civil Action No. 16151. Dated June 6, 1957.

Sherman Antitrust Act and Robinson-Patman Price Discrimination Act

Combinations and Conspiracies—Elements and Proof of Unlawful Conspiracy—Conspiracy Between Corporation and Its Employees—Sufficiency of Allegations.—A conspiracy under the Sherman Act was not pleaded where it was alleged that a corporation, two of its employees, and other persons not presently known conspired to control and restrict the sale of radar and microwave equipment. The corporation could not conspire with itself, and there was no allegation of a monopoly under Section 2 of the Sherman Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.400.

Combinations and Conspiracies—Refusal to Deal—Secondary Boycott—Sufficiency of Allegations.—An allegation of a counterclaim charging that a corporation (plaintiff) and others, pursuant to an illegal monopoly, threatened to withdraw the corporation's business from two of its suppliers unless they refrained from engaging in business transactions with the defendant will not be stricken. In the absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict the right of a manufacturer engaged in an entirely private business to freely exercise his own independent discretion as to the parties with whom he will deal. Since there was no factual allegation of a monopoly on the part of the plaintiff corporation, its right to continue to do business with the suppliers or to refrain therefrom was recognized by law; and its contingent exercise apparently did not constitute a Sherman Act violation. However, the defendant alleged what may be likened to a secondary boycott and, since the plaintiff corporation did possess a restricted form of monopoly (patent) which the law sanctions, it cannot be held on the basis of the pleadings that the defendant would not be able to demonstrate at trial an effort to extend that monopoly unlawfully.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.533, 2005.785.

Combinations and Conspiracies—Patents—Discrimination—Refusal to License Patents—Sufficiency of Allegations.—An allegation of a counterclaim charging that a corporation (plaintiff), together with one of its employees, in bad faith selectively discriminated against the defendant in the issuance of licenses under the corporation's patents was stricken. Assuming the allegation to mean that the defendant has unsuccessfully sought to obtain one or more patent licenses from the plaintiff corporation, the law, thus far, has not required the compulsory licensing of patents.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.630, 2013.

Price Discrimination—Sales at Unreasonably Low Prices—Submission of Bids to Federal Government—Right to Maintain Private Action Based on Violation of Section 3 of Robinson-Patman Act.—An allegation of a counterclaim charging that a corporation (plaintiff) submitted certain bids to the Signal Corps, in competition with the defendant, at prices which were less than the cost to manufacture the affected items was held not to

be insufficient as a matter of law. The plaintiff had contended that a sale to the United States Government did not fall within the scope of the Robinson-Patman Act. Also, the court cited a decision holding that a private action for treble damages can be maintained for a violation of Section 3 of the Robinson-Patman Act.

See Price Discrimination, Vol. 1, ¶ 3551; Private Enforcement and Procedure, Vol. 2, ¶ 9011.710.

Private Enforcement and Procedure—Antitrust Law Violation as Defense—Sufficiency of Pleading—Public Injury.—An allegation that a corporation and two of its employees, in carrying out a conspiracy, entered into a scheme, the intent of which was to control and unduly restrict the sale of radar and microwave equipment in its flow through interstate commerce, whereby the public interest was inevitably prejudiced was held insufficient as a pleading and therefore it was stricken as a defense. The allegation was not an adequate pleading to support testimony on the subject of public injury. In connection with an alleged breach of the antitrust laws, a general allegation, containing the conclusions of the pleader, is not sufficient. Also, it was held that the defendant failed to allege facts to relate the conduct of which it complained to the issues involved in the plaintiff's action for patent infringement

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.475, 9048.

For the plaintiff: Brumbaugh, Free, Graves & Donohue by Walter H. Free, of counsel, New York, N. Y.

For the defendants: Delavan Smith, New York, N. Y.

For a prior decision of the U. S. District Court, Eastern District of New York, see 1957 Trade Cases ¶ 68,658.

[*Counterclaim and Defense*]

BYERS, District Judge [*In full text*]: This is a plaintiff's motion to dismiss a counterclaim and strike a defense proffered as part of a second amended answer. A previous pleading of the same general character was stricken by order of Judge Rayfiel dated March 12, 1957, with leave to file a second amended answer and counterclaim, reserving to the plaintiff the right to make an appropriate motion addressed thereto. In granting the leave sought by the defendant, the judge said:

> "However, a reading of the proposed counterclaim reveals that it is so indefinite, and so utterly lacking in specificity as to be defective on its face."

The present task is to compare the two pleadings to ascertain if the defects referred to have been remedied.

[*Patent Infringement*]

The action is for alleged infringement by defendants of five listed patents said to be owned by plaintiff. An injunction is sought, damages, and attorneys' fees.

The defenses are invalidity and, seemingly, noninfringement.

[*Antitrust Counterclaim*]

The asserted counterclaim alleges violation by plaintiff of the Sherman Act, Sec. 1, the Robinson-Patman Act, Sec. 13a; and the Clayton Act, Sec. 15.

The question for decision is whether the proposed pleading now alleges facts sufficient to enable it to survive the earlier ruling.

[*Conspiracy Within Corporation*]

The paragraphs involved are:

Thirty-first and Thirty-second: As to both, the original charge is of conspiracy in violation of the Sherman Act. The alleged conspirators were said to be the plaintiff by its officers, etc., "together with other persons not presently known to the corporate defendant."

The revised designation of conspirators is of the plaintiff "together with one S. C. Yeaton and one W. G. Newman as well as with other persons not presently known to the corporate defendant."

The *Thirty-second* paragraph is changed only to add the names of Yeaton and Newman; the activities of plaintiff and the persons named with others are said to comprise a plan to control and restrict the sale of

radar and microwave equipment, to the prejudice of the public.

The insertion of the names of the two individuals might be thought to introduce a hitherto missing element in the proposed pleading, except for the conceded fact that they are employees of the plaintiff. It is true that they are not so designated in the proposed pleading, but are thus described in the defendants' brief on this motion (p. 2):

> "At this point, Sperry, (plaintiff) submitting to certain schemes of its employees, Yeaton & (sic) Newman, directed attempts to crush the new company (the corporate defendant)."

The question then is whether a conspiracy under the Sherman Act is pleaded; that is, whether Sperry could have conspired with itself.

The answer is necessarily in the negative. See *Nelson etc. v. Motorola, etc.* [1952 TRADE CASES ¶ 67,386], 200 Fed. (2d) 911; *Cott etc. v. Canada Dry etc.* [1956 TRADE CASES ¶ 68,531], 146 Fed. Supp. 300.

In the latter case, as in this, there is no allegation of a monopoly under Sec. 2 of the Sherman Act. As to this paragraph, the motion is granted.

[*Refusal to Deal*]

Thirty-third: This paragraph has been recast so as to allege five instead of two forms of oppression on the part of the plaintiff. The original subd. (a) alleged that the plaintiff had exercised coercion upon its customers to force them from doing business with the defendant. The new subdivision has to do with Peerless Instrument Co. and Adolf Fischer said to have been in January, 1953 "substantial suppliers and sub-contractors of the plaintiff." (It is assumed that they were purchasers of plaintiff's products.)

That the former had "agreed to give financial and manufacturing assistance and orders for material to the defendant or defendant's successor." That "pursuant to the illegal monopoly, hereinbefore set forth, (as stated there is no allegation of monopoly), S. C. Yeaton, W. G. Newman and others, in concert with plaintiff, threatened to withdraw the business of plaintiff from the aforesaid Peerless Instrument Co. and Adolf Fischer unless the latter refrained from engaging in business transactions with the defendant or defendant's successor."

The added subd. (d) is that as a result the named enterprises "were restrained from doing business with the defendant and defendant's successor."

The foregoing is specific enough to avoid the criticism of the original pleading as quoted above. Whether it states a valid claim for relief remains to be considered.

The plaintiff is entitled to pick and choose its customers, not being a public service corporation. See *Federal Trade Commission v. Raymond, etc., Co.*, 263 U. S. 565.

The court there says that no elements of monopoly or oppression were revealed in the record before it, and that (p. 573): "It is the right, 'long recognized,' of a trader engaged in an entirely private business, 'freely to exercise his own independent discretion as to parties with whom he will deal'" (citing many cases). The only statute there involved was the Trade Commission Act of September 26, 1914, 15 U. S. C. § 41.

The subject was more recently discussed in *Lorain Journal v. U. S.* [1950-1951 TRADE CASES ¶ 62,957], 342 U. S. 143, a Sherman Act case in which a newspaper publisher was enjoined from conduct found to be intended to monopolize interstate commerce, by forcing its advertisers to boycott a competing radio station.

The opinion discusses the publisher's argument that it was entitled to refuse to accept advertising from anyone. The court recognizes the right, but says that the latter is a qualified one, not absolute or exempt from regulation (p. 155).

> "Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act. * * * '*In the absence of any purpose to create or maintain a monopoly,* the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal'" (citing cases).

Since there is no factual allegation of a commercial monopoly on the part of Sperry, its right to continue to do business with Peerless or Fischer, or to refrain therefrom, is recognized by the law; and its contingent exercise seems not to have been held to constitute a violation of the Sherman Act.

Since however this motion is addressed to a pleading, and can in no wise involve conjectures as to what the proof at trial might or might not disclose, it seems proper to point out that the exercise of the right for which plaintiff contends, does not furnish an automatic answer to the present problem.

The defendant alleges what may be likened to a secondary boycott, the oppressive nature of which does not find ready tolerance in equity. Since the plaintiff does possess that restricted form of monopoly which the law sanctions, it cannot be now held that the defendant would not be able to demonstrate at the trial the kind of an effort to extend that monopoly which the admonition quoted from the *Lorain* case would quicken into action. It is understood of course that the monopoly there discussed was not one resting in the grant of letters patent. Perhaps the distinction renders the *Lorain* decision entirely remote in the legal sense, from this controversy.

I am unwilling however to decide that question on a motion addressed to the pleadings. Its ultimate disposition can wait upon whatever the evidence discloses at the trial.

As to subds. (a) to (d) inclusive of this paragraph of the counterclaim, the motion is denied.

[*Patent Licensing*]

Subd. (e) is new. It alleges that "Plaintiff, together with S. C. Yeaton, have in bad faith selectively discriminated against the corporate defendant in the issue of licenses or agreements for licenses under United States Letters Patent under their control or ownership."

This is assumed to mean that the defendants have unsuccessfully sought to obtain one or more patent licenses from the plaintiff. Thus far the law has not declared for compulsory licensing; nor does the defendants' brief argue to the contrary. See *Hartford v. U. S.* [1944-1945 TRADE CASES ¶ 57,319], 323 U. S. 386 at 432.

[*Discrimination*]

As to subd. (e) the motion is granted.

Thirty-fourth: This paragraph is a repetition of the earlier one bearing the same number. It invokes the Robinson-Patman Act, §§ 13a and 15, but without factual allegations. It is obviously deficient, and the motion is granted.

[*Unreasonably Low Prices*]

Thirty-fifth: This is a new paragraph and purports to supply facts, i.e., that in May, 1954 the plaintiff submitted certain bids to the Signal Corps (U. S. Army?) in competition with the defendant, at less than the cost to manufacture the affected items, in bad faith and "to lessen and diminish competition."

Seemingly the defendants rely upon that portion of Section 13a which reads in part:

> "It shall be unlawful for any person engaged in commerce, * * * to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

[*Sale to Government*]

The plaintiff urges that a sale to the United States Government does not fall within the scope of the Robinson-Patman Act, but cites no cases in which it has been held that sales to the Government fall outside the above quoted provision; and the contrary to that position seems to be stated in *A. J. Goodman etc. v. United Lacquer, etc.* [1948-1949 TRADE CASES ¶ 62,355], 81 Fed. Supp. 890, from which the following quotation on page 893 is pertinent:

> "The complaint sets forth sufficient facts to show that plaintiff and defendant were competitors, since they were rivals for the business of selling lacquer to the State of New Hampshire. It describes the basic facts of an alleged course of conduct by defendant which might on further proof justify a finding that defendant acted for the purpose of eliminating plaintiff as a competitor. Nor can I hold, in the absence of further evidence, that the price of $1.75 was not unreasonably low. Consequently, I hold that on this point, the complaint properly alleges a violation of Sec. 13a."

A recent discussion of this statute will be found in *Moore v. Mead's etc.* [1954 TRADE CASES ¶ 67,906], 348 U. S. 115. This was a case in which the defendant was charged with having cut prices in intrastate transactions and driving competition out of business, and the court discusses the different

prices quoted by the defendant in its intra as distinguished from its interstate business. In reversing a decree for the respondent, the court uses this language at page 120:

"It is, we think, clear that Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business, outlawing the price cutting employed by respondent."

[*Right To Sue*]

As to the right of a private litigant to recover damages under the quoted section, see *Vance v. Safeway Stores, etc.* [1956 TRADE CASES ¶ 68,538], 239 Fed. (2) 144 at 146.

Without unnecessarily prolonging this opinion, it will suffice to state that the defendants' amended pleading as to these challenged paragraphs cannot be held to be deficient as a matter of law, and consequently as to them the motion to dismiss as a counterclaim will be denied.

Thus far the effort has been made to deal with the proposed counterclaim as distinguished from the office of the pleading to set up defenses.

[*Public Injury*]

In that aspect of the proposed pleading, it is deficient in the following respects:

As to paragraph *Thirty-second,* the allegation is that the plaintiff and Yeaton and Newman "in the carrying out of the said conspiracy, have entered into a scheme or plan, the intent, tendency and inherent nature of which is to control and unduly restrict the sale of radar and microwave equipment in its flow through interstate commerce whereby the public interest is inevitably prejudiced."

The foregoing is not an adequate pleading to support testimony on the subject of public injury concerning which, in connection with an alleged breach of the antitrust laws, a general allegation is not sufficient. *Cf. Wilder etc. v. Corn Products Co.,* 236 U. S. 165. That case holds that a pleading must allege facts which the above paragraph completely fails to do.

See also, *Kinnear-Weed etc. v. Humble Oil etc.* [1954 TRADE CASES ¶ 67,822], 214 Fed. (2) 891. That case states that a conclusion of the pleader is not sufficient in such matters.

The defendants rely upon certain language appearing in the opinion in *Georgia-Pacific etc. v. United States Plywood etc.,* 139 Fed. Supp. 234. In that case an amendment was permitted of the same general nature, although stated in general language amounting to a conclusion; it was said that details might be secured by interrogatories and pre-trial discovery.

That view seems to be at variance with a decision rendered in the same court, *Baim & Blank etc. v. Warren-Connelly etc.* [1956 TRADE CASES ¶ 68,285], 19 F. R. D. 108, in which Judge Dawson states views on page 109 to which I entirely subscribe. See also, *National etc. v. International General Electric etc.,* 15 F. R. D. 379.

The general subject of the essential allegations in such a pleading, was treated in the case of *Glen Coal Company v. Dickinson Fuel Co.,* 72 Fed. (2) 885.

Tested by the foregoing, paragraph *Thirty-second* as proposed is insufficient as a pleading, and therefore the motion to strike it as a defense is granted.

Having in mind that the plaintiff has brought this cause for patent infringement, it is further to be observed that the proposed pleading fails to allege facts to relate the conduct of which the defendants complain, to the issues appropriate to an infringement suit. This subject was clearly expounded in *Radio Corporation v. Hygrade Sylvania Corp.* [1932-1939 TRADE CASES ¶ 55,062], 10 Fed. Supp. 879.

The plaintiff calls attention to the extent to which this subject has received attention at the hands of the Department of Justice as shown in the "Report of the Attorney General's National Committee to Study the Anti-Trust Laws," (March 31, 1955), to which reference is hereby made.

[*Summary*]

It results from the foregoing that the plaintiff's motion with respect to the second amended answer and counterclaim, is granted, in that paragraphs *Twenty-seventh to Thirty-seventh,* inclusive, are stricken as a separate and distinct defense; paragraphs *Thirty-third* and *Thirty-fifth* will not be stricken as counterclaims; in all other respects, the plaintiff's motion is granted.

Settle order.

[¶ 68,738] Casco Products Corporation v. Hess Brothers, Inc.

In the Superior Court of Pennsylvania. October Term, 1957. No. 79. Filed June 11, 1957.

Appeal from Decree of Court of Common Pleas of Lehigh County, at No. 10, June Term 1955. KOCH, Judge.

Pennsylvania Fair Trade Act

Fair Trade—Enforcement of Fair Trade Prices—Violation of Injunction—Amount of Fine—Defense of Non-Enforcement of Fair Trade Prices.—A decree imposing a $500 fine on a retailer which was found guilty of contempt of court for violating an injunction prohibiting it from selling or advertising a fair trader's products below their established fair trade prices was modified to the extent that it imposed a fine in excess of $100. The contempt was an indirect criminal contempt and not a civil contempt; therefore, under the laws of Pennsylvania, only a fine not exceeding $100 could be imposed. However, the lower court did not err in refusing to allow the retailer to introduce in evidence the defense that the fair trader was not enforcing its prices against the competitors of the retailer. The fact that the fair trader may not have been enforcing its prices with respect to other retailers would not constitute a defense to an indirect criminal contempt proceeding.

See Fair Trade, Vol. 1, ¶ 3380.40.

For the appellant: Orrin E. Boyle, Allentown, Pa.

For the appellee: Robert B. Doll and W. Hamlin Neely, Allentown, Pa.

Affirming, as modified a decree of the Pennsylvania Court of Common Pleas, Lehigh County, 1956 Trade Cases ¶ 68,466.

Opinion

[*Violation of Fair Trade Injunction*]

RHODES, Presiding Judge. [*In full text*]: This is a contempt proceeding. Defendant, Hess Brothers, Inc., was adjudged guilty of a civil contempt by the Court of Common Pleas of Lehigh County, sitting in equity, for violation of an injunction prohibiting the sale of products of plaintiff, Casco Products Corporation, at prices less than the minimum retail prices stipulated in plaintiff's contracts. Defendant admits that it violated the injunction; but it complains that the fine imposed is excessive, and that the court below erred in refusing to allow the introduction of certain evidence as a defense.

A complaint in equity was filed by plaintiff on August 24, 1955, in which it was alleged that defendant was offering for sale and selling at resale plaintiff's trade-marked "Casco steam irons," at less than the price stipulated by plaintiff in its fair trade contracts and price lists, in violation of the Pennsylvania Fair Trade Act of June 5, 1935, P. L. 266, §§ 1, 2, as amended by the Act of June 12, 1941, P. L. 128, No. 66, § 1, 73 PS §§ 7, 8. Defendant made no answer to the complaint; on September 12, 1955, a consent decree was entered. Defendant was permanently enjoined from offering for sale or selling any irons bearing plaintiff's trade-mark, brand, or name "Casco" at prices less than those stipulated for the same in plaintiff's fair trade contracts and price lists supplemental thereto. Defendant was permitted to close out its existing stock of "Casco" products at less than the stipulated prices; the decree further provided that the injunction was to remain in effect against defendant unless amended or vacated.

On May 3, 1956, plaintiff filed a petition alleging that defendant had violated the consent decree; a rule was granted upon defendant to show cause why it should not be held in contempt of court. Defendant, in an answer, admitted the sale of plaintiff's product in violation of the consent decree, but advanced the defense that its action was justified because plaintiff was not enforcing its fair trade prices against defendant's competitors in the same trading area. At the hearing the court below refused to admit evidence of the purported defense. Thereafter the court filed its opinion in which it made the following finding of fact:

"2. That on May 10, 1956, the defendant advertised in its public display windows signs which contained this phraseology: 'Casco Steam Irons. This is what the manufacturer says we must sell them for:

$15.95. Which would you rather pay? We may go to jail—but while they last Hess's price is $10.00.' "

The court also found that on April 5, 1956, defendant had sold a Casco iron for $10.30, including tax, and that this iron was not one of the close-out items specifically excluded from the operation of the original injunction. Defendant was adjudged guilty of a civil contempt and fined $500. There was no provision whereby defendant could purge itself of the contempt.

[*Contentions on Appeal*]

Defendant's contentions on this appeal are that the contempt is an indirect criminal contempt within the scope of the Act of June 23, 1931, P. L. 925, § 1, 17 PS § 2047, and that the fine imposed exceeds the maximum of $100 fixed by section 2 of the Act, 17 PS § 2048. An unusual aspect of the matter before us is that plaintiff agrees with defendant that the contempt with which the latter is charged is an indirect criminal contempt. However, it is plaintiff's position that the Act of 1931, 17 PS § 2047, is not applicable to this case because defendant is a corporation and not a natural person.

[*Types of Contempt*]

There are three types of contempt: (1) Direct criminal contempt, (2) indirect criminal contempt, and (3) civil contempt. They differ with respect to their nature, the procedure to be followed, and the penalty which may be imposed. Direct criminal contempt is readily recognized because it occurs in the presence of the court or so near thereto as to interfere with its immediate business; and punishment may be summarily imposed. See Act of June 16, 1836, P. L. 784, §§ 23, 24, 17 PS §§ 2041, 2042. Indirect criminal contempt (Act of June 23, 1931, P. L. 925, §§ 1, 2, 17 PS §§ 2047, 2048) and civil contempt, however, are often difficult to distinguish. The misconduct giving rise to both occurs elsewhere than in the presence of the court, and consists of the violation of an order or decree of the court. For example, the violation of an injunction has been held to be a civil contempt (*Knaus v. Knaus,* 387 Pa. 370, 378, 127 A. 2d 669) and an indirect criminal contempt (*Milk Control Commission v. McAllister Dairy Farms, Inc.,* 384 Pa. 459, 121 A. 2d 144). Whether the violation is a civil contempt or a criminal contempt depends upon the essential purpose of the proceeding. "The dominant purpose of a contempt proceeding determines whether it is civil or criminal. If the dominant purpose is to vindicate the dignity and authority of the court and to protect the interest of the general public, it is a proceeding for criminal contempt. But where the act of contempt complained of is the refusal to do or refrain from doing some act ordered or prohibited primarily for the benefit of a private party, proceedings to enforce compliance with the decree of the court are civil in nature. The purpose of a civil contempt proceeding is remedial, and judicial sanctions are employed (1) to coerce the defendant into compliance with the court's order, and (2) in some instances to compensate the complainant for losses sustained: *United States v. United Mine Workers of America,* 330 U. S. 258, 303 [67 S. Ct. 677, 91 L. Ed. 884]. A judgment in a civil contempt proceeding for the benefit of a private plaintiff will, of course, incidentally vindicate the authority of the court just as on the other hand a criminal contempt judgment, which is punitive, may often advance private interests. But the test is the dominant purpose, not the incidental result: *Gompers v. Bucks Stove & Range Company,* 221 U. S. 418, 441 [31 S. Ct. 492, 55 L. Ed. 797]." *Knaus v. Knaus, supra,* 387 Pa. 370, 376, 127 A. 2d 669, 672.

An examination of the instant proceeding before the court below clearly indicates that the contempt was an indirect criminal contempt and not a civil contempt. The sole purpose of the proceeding was to vindicate the authority of the court; there was neither a compensatory order nor a condition provided by which defendant could purge itself of the contempt to the benefit of plaintiff.

> "The primary objective or purpose of punishment for civil contempt is to coerce the defendant into compliance with the decree of the court and thereby provide the remedy ordered for the benefit of the plaintiff. Every order which imposes punishment for civil contempt should state the condition which upon fulfilment will result in the release of the defendant or the remission of the fine."

Knaus v. Knaus, supra, 387 Pa. 370, 379, 127 A. 2d 669, 673. The Fair Trade Act of 1935, as amended by the Act of 1941, 73 PS § 7, which was the basis of the violated injunction, has as its purpose the protection of the public as well as the producer of a trade-marked product. *Bristol-Myers Com-*

pany v. Lit Brothers, Inc. [1932-1939 TRADE CASES ¶ 55,227], 336 Pa. 81, 85, 6 A. 2d 843. While this public interest was not stressed by the court below, its presence cannot be ignored. Aside from this consideration it is apparent that throughout its opinion the court below has indicated that it was acting primarily to defend and assert its lawful authority and to impose a penalty for the violation.[1] There is no indication that the proceeding was essentially remedial for plaintiff. While it may incidentally follow that defendant will comply with the injunction to plaintiff's benefit, the dominant purpose of the contempt decree in this instance is punitive. The court below noted the defiant advertisement of defendant in disregarding the decree.[2]

[*Excessiveness of Fine*]

As this is an indirect criminal contempt proceeding for violation of an injunction, the question arises whether the fine imposed is excessive. The Act of June 23, 1931, P. L. 925, § 2, 17 PS § 2048, provides a fine in such instances "not exceeding one hundred dollars." Plaintiff argues that this limitation is not applicable because the Act by its terms is operative only where a "person" is charged with the contempt. The Statutory Construction Act of May 28, 1937, P. L. 1019, § 101, as amended, 46 PS § 601, provides: ". . . unless the context clearly indicates otherwise," . . . (84) 'Person,' includes a corporation, partnership and association, as well as a natural person." The definition found in the Statutory Construction Act cannot directly control the issue here, as section 101, 46 PS § 601, specifically provides that it is applicable only to legislation "hereafter enacted." However, it is declaratory of the interpretation given to the word "person" prior to its enactment. The word "person," as a general rule, is held to include corporations. 32 Words and Phrases, Person, p. 335. In *Bushel v. The Commonwealth Insurance Company*, 15 S. & R. 173, 177, our Supreme Court said: "When the word *person* is used in a statute, corporations as well as individuals are included." This is not without exception. "The word 'person,' when used in a statute, is ordinarily sufficiently comprehensive to include corporations, but in revenue acts they are not to be included unless such intent is clearly indicated." *Lehigh & Wilkes-Barre Coal Co. v. Riley*, 297 Pa. 522, 524, 147 A. 605, 606. See, also, *Com. v. Bailey, Banks & Biddle Company*, 20 Pa. Superior Ct. 210, 216; *Appeal of Fox*, 112 Pa. Superior Ct. 337, 350, 4 A. 149. We are of the opinion that the Act of 1931, 17 PS § 2047, is applicable to corporations as well as natural persons. It is comprehensive legislation on the subject of indirect criminal contempt for violation of an injunction or restraining order, and it does not appear from the context that the Legislature intended to exclude corporations.[3] See *Penn Anthracite Mining Co. v. Anthracite Miners of Pennsylvania*, 318 Pa. 401, 409, 411, 178 A. 291. The fine of $500 for the single act of contempt found by the court below is therefore excessive. Plaintiff cites *Milk Control Commission v. McAllister Dairy Farms, Inc., supra*, 384 Pa. 459, 121 A. 2d 144, as indicating the inapplicability of the limitation of the Act of 1931 to corporate defendants. That case neither holds nor infers the proposition advanced. There a corporate defendant was adjudged guilty of indirect criminal contempt for violation of an injunction; and apparently a fine of $2,000 was imposed by the court and affirmed by the Supreme Court. However, the possible excessiveness of the fine was not an issue in the case; and it further appears that there were a number of violations each of which would be a contempt and thus the basis for a separate fine. See *Milk Control Commission v. McAllister Dairy Farms, Inc., supra*, 384 Pa. 459, 462, 121 A. 2d 144. In the instant case only one violation is involved.

[1] For example, the court below states: "The defendant is asking this Court to overlook the purpose of a contempt proceeding. It is not fundamentally an issue between the plaintiff and defendant but its purpose is to vindicate the authority of the Court."

[2] As to this the court below said: "It is difficult to comprehend a more obvious flouting of an order of court and we can only conclude that this was a deliberate design to challenge the authority of this Court."

[3] Section 2 of the Act of June 23, 1931, P. L. 925, 17 PS § 2048, provides: "Punishment for a contempt specified in section one may be by fine not exceeding one hundred dollars, or by imprisonment not exceeding fifteen days in the jail of the county where the court is sitting, or both, in the discretion of the court."

"However, the fact that the penalty provided for the violation of a statute is a fine or imprisonment, or both, in the discretion of the court, does not render it inapplicable to a corporation, and the same rule applies where the statute creating the offense provides for imprisonment if the fine imposed is not paid." 13 Am. Jur., Corporations, § 1137, p. 1061. See *United States v. Union Supply Co.*, 215 U. S. 50, 30 S. Ct. 15, 54 L. Ed. 87, 88; and Annotation, 33 A. L. R. 1211.

[*Defense*]

Defendant's other contention is that the court erred in refusing to allow it to place in evidence the defense that plaintiff was not enforcing its fair trade prices against defendant's competitors. We cannot agree that this was error. The fact that plaintiff may not have been enforcing its fair trade prices with respect to other retailers would be no defense to this indirect criminal contempt proceeding.[4] The contempt was deliberate and obvious as defendant's advertising establishes; and the purpose of the present proceeding was punitive. If this had been a civil contempt proceeding for the primary benefit of plaintiff, it might have been proper to introduce this evidence in defense. See Act of June 5, 1935, P. L. 266, § 2, as amended, 73 PS § 8. But it is unrelated to the criminal contempt. Moreover, the injunction which was violated provided that it was to remain in effect until modified or vacated. When defendant became aware of facts indicating that competitors were continuing to sell plaintiff's products below the fair trade prices, defendant wrote to plaintiff stating that, unless plaintiff actively enforced the prices with uniformity, defendant would petition the court for vacation of the decree. Defendant eventually took such action. It is obvious that defendant clearly understood the injunction and its significance as well as the proper and available legal remedies for relief, which it failed to pursue in a timely manner. The violation is clear beyond a reasonable doubt. The fine is excessive although the conviction is proper.

[*Decree Modified*]

The decree of the court below is modified to the extent that it imposes a fine in excess of $100; as modified it is affirmed. Each party shall pay its own costs.

[¶ 68,739] National Casualty Company v. Federal Trade Commission.

In the United States Court of Appeals for the Sixth Circuit. No. 12944. Filed June 6, 1957.

Petition to Review an Order of the Federal Trade Commission.

Federal Trade Commission and McCarran-Ferguson Acts

Unfair Practices—False Advertising of Insurance—Jurisdiction of Federal Trade Commission To Regulate Insurance Advertising—McCarran-Ferguson Act.—The Federal Trade Commission did not have jurisdiction to regulate the advertising practices of an insurance company in those states where the advertising of insurance was regulated by state law. Under the McCarran-Ferguson Act, jurisdiction over the business of insurance was granted to the Federal Trade Commission after June 30, 1948, only where the business was not regulated by state law. It was the purpose of the McCarran-Ferguson Act to deprive federal agencies of their newly acquired jurisdiction over the business of insurance in order to restore such jurisdiction to the states if they elected to assume such jurisdiction. A Federal Trade Commission cease and desist order, based on its ruling that it had full jurisdiction over the interstate sale of insurance by means of unfair and deceptive advertising practices, irrespective of whether a state had adopted a local law regulating such practices within its boundaries, was set aside and the case was remanded to the Commission for further proceedings.

See Unfair Practices, Vol. 2, ¶ 5081.362, 5201, 5201.171, 5201.317, 5201.581, 5301.

For the petitioner: John F. Langs, Detroit, Mich. (Langs, Mollyneaux & Armstrong, by John F. Langs, on the brief).

For the respondent: Robert B. Dawkins, Washington, D. C. (Earl W. Kintner, General Counsel, Robert B. Dawkins, Asst. General Counsel, and J. B. Truly, Attorney, Washington, D. C., on the brief).

On brief *Amici Curiae:* Covington & Burling for Life Insurance Assn. of America and American Life Convention; Thomas M. Kavanagh, Stanton S. Faville, and Edmund E. Shepherd for State of Michigan; Latham Castle and Wm. C. Wines for State of Illinois; M. L. Landis for American Mutual Alliance; Simpson Thacher & Bartlett for Health Inc.

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[4] *Cf. Bulova Watch Co., Inc., v. Hess Brothers, Inc.* [1956 TRADE CASES ¶ 68,571], Court of Common Pleas of Lehigh County, No. 16, January Term, 1955, opinion by President Judge Henninger, filed November 19, 1956, 27 Lehigh Law Journal 217.

Assn. of America; John J. O'Connell and John W. Riley for State of Washington; Bruce Bennett for State of Arkansas; Will Wilson and Will D. Davis for State of Texas; J. M. Ferguson and Earle V. Powell for Commonwealth of Kentucky; Edmund G. Brown and Harold B. Haas for State of California; Edwin K. Steers and Jas. C. Jay for State of Indiana; and John Anderson, Jr., and Charles C. McCarter for State of Kansas.

Setting aside a Federal Trade Commission cease and desist order in Dkt. 6311.

Before: SIMONS, Chief Judge, ALLEN and MILLER, Circuit Judges.

[*Appeal*]

MILLER, Circuit Judge. [*In full text*]: The petitioner seeks a review of an order of the Federal Trade Commission requiring the petitioner to cease and desist from engaging in acts and practices in the conduct of its insurance business found by the Commission to be unfair and deceptive, in violation of the Federal Trade Commission Act, as amended. Sect. 45(a)(1)(6) and (c), Title 15, U. S. Code.

[*FTC Proceeding*]

The complaint filed by the Commission alleged that the petitioner in the course of its interstate business of selling accident and health insurance and for the purpose of inducing purchases of such insurance policies, was making statements and representations concerning the benefits of said policies of insurance which were false and deceptive, were to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act. Petitioner by its answer admitted that it had advertised its accident and health insurance policies as charged in the complaint, but denied that its advertising was false or misleading, or was to the prejudice and injury of the public, or that it had violated the Federal Trade Commission Act. The petitioner affirmatively alleged that the Commission was without jurisdiction over its interstate insurance business because of state statutes regulating unfair and deceptive acts or practices within the respective boundaries of the states, within the scope and meaning of the McCarran Act, Sections 1011-1015, Title 15, U. S. Code.

At the hearings which followed, the facts were shown to be as follows. Petitioner is a stock company incorporated under the laws of Michigan for the purpose of selling accident, health and all types of casualty insurance, with its principal office in Detroit, Michigan. It is licensed to sell such policies in all states of the United States, the District of Columbia and Hawaii, through resident agents located therein. It sells its insurance policies by solicitation from 350 to 400 direct, but independent, insurance agents throughout the nation, who operate under contract on commission only. Petitioner prepares and sends to these agents direct-mailing cards, advertising material and applications. The agents mail locally or distribute personally this material to likely prospects, secure leads thereby and then call and personally solicit the prospect. A small percent of direct mail advertising is sent by petitioner from its offices in Detroit to the public. 80% or more of petitioners' accident and health policies are issued by it from its home office after receipt, checking and consideration by it of the prospect's signed application which has been secured by the agent. Any policy issued by petitioner is forwarded to the agent for delivery to the insured. Premium notice forms are printed by the petitioner and furnished to the agents who mail them out locally. Premium collection is the agent's responsibility, only 5% or less being remitted directly to the petitioner in cases of unusual or temporary situations.

The Hearing Examiner held that four of the five categories of advertising set forth in the complaint were unfair and deceptive as alleged. He held that the Commission's overall interstate jurisdiction was limited to the four states and the District of Columbia which had no statute regulating unfair or deceptive acts or practices in the business of insurance within their respective boundaries. He also held that the Commission had jurisdiction in all states over the advertising practices of petitioner to the extent that its deceptive advertising material was disseminated by the petitioner by the use of the United States mails. He issued a Cease and Desist order to that effect.

Upon appeal, the Commission reversed the Examiner in part, holding by a three-to-two decision that it had full jurisdiction over the interstate sale of insurance by means of unfair and deceptive advertising practices, irrespective of whether the state had adopted a local law regulating such practices within its boundaries. Since, in our opinion, this case will be disposed of on the jurisdictional issue, it is unnecessary to discuss petitioner's contentions that its advertising was not false or misleading and that the proceeding and

the issuance of a Cease and Desist order did not serve any public interest. The jurisdictional question involves the construction and application of the McCarran Act referred to above.

[*McCarran Act*]

The background giving rise to the McCarran Act is important.

In 1869, the Supreme Court upheld the validity of a Virginia statute which regulated foreign insurance companies, on the ground that the statute did not offend the Commerce Clause of the U. S. Constitution because "issuing a policy of insurance is not a transaction of commerce." *Paul v. Virginia,* 8 Wall. 168, 183. Thereafter, in similar cases, the Supreme Court consistently ruled that the business of insurance was not commerce. In *New York Life Insurance Company v. Deer Lodge County,* 231 U. S. 495, 503-504, 510, the Supreme Court, as late as 1913, held to this view, stating in its opinion in that case that "contracts of insurance are not commerce at all, neither state nor interstate." However, in 1944, the Supreme Court in *United States v. South-Eastern Underwriters Association* [1944-1945 TRADE CASES ¶ 57,253], 322 U. S. 533, a case involving alleged violations of the Sherman Anti-Trust Act, again considered the question and in a four-to-three decision, held that the business of insurance conducted across state lines was interstate commerce subject to regulation by Congress under the Commerce Clause.

The Supreme Court's decision was vigorously protested in the insurance field. The insurance companies, relying upon the court's previous rulings, had engaged in practices which were prohibited under the federal anti-trust laws but which were permitted under the laws and regulations of the various states. The states feared the loss of large revenues under their laws taxing insurance sold within the states, which, under the new ruling, might be held discriminatory of interstate commerce and, therefore, unconstitutional. As a result of this vigorous reaction to the decision, Congress passed the so-called McCarran Act in 1945. This Act provides in part as follows:

"*Sec. 1.* Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"*Sec. 2.* (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business. (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

"*Sec. 3.* (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof. (b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

"*Sec. 4.* Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920."

[*Contentions*]

The petitioner contends that the purpose of the Act was generally to restore the insurance business to the situation existing prior to the decision in the *South-Eastern Underwriters* case, and that in states in which the insurance business was regulated by state law, such business was not subject to regulation by the Federal Trade Commission.

The Commission does not challenge the validity of any state statute regulating the business of insurance, nor the validity of the McCarran Act. It points out that state laws have no extra-territorial effect and cannot regulate the business of insurance beyond the borders of the particular state; that prior to the *South-Eastern Underwriters Association* case, the states were authorized to regulate the intrastate aspects of the insurance business, even though state regulation might affect interstate commerce in insurance; that following the decision in the *South-Eastern Underwriters Association* case there was a field of interstate business of insurance which the states could not regulate and which Congress did not intend to leave unregulated; that in enacting the McCarran Act, Congress intended only to authorize the states to exercise their police power in the same manner they had exercised it when the business of insurance was not considered to be commerce, and gave the states until January 1, 1948, later extended by statute to June 30, 1948, in which to define a reasonable area of state police power, beyond which they could not go; that after that date the Commission was authorized to regulate insurance on different grounds, namely, regulating the use of the interstate channels of commerce; and that the Federal and state laws in the field of insurance supplement and reinforce one another in order to provide full protection to the public.

[*Scope of Federal Regulation*]

The wording of the Act clearly indicates that, regardless of the ruling in the *South-Eastern Underwriters Association* case, Congress did not intend to take from the states the regulation of insurance within the state. Section 1 declares that "the *continued* regulation . . . by the several states of the business of insurance is in the public interest, . . ." (emphasis added). Section 2 states, "The business of insurance . . . shall be subject to the laws of the several states which relate to the regulation or taxation of such business." The real question is, to what extent, if any, did Congress provide for federal regulation in addition to state regulation.

The Act is equally clear, by the express wording of Section 3, that until January 1, 1948, subsequently extended by amendment to June 30, 1948, the business of insurance was not subject to the Federal Trade Commission Act or certain other federal regulatory acts. After January 1, 1948, according to Section 2 of the Act, the Federal Trade Commission Act and the Sherman and Clayton Acts were made "applicable to the business of insurance to the extent that such business is not regulated by state law." That is the only express grant of power to the Federal Trade Commission over the business of insurance contained in the Act. It is a grant expressly limited by its terms to insurance business which "is not regulated by state law." We do not find in those words the "clear and specific grant of jurisdiction" to the Federal Trade Commission which the Commission claims is given to it by the Act. On the contrary, we find the logical and reasonable conclusion from the two sections to be that jurisdiction over the business of insurance was granted to the Federal Trade Commission after January 1, 1948, *only* where the business was not regulated by state law.

There is some merit in the Commission's contention that since the decision in the *South-Eastern Underwriters Association* case there is a field of interstate insurance, outside the jurisdiction of the states, which should be subject to federal regulation. But it does not follow that it was the purpose of the McCarran Act to accomplish such result, desirable though it might be. Congress realized that by reason of the Supreme Court decision federal jurisdiction existed over the interstate business of insurance. The enactment of the McCarran Act was to correct that situation. It expressly prohibited the exercise of such jurisdiction for a period of approximately three years. After that period it made a restrictive grant of jurisdiction. In order to sustain the contention of the Commission, we must imply a broader grant of jurisdiction to the Commission after the three-year period than is contained in the express words of the Act. We do not believe that Congress would leave to implication such an important segment of the overall question of jurisdiction which it was dealing with, when it could easily have been provided for by express words. A construction of the Act does not sustain the contention.

Section 4 of the Act provides that nothing contained in the Act shall be construed to affect the application to the business of insurance of the National Labor Relations

Act, the Fair Labor Standards Act or the Merchant Marine Act. If it was intended by the Act to retain in or give to the agencies of the Federal Government jurisdiction over insurance companies engaged in interstate commerce, irrespective of its regulation by state law, this section of the Act was unnecessary and meaningless since the acts referred to would be applicable by reason of the Supreme Court's decision without the provisions of Section 4.

It is probable that in the regulation of the business of insurance by both the federal and state governments there will develop a conflict of policies. The parties agree that in such event the federal regulation would control. If so, "the continued regulation and taxation by the several states," referred to in Section 1 of the Act as being in the public interest, would no longer exist.

The general purpose of restoring to the states the right to regulate the business of insurance as it existed prior to the 1944 decision was carried out by the moratorium provided by the Act until January 1, 1948. During the moratorium there was no jurisdiction over the business of insurance in the Commission. During that period the states which did not have such laws had the necessary time in which to pass regulatory legislation. The tie-in between the moratorium and the obvious invitation to enact regulatory legislation while it existed, both recognized the need of regulating the business of insurance and indicated an intention to permit the states to do it to the exclusion of the federal government if they elected to do so. It seems more logical to conclude that it was the purpose of the moratorium to deprive the federal agencies of their newly acquired jurisdiction over the business of insurance in order to restore such jurisdiction to the states if they elected to assume it, than to conclude that it was the purpose of the moratorium to deprive the agencies of their newly acquired jurisdiction for only a short period of time after which it would be given back to them regardless of what the states did in the meantime.

This construction of the Act is in accord with statements by Senator McCarran on the floor of the Senate on February 26 and 27, 1945, in connection with the Senate's consideration of the Conference Report on S. 340. Senator McCarran stated: "The moratorium would not be continued, but if in the meantime the states themselves had regulated the business of insurance, the Sherman and Clayton Acts and the other acts would not become effective." He also said: "During the 3-year moratorium the states may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate, they will have taken the business of insurance out from under the Sherman Anti-Trust Act, the Clayton Act, and the other acts. If during the moratorium the states do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable." 91 Cong. Rec. 1442-1444.

[*Supreme Court Decisions*]

The Supreme Court, since the passage of the Act, has expressed similar views. In *Prudential Insurance Co. v. Benjamin,* 328 U. S., 408, 429-431, the court said: "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." It referred to the nationwide existence of state systems of regulation and taxation and to the great difference in scope and character of the regulations imposed and of the taxes exacted. It then said: "Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations." Continuing with the discussion, it later said, ". . . it clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for." In a later case, *Maryland Casualty Co. v. Cushing,* 347 U. S. 409-413, the court said: "Suffice it to say that even the most cursory reading of the legislative history of this enactment makes it clear that its exclusive purpose was to counteract any adverse effect that this court's decision in *United States v. South-Eastern Underwriters Association* [1944-1945 TRADE CASES ¶ 57,253], 322 U. S. 533, might be found to have on state regulation of insurance." In *Wilburn Boat Co. v. Fireman's Insurance Co.,* 348 U. S. 310, 319, the court in reviewing the enactment of the McCarran Act said: "Passage of the bill followed *United States v. South-Eastern*

Underwriters Assn., supra, holding that, despite the constitutional doctrine embodied in the *Paul v. Virginia* line of cases, Congress had power under the Constitution to regulate interstate insurance transactions. In the *South-Eastern* case, however, all the opinions had emphasized the historical fact that states had always been free to regulate insurance. The measure Congress passed shortly thereafter, known as the McCarran Act, was designed to assure that existing state power to regulate insurance would continue."

[*Related Ruling*]

In making its ruling the Commission followed its prior ruling in *The American Hospital and Life Insurance Company* case, which at that time had not been reviewed by the Court of Appeals. On April 9, 1957, following the argument on appeal and submission of the present case, the Court of Appeals for the Fifth Circuit handed down its opinion on its review holding that the Commission was without jurisdiction in the matter and setting aside the Cease-and-Desist Order in that case. *The American Hospital and Life Insurance Co. v. Federal Trade Commission* [1957 TRADE CASES ¶ 68,675], — F. (2d) — C. A. 5th. We agree with the ruling of the Court of Appeals in that case.

[*FTC Lacks Jurisdiction*]

We are of the opinion that the Federal Trade Commission was without jurisdiction to regulate the insurance business of the petitioner in those states where such business is regulated by state law. The order of the Commission is set aside and the case remanded to the Commission for further proceedings consistent with this opinion.

[¶ 68,740] Beacon Fruit & Produce Co., Inc., et al. v. H. Harris & Co., Inc., et al.

In the United States District Court for the District of Massachusetts. Civil Action No. 56-172-F. Dated May 28, 1957.

Sherman Antitrust Act

Combinations and Conspiracies—Elements and Proof of Unlawful Conspiracy—Conspiracy Between Corporation and Its Officers.—While it is generally true that the acts of the agents of a corporation in carrying out their duties of formulating the policy of the corporation do not constitute a conspiracy violative of Section 1 of the Sherman Act, a corporation and its principal officers and directors were not entitled to a summary judgment in an action charging that they engaged in a conspiracy in restraint of trade because the plaintiffs also asserted that the individual defendants conspired to form the defendant corporation as a mere instrumentality to take over a partnership business as a step in securing control of the market and imposing a restraint of trade for their individual benefit.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.400.

Combinations and Conspiracies—Restraint of Trade—Test of Reasonableness.—In an action charging that the operators of an auction market for the sale of fruits unlawfully imposed a five cent charge on dealers for each package purchased, the operators' motion for summary judgment on the ground that there has been no restraint of trade because statistics show that business has increased and that many of the dealers have prospered was denied. On the basis of the facts before the court, it could not be said whether because of other factors business may not have been profitable in spite of alleged restraints. Also, there were conflicting contentions as to whether or not the five cent charge affected the dealers' selling prices or their profits. It could not be held, as a matter of law, that any restraint imposed by the imposition of the charge was reasonable or unreasonable.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.315.

Monopolies—Monopolization—Relevant Market.—It could not be decided on motions for summary judgment whether or not defendants, which operated an auction market for the sale of citrus and deciduous fruits, had a monopoly since the limits of the relevant competitive market in which the defendants offered their services could not be determined.

The complaint referred to the market in New England for the sale of such fruits, but the plaintiffs also relied on a market limited to the sale of one particular brand of citrus fruits at auction in Boston, Massachusetts. The defendants claimed that the relevant market should be considered as including all sales of citrus fruits at less than carload lots. To decide the proper limits of the market, it must be determined whether alleged competitors offer a reasonable substitute for the services offered by the defendants.

See Monopolies, Vol. 1, ¶ 2540.10.

For the plaintiffs: Lawrence R. Cohen, Boston, Mass.; Joseph Aborn, Boston, Mass.; Sigmund Timberg, Washington, D. C.; Albert R. Mezoff, Boston, Mass.; Charles George, Boston, Mass.; and Arthur L. Brown, Boston, Mass.

For the defendants: John L. Saltonstall, Jr.; Richard Maguire; Thomas J. Carens; and I. J. Silverman; all of Boston, Mass.

Memorandum of Decision on Motions for Summary Judgment

[*Antitrust Action*]

FORD, District Judge [*In full text*]: This is an action under the antitrust laws to recover damages for alleged violations of §§ 1 and 2 of the Sherman Act, 15 U. S. C. A. §§ 1 and 2. The plaintiffs are dealers in fruits and vegetables. The defendants who now remain in the case are H. Harris & Co., Inc., a Massachusetts corporation (hereinafter called Harris) and three individuals, Albertson, Pontefract and Giovino, who are the directors and principal stockholders of Harris, Pontefract being president of the corporation and Albertson its treasurer.

[*Defendant's Business*]

The business of Harris was conducted for many years by a partnership. In 1951 the present corporation was formed (originally under the name of Fruit Auction, Inc.) by a group of customers of the partnership, with the individual defendants as principal shareholders, which purchased the partnership assets and thereafter carried on the business.

Harris conducts an auction market for the sale of citrus and deciduous fruits by shippers or receivers who act as agents for the shippers. These sellers notify Harris of shipments of produce they wish to sell. Harris then arranges with the carriers for delivery to its warehouse, unloads the produce, displays sample packages, and prepares a catalogue of items offered for sale. All produce is sold at auction, subject to withdrawal by the seller if a minimum price fixed by the seller is not bid. Any person who meets certain credit qualifications may buy. Plaintiffs are all buyers at these auctions. Upon the sale of the produce Harris keeps a record of the transaction, pays the seller, supervises delivery to the buyers, and then bills the buyers and collects from them.

Harris charges each seller a commission based on a percentage of the selling price of its produce. It also collects from the buyer a charge of five cents for each individual package purchased, regardless of the size and contents of the package. It is this five cent charge of which plaintiffs complain.

[*Summary Judgment*]

Each side has moved here for summary judgment. While there is no complete agreement on the facts, it appears to be the contention of each party that on the basis of certain facts asserted by it and not controverted by the opposing parties, it is entitled to judgment as a matter of law and that other facts alleged by the opposing parties are immaterial to the decisive issues of the case.

On consideration of the contentions advanced by the parties, it does not appear that the issues here resolve themselves into clear cut questions of law which can be resolved on the basis of a selection of facts which are not controverted, but rather that the solution of each of the issues involved requires a further development of the factual background.

[*Conspiracy Alleged*]

The first charge of plaintiffs is that defendants have engaged in a combination or conspiracy in restraint of trade in violation of § 1 of the Act. Defendants argue that there can be no conspiracy among these defendants since they are a corporation and its principal officers and directors. It is generally true that the acts of the agents of a corporation in carrying out their duties

of formulating the policy of the corporation do not constitute a conspiracy violative of § 1 of the Act. *Nelson Radio & Supply Co. v. Motorola* [1952 TRADE CASES ¶ 67,386], 200 F. 2d 911, 914. But plaintiffs do not rely merely on this, but claim they can prove that in fact the individual defendants here conspired to form the defendant corporation as a mere instrumentality to take over the partnership business as a step in securing control of the market and imposing a restraint of trade for their individual benefit. The validity of this contention depends on proof of facts which defendants do not concede.

[*Restraint of Trade*]

Similarly defendants say there has been no restraint of trade because statistics show business has increased and many of the individual plaintiffs have prospered in recent years. This is not conclusive. On the facts now before the court it cannot be said whether because of other factors business may not have been profitable in spite of restraints. So also the conflicting contentions as to whether or not the five cent charge has affected the price at which plaintiffs can resell their fruit, or the profits realized by them on resale require a knowledge of more of the facts as to how their business is carried on. Defendants also argue that if there is any restraint of trade imposed, it is reasonable. But assuming that, as defendants claim, they must have the revenue produced by the five cent charge or its equivalent from some other source, the court has no facts on which to decide whether it would be possible for them to increase their charges to the shippers or whether it would be practicable to collect a charge from the buyers on another basis than that of a flat rate per package.

Plaintiffs' position is that the collection of any charge from the buyers is illegal. Again there are not enough facts before the court to enable it to make any such sweeping ruling at this stage of the proceedings, or to hold that, even if the charge is illegal, it creates a restraint of trade in violation of the Sherman Act.

[*Monopolization*]

The complaint further charges illegal monopolizing on the part of defendants in violation of § 2 of the Act. To decide whether defendants have a monopoly it must first be decided what the limits are of the relevant competitive market in which defendants offer their services. *United States v. du Pont & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 394. The parties are not agreed on what the relevant market is. The complaint refers to the market in New England for the sale of citrus and deciduous fruit. Plaintiffs now seem to rely on a market limited to the sale of one particular brand of citrus fruits at auction in Boston. Defendants argue that the relevant market should be considered as including all sales of citrus fruits at less than carload lots, whether by auction or negotiated sale. To decide the proper limits of the market, it must be determined whether the alleged competitors offer a reasonable substitute for the services offered by defendants. *United States v. du Pont, supra.* There are no facts now before the court on which it can decide this question.

[*Motions Denied*]

The case, therefore, is not at least at the present stage of the proceedings a proper one for summary judgment and the motions of plaintiffs and defendants for summary judgment are denied without prejudice.

[¶ 68,741] J. Rose & Company, Inc. v. Unity Stove Company, Inc.

In the New York Supreme Court, Appellate Division, First Department. Dated April 23, 1957.

New York Antitrust Laws

Combinations and Conspiracies Under State Laws—Practices—Refusal to Deal—Sufficiency of Counterclaim.—An order striking a counterclaim of a wholesaler-retailer of gas ranges charging that a manufacturer of gas ranges and three other wholesaler-retailers of gas ranges engaged in a conspiracy in which the manufacturer refused to sell its gas ranges to the wholesaler-retailer as insufficient was reversed on the ground that the

manufacturer had not made a showing which would warrant a summary disposition of the counterclaim, although the wholesaler-retailer had made no counter showing and its charge of conspiracy had been given little elaboration and substantiation in the pleading. The counterclaim stated a cause of action.

See Combinations and Conspiracies, Vol. 1, ¶ 2337.34, 2425.34.

Reversing a decision of the New York Supreme Court, New York County, 1957 Trade Cases ¶ 68,667.

Memoranda

[*Antitrust Counterclaim*]

[*In full text*]: It being conceded on the argument of this appeal that the defendant has paid the amount demanded in the complaint, the only remaining questions are whether the counterclaim is sufficient as a pleading and whether plaintiff is entitled to summary judgment dismissing the counterclaim. We find the counterclaim sufficient as a statement of a cause of action. We doubt that subdivision 3 of rule 113 of the Rules of Civil Practice was intended to encompass a cause of action for an alleged conspiracy in restraint of trade in violation of section 340 of the General Business Law or that such an action lends itself to a motion for summary judgment under rule 113. But without deciding that question, we conclude that plaintiff has not made a showing here which would warrant a summary disposition, despite the fact that defendant has made no counter showing and its charge of conspiracy is given little elaboration and substantiation in the pleading. Order unanimously modified so as to deny the motion to strike the counterclaim and to sever the counterclaim under section 262 of the Civil Practice Act and, as so modified, otherwise is affirmed, with costs to abide the event. Settle order on notice. Concur—PECK, P. J., BREITEL, BOTEIN, RABIN and BERGAN, JJ.

[¶ 68,742] Opinion of the Attorney General of the State of Texas.

Addressed to Honorable W. S. Heatly, Jr., Chairman, State Affairs Committee, House of Representatives, Austin, Texas, from Will Wilson, Attorney General of Texas, by James W. Wilson, Assistant. Opinion No. WW-123. Dated May 16, 1957.

Texas Sales Limitation Bills

Sales Below Cost—Texas Sales Limitation Bills—Constitutionality.—A proposed Texas "Sales Limitation Act," which prohibits the sale, or the advertising or offering for sale, of any item of merchandise at less than cost when the seller limits, or reserves the right to limit, any purchaser to a quantity less than the entire supply of the item, would violate the requirements of due process of law provided in Article I, Section 19, of the Texas Constitution, and the 14th Amendment to the United States Constitution, since it includes within its prohibition practices which are not reasonably related to its purpose of preventing unfair competition. While the purpose of the proposed act is the elimination of practices designed to lessen or destroy competition, the operative provisions of the act are not limited to situations where limited sales are made with an intent to injure competition or where that effect is achieved. Also, the proposed act, in proscribing sales below cost in limited quantities, prohibits legitimate competitive practices.

See Sales Below Cost, Vol. 2, ¶ 7111.

Re: Constitutionality of House Bill 25 and Senate Bill 177, known as the "Sales Limitation Act."

[*In full text*]: With respect to your request for an opinion on the constitutionality of the proposed "Sales Limitation Act" incorporated in House Bill 25 and Senate Bill 177, we submit the following:

In essence these identical Bills provide a definition of the "cost basis" of products sold in the course of wholesale and retail business and prohibit the sale, or the advertising or offering for sale, of any item of merchandise at less than cost when the seller limits, or reserves the right to limit, any purchaser to a quantity less than the

entire supply of that item. A similar Act was held unconstitutional in *San Antonio Retail Grocers v. Lafferty* [1957 TRADE CASES ¶ 68,588], 297 S. W. 2d 813 (Tex. Sup. Ct. 1957) on the grounds that by limiting its effect to grocery stores alone, it provided an unreasonable and arbitrary classification. The constitutional impediment found by the court in the *Lafferty* case has been removed in these Bills since they are applicable to all sales in the course of business. It is necessary, therefore, to consider in this opinion questions not reached in the *Lafferty* case.

[*Purpose of Bills*]

The purpose of the Bills as evidenced by the emergency clause is to "protect retailers and wholesalers, and the consuming public, against monopolistic practices designed to lessen or destroy competition in the ordinary purchase and sale of commodities." Such a purpose is a legitimate object for the exercise of the police power, and statutes prohibiting sales below cost when such sales are intended to injure competition or when they have that effect, have generally been held to be valid legislative methods for the accomplishment of this purpose. See cases collected in annotations at 118 A. L. R. 506 and 128 A. L. R. 1126.

[*Injury to Competition*]

The principal difficulty with the proposed Sales Limitation Act is that though its stated purpose is the elimination of practices "designed to lessen or destroy competition," the operative provisions are not limited to situations where limited sales are made with an intent to injure competition or where that effect is achieved. This intent or effect has been a part of every statute upheld by the courts of other jurisdictions, and in many cases the courts have considered such an element to be an essential ingredient to validity. See *e. g. Blum v. Engleman* [1948-1949 TRADE CASES ¶ 62,232], 190 Md. 109, 57 A. 2d 421 (1948); *Associated Merchants v. Ormesher* [1932-1939 TRADE CASES ¶ 55,209], 107 Mont. 530, 86 P. 2d 1031 (1939); *Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co.* [1932-1939 TRADE CASES ¶ 55,191], 11 Cal. 2d 634, 82 P. 2d 3 (1938). Only two cases have been found where the statute before the court did not require a wrongful intent or an injurious effect, and in each the statute was held to be violative of due process requirements for that reason. *Commonwealth v. Zasloff* [1940-1943 TRADE CASES ¶ 56,034], 338 Pa. 457, 13 A. 2d 67 (1940); *State ex rel. Lief v. Packard-Baumgardner & Co.* [1932-1939 TRADE CASES ¶ 55,240], 123 N. J. L. 180, 8 A. 2d 291 (1939). The basis for this holding was well expressed by the Pennsylvania Supreme Court in the *Zasloff* case as follows:

> "If the Act confined itself to prohibiting sales below cost when intended to destroy competition, it would undoubtedly be valid, as has been held in various jurisdictions where such acts have been enacted with that qualification. (Citing cases) The opinions of the courts in those cases emphasized the fact that the statutes there under consideration made criminal only such sales as were designed for the suppression of competition or other predatory purposes, and the means employed by those statutes were therefore reasonably related to their objective. In New Jersey, on the other hand, where, as in Pennsylvania, this qualification was not in the act, the statute was declared unconstitutional. (Citing the *Lief* case) Price cutting in itself is not an evil; on the contrary, the more intense the competition the greater the likely advantage to the purchasing public. Indeed there is no reason why merchants should not make an absolute gift of merchandise to his customers if he desires to be benevolent or thereby to advertise his business. There are many other conceivable and wholly proper reasons which might induce him to make sales without profit, as, for example, a necessity of paying importunate creditors. It is only when the object of price cutting is sinister, — to destroy a competitor by suffering a temporary loss in order to gain an ultimate monopoly . . ., or to defraud the public by seducing them into the purchase of other goods at an exorbitant price—that the selling of goods at less than cost may constitute an economic or social evil. The Pennsylvania Act, therefore, is arbitrary, and the means which it employs are grossly out of proportion to the object which it seeks to attain."

We believe this reasoning to be applicable to the proposed Sales Limitation Act unless other features of the Bills are effective to exclude such lawful practices from their effect.

[*Scope of Bills*]

The proposed Act differs from the statutes before the courts in the above cases principally in that those statutes prohibited all sales below cost while in the instant Bills only sales below cost ***in limited quantities*** are within the reach of the statute. It has been argued that such a provision intensifies the invalidity of the statute rather than aiding its validity by providing an unreasonable classification in not prohibiting unlimited sales intended to destroy competition. It is, of course, quite possible that a powerful seller might make unlimited sales of his product below cost until his competitors are forced out of business, but it is believed that this argument overlooks the fact that it is not required that the Legislature prohibit all forms of unfair competition in order to reach specific abuses it considers to be threatening. As stated by the Supreme Court in *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 33 S. Ct. 65 (1912):

> "If the Legislature shares the now prevailing belief as to what is public policy, and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its laws against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

The problem, therefore, is not whether some classes of unfair competitors are excluded from the Bills, but whether the device of prohibiting only limited below cost sales removes from the statutory ambit those practices innocent of destructive intent or effect on competition referred to in the *Zasloff* case. No case has been found where this feature has been considered by a court, but it is apparent that, by removing unlimited sales from the Bill's prohibition, unquestioned fair methods of competition, such as sales below cost to clear inventories of slow-moving, damaged, imperfect or short stock, or to liquidate a business, are removed from the scope of the Bill.

However, it is also apparent that other legitimate competitive practices are still prohibited by the proposed Act. For instance, an attempt to attract business through "loss leaders" would seeem to be as legitimate a competitive device as advertising, credit services, attractive surroundings and the like where there is no attempt thereby to monopolize the market. Furthermore, sales below cost made in good faith to *meet* competition do not appear to be adequately excluded by the proposed Act. Section 7 which purports to exclude such sales is ineffective for this purpose since it requires a business man to determine at his peril that the competing price is at cost or above before lowering his price to meet the competing price without providing any method whereby he can ascertain whether the competing price is lawful. See *State ex rel. Lief v. Packard-Baumgardner & Co., supra*. We find no feature in the Act which would save such below cost sales which are not intended to injure competition from its effect, and we must conclude that the Bill as written is unconstitutional as violative of due process of law. Tex. Const. Art. I, Section 19; U. S. Const. 14th Amend. In view of our holding, it is unnecessary to consider other constitutional objections which have been raised against the Bill.

Summary

The proposed Sales Limitation Act incorporated in House Bill 25 and Senate Bill 177 violates the requirements of due process of law provided in Article I, Section 19, of the Texas Constitution, and the 14th Amendment to the U. S. Constitution, since it includes within its prohibition practices which are not reasonably related to its purpose of preventing unfair competition.

[¶ 68,743] Kinnear-Weed Corporation v. Humble Oil & Refining Company.

In the United States District Court for the Eastern District of Texas, Beaumont Division. Civil Action No. 2363. Filed September 28, 1956.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Elements Which Must Be Established—Antitrust Violation and Injury to Plaintiff.—An owner of patents relating

to a rotary drill bit for drilling oil and gas wells did not have a cause of action against an oil refiner for violation of the antitrust laws since the patent owner failed to prove (1) a violation by the refiner of some specific provision of the antitrust laws with consequent injury to the public and (2) injury to its business or property by reason of such a violation. The patent owner had contended, among other things, that its method of drilling, as disclosed in its patents, was wrongfully appropriated by the refiner, was monopolized or attempted to be monopolized by the refiner, and was used by the refiner to restrain trade.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.200; Monopolies, Vol. 1, ¶ 2610.500; Private Enforcement and Procedure, Vol. 2, ¶ 9009.275, 9009.475.

Texas Antitrust Laws

Combinations and Conspiracies Under State Laws—Practices—Patents—Right To Maintain Action for Damages.—An owner of patents relating to a rotary drill bit for drilling oil and gas wells did not have a cause of action against an oil refiner for violation of the Texas antitrust laws since no violation of the Texas antitrust laws was shown and since the Texas antitrust laws make no provision for a private civil action for violation of such laws. The patent owner had contended, among other things, that its method of drilling, as disclosed in its patents, was wrongfully appropriated by the refiner, was monopolized or attempted to be monopolized by the refiner, and was used by the refiner to restrain trade.

See Combinations and Conspiracies, Vol. 1, ¶ 2329, 2403.

For the plaintiff: William E. Kinnear, Beaumont, Tex.

For the defendant: Nelson Jones, General Counsel, Humble Oil & Refining Co., Houston, Tex.; Walter B. Morgan, Law Department, Humble Oil & Refining Co., Houston, Tex.; Garrett R. Tucker, Jr., of Baker, Botts, Andrews & Shepherd, Houston, Tex.; and B. D. Orgain, of Orgain, Bell & Tucker, Beaumont, Tex.

For a prior opinion of the U. S. Court of Appeals, Fifth Circuit, see 1954 Trade Cases ¶ 67,822.

Findings of Fact

[*Plaintiff*]

Cecil, District Judge [*In full text except for omissions indicated by asterisks*]: 1. Plaintiff, Kinnear-Weed Corporation, is a Texas corporation having its principal office and place of business in Beaumont, Texas. Plaintiff is the owner of U. S. Patents Nos. 2,380,112 and Re. 23,416, both issued to C. W. Kinnear, the subject matter of which is a rotary drill bit for drilling oil and gas wells. These patents constitute Plaintiff's principal assets and Plaintiff's only business is the exploitation of these patents.

[*Defendant*]

2. Defendant, Humble Oil & Refining Company, is a Texas corporation having its principal office and place of business in Houston, Texas. Defendant is engaged in the business of producing, refining and marketing petroleum and petroleum products. Defendant is not in the drill bit business, but does use drill bits in the drilling of its oil and gas wells. Defendant has an office and does business in the Eastern District of Texas.

[*Causes of Action*]

3. Plaintiff charges Defendant with breach of a confidential relationship, unfair competition, patent infringement and violation of the Federal and Texas anti-trust laws. All of these claims involve, and are inextricably connected with, the above-mentioned two Kinnear patents, Nos. 2,380,112 and Re. 23,416.

4. In addition to this suit, Plaintiff has sued Hughes Tool Company, Reed Roller Bit Company and Hunt Tool Company, all of Houston, Texas, for infringement of the same two patents, as well as for violation of confidential relationship and unfair competition. These suits are pending the United States District Court for the Southern District of Texas, Houston Division.

* * *

11. Plaintiff contends that C. W. Kinnear conceived the idea of positioning the water

courses in the bit body so that the streams of drilling fluid discharged therefrom would miss the cutting elements and strike directly on the bottom of the hole in what Plaintiff refers to as "a concentrated stream" or a "direct blast." Plaintiff further contends that this concept is disclosed and claimed in the two patents in suit, was disclosed by C. W. Kinnear to Defendant in confidence prior to the issuance of either of the patents in suit, was utilized by Defendant to its own advantage in the drilling of its wells, was disclosed by Defendant to others in violation of such confidence, was wrongfully appropriated and publicized by Defendant as Defendant's own development and was monopolized or attempted to be monopolized, and was used by Defendant to restrain trade, in violation of the antitrust laws.

12. Defendant denies that C. W. Kinnear invented the concept of positioning the water courses in a bit so that the drilling fluid would miss the cutters and strike directly on the bottom of the hole, denies that the patents in suit disclose or claim any such concept, denies that C. W. Kinnear disclosed such concept (or any other information) to Defendant in confidence, denies that Defendant utilized, disclosed to others or published any information obtained by it from C. W. Kinnear, denies that it has competed unfairly with C. W. Kinnear, or his successors in interest, including Plaintiff, denies that the patents in suit are valid or have been infringed by Defendant, denies that Defendant has violated any of the antitrust laws and denies that Kinnear, or his successors in interest, including Plaintiff have been injured by any act of Defendant.

[*Patent Application*]

13. On January 2, 1942, C. W. Kinnear filed an application in the U. S. Patent Office entitled "Drill", disclosing a combination bit having a pair of disk-shaped outer-roller cutters mounted on the opposite side faces of a fishtail blade, with two pairs of water courses through the bit body, one pair positioned to discharge drilling fluid directly onto the tops of the outer-roller cutters and the other pair positioned to discharged drilling fluid onto and wash down the opposite side faces of the fish-tail blade and thence onto the bottom of the hole. The applicant asserted claims to the entire combination bit and to the structure of the outer-roller cutter per se. The Patent Office rejected the claims to the entire combination bit, but allowed two claims covering the roller cutter per se, and U. S. Patent No. 2,380,112 was issued to C. W. Kinnear on July 10, 1945 containing these two claims.

[*Reissue*]

14. On June 7, 1946, Kinnear applied for a reissue of the patent on the ground that, as the result of inadvertence, accident or mistake, the original patent did not fully set forth and claim his true invention. During the prosecution of the reissue application, the two claims of the original patent covering the roller cutter per se were rejected by the Patent Office and were abandoned by the applicant, but eventually the patent was reissued on October 16, 1951, as Re. 23,416, with 18 claims (Nos. 3-20). The two claims of original Patent No. 2,380,112 form no part of Re. 23,416.

[*Transactions Between Parties*]

15. In the Spring of 1945, after receiving notice from the Patent Office that the two claims covering the roller cutter per se had been allowed on his original application, Kinnear called on Douglas Ragland, an employee of Defendant. Kinnear explained his bit to Ragland and told Ragland the status of his patent application. This was the first contact between Kinnear and Defendant concerning or relating to the subject matter of this suit. The purpose of Kinnear's visit was to induce Defendant either to finance the manufacture of Kinnear's bit or to purchase and test some of his bits. Ragland explained to Kinnear that, as a matter of policy, Defendant was not interested in financing manufacture of the bit, but that Defendant would be willing to test the bit. Thereafter in 1945 and 1946, Defendant purchased approximately 52 bits from Kinnear. These bits were made in accordance with Patent No. 2,380,112, substantially as shown by the wooden model, Plaintiff's Exhibit No. 9. Defendant used approximately 22 of these bits in tests and junked the remaining 30, after concluding that the Kinnear bit was less satisfactory than competitive bits.

16. At no time did Defendant request Kinnear to furnish any information to Defendant. All information given by Kinnear to Defendant was volunteered by Kinnear in his efforts to interest Defendant in financ-

ing the manufacture of, or in purchasing, his bits. Kinnear did not ask Defendant to keep any information confidential and Defendant did not promise or agree to keep confidential any information received by it from Kinnear.

17. The information disclosed by Kinnear to Defendant consisted of the contents of Kinnear's original patent application (including the notice of allowance of the two claims on the roller cutter per se), some machine shop drawings showing the actual dimensions of his bit and his wooden model, Plaintiff's Exhibit No. 9. At no time did Kinnear furnish to Defendant any information concerning his invention which was not contained in the patent application or shown by the drawings and/or the wooden model.

18. The drawings and the wooden model which Kinnear showed Defendant simply illustrated the bit disclosed in his application. Accordingly, Patent No. 2,380,112 discloses everything of substance which Kinnear told any employee of Defendant with reference to his invention.

19. Prior to his first contact with Defendant in the Spring of 1945, Kinnear had discussed his bit with the leading bit manufacturers in the Houston area, including Hughes Tool Company, Reed Roller Bit Company and Hunt Tool Company, and had disclosed to each of these substantially the same information he later disclosed to Defendant, including his patent application, drawings of his bit and his model.

20. All of Defendant's acts of which Plaintiff complains, including the alleged publication and disclosure to others of information received from Kinnear, and use of "jet" bits and "jet" drilling, occurred after the issuance of Patent No. 2,380,112.

21. Kinnear sold a few of his bits to other oil operators in addition to the bits he sold to Defendant in 1945 and 1946. Each of these bits disclosed to the public the way in which it was constructed. Any competent mechanic could have duplicated the Kinnear bit after examining one of the bits which Kinnear sold and any competent driller on seeing such a bit would have known how to use it for drilling wells.

[*"Jet Drilling"*]

22. The term "jet drilling" as used in the industry means a technique which consists of utilizing the available horsepower on a given drilling rig in the most efficient manner by correlating properly all of the various factors affecting the rate of penetration, including (1) rate of fluid circulating through the bit, (2) fluid velocity through the bit nozzles, (3) speed of rotation of the bit, (4) amount of weight maintained on the bit, and (5) annular rising velocity.

23. The term "jet bit" as used in the industry means a bit having the following characteristics:

(1) water courses properly sized to give the maximum product of nozzle fluid velocity and rate of circulation for a given hydraulic system,

(2) water courses lined with erosion resistant material so that they will retain their most efficient diameter throughout the useful life of the bit, and

(3) water courses so positioned that the high velocity fluid issuing therefrom will not destroy or damage the cutting elements of the bit through erosion, which means, as a practical matter, that the streams of drilling fluid issuing from the water courses should not strike the cutting elements of the bit.

24. Kinnear did not furnish Defendant any information concerning "jet drilling" or "jet bits".

25. Neither of the patents in suit contains a disclosure of "jet drilling" or "jet bits".

[*Defendant's Activities*]

26. The technique of "jet drilling" was developed by Defendant as the result of a research program into the hydraulic factors affecting the rate of penetration in rotary drilling, which was commenced in 1943, was formalized as Research Project 4025 on January 1, 1946 and was intensified as equipment and personnel became available in the years immediately following the War. This program involved primarily a series of "short interval" tests conducted on a number of Defendant's drilling rigs under actual field conditions, wherein all but one of the various factors known to affect the rate of penetration would be held constant while the remaining factor would be varied from minimum to maximum within practical limits and the results recorded. The data obtained from these tests enabled Defendant's engineers to determine the relative importance of the several factors involved, and to correlate these factors in order to achieve

optimum efficiency in drilling. For example, it was discovered that the rate of penetration was greatest when the *product* of nozzle fluid velocity and rate of circulation (frequently referred to as "QV") was at a maximum, rather than when either of these factors alone was at a maximum. These data also enabled Defendant's engineers to predetermine the most efficient set of drilling conditions for any given drilling operation, including, in particular, selecting the diameter of the nozzle in the bit which would produce the maximum QV.

27. Defendant's engineers also discovered, as a result of this research project, that when the bit was equipped with nozzles of the proper diameter to produce a jet stream having the maximum QV, the velocity of the jet stream was so great that (a) the nozzles had to be lined with an extremely hard, erosion resistant material or they would become enlarged very quickly and would no longer be the proper size, and (b) the cutting elements of the bit had to be protected from the abrasive effects of the high velocity jet streams, either by hard surfacing or, preferably, by directing the streams so as to miss the cutting elements and hit the bottom of the hole. Both the lining of nozzles with erosion resistant material and the positioning of the nozzles so as to discharge drilling fluid directly onto the bottom of the hole, missing the cutters, were old long before the inception of Defendant's research program. For example, in 1938 the Defendant used a large number of so-called "parabolic blade" bits having water courses so positioned as to discharge streams of drilling fluid directly on the bottom of the hole ahead of the blade. Hard metal nozzles were used to protect bit water courses from fluid erosion at least this early.

28. Defendant's initial experiments were with drag bits and Defendant obtained from various bit manufacturers drag bits equipped with tungsten carbide nozzles of varying diameters for use under different drilling conditions, the nozzles being positioned so as to direct the high velocity jet streams onto the bottom of the hole, ahead of the blade, rather than onto the blade. These bits obtained and used by Defendant commencing in 1946, were the first of the so-called "jet" bits.

29. Defendant's drilling crews, using "jet" drag bits and applying the technique of "jet" drilling, achieved significant increases in rate of penetration and over-all drilling efficiency in a number of instances.

30. Commencing in 1948, Defendant's engineers published a series of technical papers containing the results of Defendant's research program and explaining the principles of "jet" drilling with "jet" drag bits.

31. In 1948 Defendant requested several of the leading bit manufacturers, particularly Hughes Tool Company and Reed Roller Bit Company, to furnish Defendant with rock bits suitable for use in "jet" drilling. The conventional rock bit in general use at that time had relatively larger water courses than those used in "jet" drag bits with which Defendant had previously experimented. Moreover, the water courses in conventional rock bits in most instances were not lined with abrasion resistant material and they discharged in whole or in part upon the cutting elements. In order to convert their conventional rock bits to "jet" bits, the bit manufacturers relocated the nozzles so that the jet streams would not strike the cutters, equipped the nozzles with erosion resistant material and, generally, reduced the total nozzle area. None of these changes presented any difficult or unusual problems to the bit manufacturers since bits had been made for many years which incorporated water courses positioned to discharged drilling fluid onto the bottom of the hole missing the cutters and nozzles made of erosion resistant material. Moreover, bits had been made for many years with water courses as small as those found desirable for "jet" drilling. The first "jet" rock bits were furnished to Defendant by the bit manufacturers during the latter part of 1948 and early 1949. Defendant's tests indicated that these "jet" rock bits, when used in accordance with the "jet" drilling technique, would drill faster than conventional rock bits under many drilling conditions.

32. As the result of Defendant's successful use of the experimental "jet" rock bits, the bit manufacturers went into large scale commercial production of "jet" rock bits. Hughes Tool Company's first production line jet rock bit was the so-called "Iron Pants", which came on the market early in 1950. Reed Roller Bit Company followed suit with its "Liquid Blast" cross-roller jet bit about the same time. These were followed by Hughes "Integral Jet" rock bit

and by Reed's "Twin Blast" rock bit in 1952.

33. Approximately 30 per cent of the rock bits now being manufactured are of the "jet" type. The large percentage of conventional rock bits still being manufactured is due to a number of factors, including the additional cost of "jet" bits, the increased over-all cost of "jet" drilling and the failure of "jet" bits to out-perform conventional bits under many drilling conditions.

34. In addition to the technical papers published by Defendant's engineers, Defendant published two articles in its house organ, "The Humble Way", one in 1950 and another in 1952, summarizing in non-technical language the results of Defendant's work with "jet" bits and "jet" drilling. This magazine is distributed by Defendant throughout all 48 states to its stockholders and to others interested in the oil business.

35. Defendant summarized the results of its research work, including its development of "jet" drilling, in periodic reports submitted to its affiliate, Standard Oil Development Company, pursuant to a contract between these two corporations providing for the sharing of the benefits and the expenses of research conducted by each. This information was in turn transmitted by Standard Oil Development Company to other members of the Standard group with which it had similar arrangements.

[*Summary of Findings*]

36. No information disclosed by Kinnear to Defendant was used by Defendant in developing or practicing "jet" drilling, in using "jet" bits, in obtaining "jet" bits from bit manufacturers, nor was any such information included in Defendant's reports to its affiliates, in the technical articles on "jet" drilling, or in the two Humble Way articles on "jet" drilling.

37. None of the information furnished by Kinnear to Defendant in connection with Kinnear's alleged invention and/or the bit which he sold to Defendant and which Defendant tested and then discarded, was used by Defendant for any purpose other than the testing and evaluation of the Kinnear bit. Defendant made no unauthorized disclosures of this information to others and made no agreements with bit manufacturers which pertained to Kinnear's alleged invention and/or bit or to anything which Kinnear disclosed to Defendant.

38. Defendant has not manufactured any bits, and has not "palmed off" as its own or as those of bit manufacturers any bits incorporating any invention or idea of Kinnear or of Plaintiff.

39. Defendant has committed no fraudulent or unfair trade practice in connection with jet drilling or jet bits, or in connection with any invention of Kinnear, or in connection with anything disclosed by Kinnear to Defendant.

40. Plaintiff has never made or sold a bit. The business which Plaintiff claims was interrupted or damaged by Defendant was new and unestablished. Kinnear never manufactured or sold bits on a commercial basis, and he lost money on the bits he did manufacture and sell.

41. Plaintiff has suffered no injury or damage as a result of any act of Defendant alleged in Paragraphs 10, 11 and 12 of the Complaint.

42. The publication by Defendant of articles on "jet" drilling, complained of by Plaintiff, occurred more than two years before the filing of this suit and such publication was known to Plaintiff or its predecessors at or shortly after the time it occurred.

43. Defendant did not enter into any of the unlawful agreements, combinations or conspiracies alleged in Paragraph 12 of the Complaint.

44. Defendant did not monopolize or attempt to monopolize trade or commerce, as alleged in Paragraph 12 of the Complaint.

45. Defendant did not interfere with the consummation of a business deal between Plaintiff or its predecessors and Houston Oil Field Material Company, as alleged in Paragraph 12 of the Complaint.

46. Defendant did not interfere with the sale of bits by Plaintiff and/or Plaintiff's predecessors, as alleged in Paragraph 12 of the Complaint.

47. Defendant has committed no act prohibited by the Federal or Texas anti-trust laws nor has Defendant injured the public by any of the acts alleged in Paragraph 12 of the Complaint.

[*Patent Infringement*]

48. In its claim of patent infringement, Plaintiff charges that Defendant has infringed both Patent No. 2,380,112 and Re. No. 23,416 by using drill bits having water

courses so positioned that the streams of drilling fluid issuing therefrom strike directly upon the bottom of the hole without first striking the cutting elements of the bit. Plaintiff has specified 19 different bits, each of which it contends infringes its patents. These bits are made by 8 different bit manufacturers. All of the accused bits are "jet" bits. Some of them are drag bits, some are cone bits, some are cross-roller bits, and some are combination bits.

49. Defendant contends that it has not infringed either of Plaintiff's patents by its use of any of the accused bits or by any other act. Defendant further contends that Patent No. 2,380,112 was extinguished by the grant of Reissue No. 23,416, and that Reissue No. 23,416 is invalid because of anticipation and lack of invention over the prior art.

* * *

Conclusions of Law

1. Plaintiff has no cause of action against Defendant for alleged breach of confidence (Paragraph 10 of the Complaint) * * *.

* * *

2. Plaintiff has no cause of action against Defendant for alleged unfair competition (Paragraph 11 of the Complaint) * * *.

3. Plaintiff has no cause of action against Defendant for alleged violation of the anti-trust laws (Paragraph 12 of the Complaint) for the following reasons:

(a) Under the Federal anti-trust laws the essential elements of a private civil action for treble damages are:

(i) a violation by the defendant of some specific provision of the Federal anti-trust laws with consequent injury to the public, and

(ii) injury to the business or property of the plaintiff by reason of such violation.

The plaintiff has the burden of proving each of these elements. In this case, Plaintiff has failed to prove the existence of either of these elements.

(b) The Texas anti-trust laws make no provision for a private civil action for violation thereof. Moreover, no violation of the Texas anti-trust laws has been shown.

4. Plaintiff has no cause of action against Defendant for alleged infringement of Patent No. 2,380,112 because the grant of a reissue patent extinguishes the original. Plaintiff No. 2,380,112 was extinguished by the grant of Re. 23,416. Therefore, Plaintiff can predicate no claim on Patent No. 2,380,112.

* * *

12. Plaintiff's suit for alleged infringement of Patent No. Re. 23,416 must be dismissed for invalidity of the patent as well as non-infringement by Defendant.

[¶ 68,744] Radio Corporation of America, Plaintiff-Counter-Defendant v. The Rauland Corporation and Zenith Radio Corporation, Defendants-Counter-Claimants. Zenith Radio Corporation and The Rauland Corporation, Cross-Claimants v. Radio Corporation of America, General Electric Company, and Western Electric Company, Inc., Cross-Defendants.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 48 C 1818. Dated May 23, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Depositions—Notice—Suppression.—A notice for the taking of a deposition which was served the day before the deposition was to be taken was not unreasonably short where counsel for the parties were all in Oslo, Norway, for the purpose of taking foreign depositions and it was understood that the party serving the notice was to proceed with its depositions at that time. Also, a motion to suppress the depositions of two witnesses because the refusal of two other witnesses to produce certain documents prevented adquate cross-examination of the witnesses whose depositions were taken was denied. The request for the production of the documents was informal, and the witnesses whose depositions were taken had no connection with the witnesses who were requested to produce the documents.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.775.

For other decisions of the U. S. District Court, Northern District of Illinois, Eastern Division, see 1957 Trade Cases ¶ 68,712, 1956 Trade Cases ¶ 68,475, 68,490, and 68,306, and 1955 Trade Cases ¶ 68,144; and for a decision of the U. S. Court of Appeals, Seventh Circuit, see 1954 Trade Cases ¶ 67,886.

Memorandum Regarding Depositions

[*Motions*]

IGOE, District Judge [*In full text*]: There are pending motions to suppress the depositions of the witnesses Steen, Broberg and Noren, as well as a motion for the production of documents under Rule 34 of the Federal Rules of Civil Procedure. They have been argued and counsel for both sides have presented very elaborate affidavits and statements of position.

As to the motion for production of documents, sought by RCA, counsel for Zenith have assured the court that except for some documents which are being made available for inspection now, and others which will be made available in connection with the answers to interrogatories, the documents called for have already been produced, to the extent they are available, and have supported this with affidavits. On this showing, the entry of an order would be an empty gesture.

RCA has also moved to suppress the depositions of the witnesses Broberg and Noren, "or in the alternative for an order authorizing RCA to re-examine the witnesses Nygren, Carajo, Broberg and Noren." The grounds asserted are the failure of the witnesses Nygren and Carajo (called by RCA) to produce documents necessary to the cross-examination of the witnesses Broberg and Noren (called by Zenith). The Steen deposition is said to have been taken by Zenith on insufficient notice to RCA.

[*Notice of Taking Deposition*]

From the affidavits of Messrs. Sokolow and Curtis, it appears that written notice of the Steen deposition was served on counsel for RCA in Oslo, Norway, on February 27, 1957, where counsel for both sides were then engaged in taking depositions in this case. The notice called for the appearance of Steen on the next day, February 28, 1957. Counsel for RCA called counsel for Zenith at about 6:00 p.m. on February 27, and protested the short notice, saying that he would not attend. He did not attend, although he and his associates were in Oslo at a place nearby the American Embassy where the deposition of Steen was taken.

The Federal rules do not specify any minimum notice of the taking of depositions, and the court must determine in any case what is reasonable under all of the circumstances. In this case, counsel were all in Oslo for the taking of the foreign depositions, and it was apparently understood that Zenith was to proceed with its depositions at the time. Under these circumstances it is not clear that the notice was unreasonably short. Certainly there appears to have been no justification for counsel deliberately staying away from the proceedings in order to prevent any taking of the deposition. The motion to suppress the Steen deposition is denied.

[*Suppression of Depositions*]

RCA moves to suppress the Broberg and Noren depositions, not because of any irregularity in the notice or taking of those depositions, but because it is claimed that the refusal of the witnesses Nygren and Carajo to produce documents relating to the approval of Zenith sets by SEMKO, an organization which has to do with electrical standards in Sweden, prevented adequate cross-examination of Broberg and Noren.

From the conflicting affidavits of Messrs. Sokolow and Curtis, it appears that Zenith radios were approved by SEMKO prior to 1939 but that no tests have been made on them since. SEMKO witnesses refused to produce records relating to the pre-1939 Zenith approval without Zenith's consent. Zenith attorneys consented, subject to the

production of similar records regarding approval of RCA sets. This consent by Zenith was withdrawn, and the documents were not produced, when it appeared that similar records relating to RCA could not be located.

According to the testimony, as set forth in the affidavits, the records of SEMKO were incomplete and it would be "fantastic work" to locate the requested records. Apparently the requests for document production were not made in the subpoenas to the witnesses, but were made informally a few days prior to the hearing.

On the basis of these facts the court is asked to suppress the testimony of two other witnesses, who apparently had no connection with SEMKO, but who testified that they had sold Zenith radios, which had been approved by SEMKO.

The motion to suppress the Broberg and Noren depositions is denied, as is also the motion for alternative relief in the form of permission to go back to Sweden for the purpose of re-examining Broberg, Noren, Nyberg and Carajo. To follow the latter course would be to disrupt completely the schedule which this court has already laid down for the commencement of the trial of this action on June 17.

[¶ 68,745] The Evening News Publishing Company v. Allied Newspaper Carriers of New Jersey, et al.

In the United States District Court for the District of New Jersey. Civil Action No. 110-57. Filed March 15, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Injunctive Relief—Pretrial Procedures —Preliminary Injunction.—A newspaper publisher was not entitled to a preliminary injunction in its action charging that an association of newspaper carriers agreed to refuse to handle the publisher's newspaper at an undetermined future date in violation of the antitrust laws. A preliminary injunction is an extraordinary process, and the granting of such relief rests in the sound discretion of the court. In the instant action, the publisher failed to establish irreparable injury, there was a conflict of material facts, and there was serious and intricate questions of law, particularly as to the applicability of the Norris-La Guardia Anti-Injunction Act. A preliminary injunction is never granted where the plaintiff's contentions, in fact and in law, are seriously disputed.

See Combinations and Conspiracies, Vol. 1, ¶ 2101.265; Private Enforcement and Procedure, Vol. 2, ¶ 9026.15.

For the plaintiff: Gilhooly, Yauch & Fagan, by Edward J. Gilhooly (Riker, Emery & Danzig, by Charles Danzig, of counsel), Newark, N. J.

For the defendants: Julius Fielo.

Memorandum Opinion

[*Boycott Alleged*]

ALFRED E. MODARELLI, District Judge [*In full text*]: Plaintiff has petitioned for a preliminary injunction. 15 U. S. C. A. § 26. Plaintiff publishes daily and Sunday editions of a newspaper in Newark which are distributed by the defendants. In February, 1956, a number of the defendant dealers organized into a voluntary association. Subsequently, on August 16, 1956, defendants incorporated as the Allied Newspaper Carriers of New Jersey, hereinafter referred to as Allied. The group has a membership of approximately forty members who distribute approximately 24% of plaintiff's newspapers throughout New Jersey.

In the summer of 1956, disagreements between the parties as to allocation of territories for routes and delivery charges to subscribers culminated in a refusal of defendants to handle the newspaper. This

"boycott," as it was termed, lasted from July 13—July 28, 1956. In its petition, complainant alleges that on January 29, 1957, the membership of Allied ratified a resolution to boycott plaintiff's newspaper at a date to be determined by Allied's president, James L. Hutchings. It is this contemplated action which is the immediate stimulus for bringing this petition. An order to show cause was entered on February 14, 1957, by Judge Meaney.

Plaintiff cites 15 U. S. C. §§ 4 and 26, commonly known as the Sherman Act and the Clayton Act, as the bases of the relief sought. In addition, plaintiff quotes extensively from numerous decisions to establish the applicability of these statutes to its activities as constituting interstate commerce and to denominate the conduct of defendants as restraints and monopoly proscribed by the anti-trust laws. The principal cases relied upon include *Lorain Journal Co. v. United States* [1950-1951 TRADE CASES ¶ 62,957], 342 U. S. 143 (1951); *United States v. Women's Sportswear Mfrs. Ass'n* [1948-1949 TRADE CASES ¶ 62,390], 336 U. S. 460 (1949); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* [1948-1949 TRADE CASES ¶ 62,251], 334 U. S. 219 (1948); *Paramount Pictures, Inc. v. United Motion Pictures Theaters* [1932-1939 TRADE CASES ¶ 55,173], 93 F. 2d 714 (CA 3 1937). In brief, plaintiff contends that the defendants seek to redistribute territories among themselves and to require plaintiff to refuse to furnish newspapers to anyone else [i. e., newsboys] in the territories. Plaintiff further alleges that defendants threaten a boycott if newsboys are used to supply the demand for deliveries in areas already served by defendants, thus creating a monopoly in the latter.

[*Answer and Defense*]

In reply, defendants deny the characterization of their activities as restraints or attempts to create a monopoly. They concede that there are grievances which arise from two practices of the plaintiff, viz., an alleged inflexible price of fifty cents for weekly deliveries, a sum inadequate to constitute a living wage, and the practice of using newsboys, many assertedly under age, to compete with defendants. Defendants oppose the petition on the following grounds: (1) That plaintiff is barred because of the equitable doctrine of unclean hands; (2) that if the preliminary injunction is granted, they will be foreclosed from publicizing their grievances; (3) that this is a labor dispute which makes applicable the terms of the Norris-La Guardia Act, 29 U. S. C. A. § 101 *et seq.* Decisional law is cited in support of these arguments, notably *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552 (1938); *Olmstead v. United States*, 277 U. S. 438 (1928); *Mitchell v. Gibbons* [1948-1949 TRADE CASES ¶ 62,388], 172 F. 2d 970 (CA 8 1949); *Miller Parlor Furniture Co. v. Furniture Workers Industrial Union*, 8 F. Supp. 209 (D. C. N. J. 1934).

[*Preliminary Injunction*]

A preliminary injunction is an extraordinary process, and the granting of such relief rests in the sound discretion of the court. *Rice & Adams v. Lathrop*, 278 U. S. 509 (1929); *American Visuals Corp. v. Holland*, 219 F. 2d 223 (CA 2 1955). The court has before it numerous affidavits of the contending parties. In fact, at the present posture of the matter, in the absence of oral testimony, it may be said that it presents a "battle by affidavit." And where the equities of a bill are denied fully and explicitly under oath, a court usually does not issue an injunction in limine but allows the matter to await a final hearing. *Behre v. Anchor Ins. Co.*, 297 Fed. 986 (CA 2 1924). This is the view of the Third Circuit expressed in numerous decisions. At no time was it more explicitly enunciated than in *Lare v. Harper & Bros.*, 86 Fed. 481, 483 (1898), where the court said:

> "It is a rule, subject to few exceptions, that a preliminary injunction should not be awarded on *ex parte* affidavits, unless in a clear case."

In *Murray Hill Restaurant v. Thirteen Twenty One Locust*, 98 F. 2d 578 (CA 3 1938), the Circuit Court reiterated its view that the petition for preliminary injunction should be denied especially where it is supported only by affidavits. The reasoning of that court was spelled out further in *Warner Bros. Pictures, Inc., et al. v. Gittone, et al.* [1940-1943 TRADE CASES ¶ 56,004], 110 F. 2d 292, 293 (1941), which warrants quotation:

> "Furthermore we think that a preliminary injunction should not have been granted upon evidence largely in the form

of affidavits as was done in the case before us. The evidence was conflicting and the trial judge, in order to enable him to resolve these conflicts, should have been afforded the opportunity of testing the credibility of witnesses by having the benefit of their cross-examination and, if possible, their presence in court. In the absence of such opportunity the affidavits of each side were entitled to equal weight."

[*Irreparable Injury*]

On numerous occasions the Third Circuit has cautioned that the granting of a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it. See *New York Asbestos Mfg. Co. v. Ambler Asbestos Air Cell Covering Co.*, 102 Fed. 890, 891 (CA 3 1900); *Barker Painting Co. v. Brotherhood of Painters,* 15 F. 2d 16 (CA 3 1926). To justify the granting of such an injunction there must be a showing of irreparable injury during the pendency of the action and a finding of fact to such effect. *Sims v. Greene,* 161 F. 2d 87, 89 (CA 3 1947); *Murray Hill Restaurant v. Thirteen Twenty One Locust, supra.* The burden is upon the complainant to prove its contentions and I find that the element of irreparable injury has not been sustained.

[*Question of Fact and Law*]

Obviously the case is controlled by the rule repeatedly announced in the district and circuit that a preliminary injunction is never granted where the petition and affidavits disclose that plaintiff's contentions, in fact and in law, are seriously disputed. *Eutectic Welding Alloys Corp. v. Zeisel, et al.*, 11 F. R. D. 78 (D. C. N. J. 1950); *United States, et al. v. Republic Oil Refining Co.,* 8 F. Supp. 897 (D. C. N. J. 1934); *Fleetway, Inc. v. Public Service Interstate Transportation Co.,* 4 F. Supp. 482, (D. C. N. J. 1933), aff'd. [1932-1939 TRADE CASES ¶ 55,061] 72 F. 2d 761 (CA 3 1934), cert. denied 293 U. S. 626 (1935).

This case illustrates the futility of considering a motion for a preliminary injunction in cases of this kind upon *ex parte* affidavits. Not only is there a conflict of material facts, but there are serious and intricate questions of law involved, particularly as to the applicability of the Norris-La Guardia Anti-Injunction Act. It has been said that in weighing an application for a preliminary injunction, to doubt is to deny. *Madison Square Garden Corp. v. Braddock,* 90 F. 2d 924 (CA 3 1937), affirming 19 F. Supp. 392 (D. C. N. J. 1937). In view of the foregoing discussion, and without touching upon the merits as they may develop upon final hearing, I am constrained to deny the motion.

If the plaintiff believes that it can establish irreparable loss or immediate danger at a final hearing, the case may be set down for that purpose on short notice.

An order may be submitted in conformity with the opinion herein expressed.

[¶ 68,746] Esso Standard Oil Company v. Secatore's, Inc.

In the United States Court of Appeals for the First Circuit. No. 5188. Dated June 14, 1957.

Appeal from the United States District Court for the District of Massachusetts. WYZANSKI, District Judge.

Massachusetts Fair Trade Act and McGuire Act

Fair Trade—Resale Price Fixing Between Competitors—Producer's Suit To Enjoin Retailer from Selling Below Fair Trade Prices—McGuire Act—Competition Between Parties—Test.—Where a United States Court of Appeals had ruled (1) that an oil company could not maintain a suit to restrain an operator of two retail gasoline stations from selling the company's gasoline at less than the fair trade prices established under the Massachusetts Fair Trade Act since the oil company and the station operator competed with each other in the sale of gasoline to commercial accounts, and (2) that the company was not entitled to partial injunctive relief, that is, relief as to the separate class of business for which it and the operator did not actually or potentially compete, the Court granted the oil company leave to file a supplemental record appendix to its brief noting that it had asked the trial court for partial injunctive relief and that the court

denied it. Also, the Court denied the company's petition for rehearing, and noted that it had not accorded controlling significance to the company's failure to ask the trial court for partial injunctive relief.

See Resale Price Fixing—Fair Trade, Vol. 1, ¶ 3015.80, 3100.

For the appellant: Robert W. Meserve, with whom Charles W. Bartlett; John R. Hally; Austin Broadhurst; Nutter, McClennan & Fish; and Ely, Bartlett, Thompson & Brown, Boston, Mass., were on the brief.

For the appellee: Albert U. Rosa, East Boston, Mass.

Denying a petition for rehearing of a decision of the U. S. Court of Appeals, First Circuit, 1957 Trade Cases ¶ 68,695, affirming U. S. District Court, District of Massachusetts, 1956 Trade Cases ¶ 68,547.

Before Woodbury and Hartigan, Circuit Judges, and Aldrich, District Judge.

Opinion of the Court on Petition for Rehearing

Woodbury, Circuit Judge [*In full text*]: In the majority opinion of the court [1957 Trade Cases ¶ 68,695] and also in Judge Aldrich's concurring opinion it is stated in substance that the plaintiff-appellant did not ask the court below for injunctive relief limited to the separate class of business for which it and the defendant-appellee were not in either actual or potential competition. On this petition for rehearing the plaintiff-appellant asserts that actually it did ask the court below for such limited relief and that the court denied it, and it points to the typewritten transcript to prove its assertion. For relief it asks us to amend our opinions to conform to the fact thus established and for leave to add to the record appendix to its brief by printing as a supplement thereto the portions of the typewritten record on which it relies.

Our Rule 24(1) permitting appellants to proceed on record appendices to their briefs requires that relevant docket entries, the charge or judgment below, and certain other matters, be printed therein, and also "such other parts of the record, material to the questions presented, as the appellant or petitioner deems it essential for the judges of the court to read in order to decide those questions." Certainly whether the plaintiff-appellant asked the District Court for the limited injunctive relief which is asserted on appeal it was entitled to is material. The plaintiff-appellant should, therefore, have printed in its original appendix the matter which it now asks for leave to print in a supplement. While we are free if we wish to scan the original record made in the court below, we are not under any obligation to thumb through that often voluminous record to see whether an appellant has failed to print in the appendix to his brief some part of it material to the questions he presents to us on appeal. Were that our duty the appendix system would have little or no point. It is the appellant's duty to print in his appendix the parts of the record essential for us to read in order to decide the questions he presents, and if he fails to do so, he runs the risk of coming before this court on an inadequate record on appeal.

However, we are disposed to be lenient in this particular case, for even though we did not accord controlling significance to the appellant's failure to ask the court below for limited injunctive relief, which we assumed from the record appendix to its brief to be the fact, we nevertheless see no reason why the relief for which it asks in this petition for rehearing should not be granted to the end that the actual fact may appear on the records of this court.

Leave is granted to the plaintiff-appellant to file a supplemental record appendix to its brief in the form submitted with its petition for rehearing, and an order will be entered denying the petition for rehearing.

[*Concurring Opinion*]

[Aldrich, District Judge, concurs. Concurring opinion reproduced at ¶ 68,695, 1957 Trade Cases.]

[¶ 68,747] **Clein v. Kapiloff et al.**

In the Supreme Court of Georgia. No. 19719, A-8. Decided June 10, 1957.

Georgia Antitrust Law

Combinations and Conspiracies Under State Laws—Practices—Covenant Not To Compete—Legality.—A retailer who owned a jewelry store and a clothing store located in the same block sold his jewelry store business. The buyer agreed not to engage in the retail clothing business on the jewelry store premises or within a radius of one-half mile of the premises for a period of approximately nine years, and the seller agreed not to engage in the retail jewelry business within a radius of one mile of the jewelry store for a period of approximately nine years. The restriction imposed on the buyer was reasonable as to time and territory, it was reasonably necessary to protect the interests of the seller, and it did not impose greater restrictions than were necessary for the protection of the seller. There was no allegation that the public would suffer in having one less clothing store in the area for the time specified.

See Combinations and Conspiracies, Vol. 1, ¶ 2319.12.

For the plaintiff in error: Harold Karp and A. Tate Conyers, Atlanta, Ga.

For the defendants in error: Marvin O'Neal, Jr., and Marvin P. Nodvin, Atlanta, Ga.

By the Court:

1. The covenant of the defendant not to engage in the retail clothing business in competition with the plaintiff's being limited in time and restricted as to territory and being otherwise reasonable, it is not invalid as being a contract in general restraint of trade. The general demurrers to the petition were properly overruled.

2. It was not error to grant an interlocutory injunction.

[*Appeal*]

ALMAND, Justice [*In full text*]: The bill of exceptions assigns error on orders overruling general demurrers to an equitable petition, and granting an interlocutory injunction.

[*Restrictive Covenants*]

The petition of Harry Kapiloff and Sam Turetsky sought to restrain the defendant Sidney A. Clein from engaging in the retail clothing business in violation of a restrictive covenant entered into by the defendant Clein and other named defendants with the plaintiffs. In substance, the petition alleged: that the plaintiffs, prior to August 28, 1950, owned and controlled Macey's, Inc., a corporation engaged in the retail jewelry business at 110 Whitehall Street in the City of Atlanta; that the plaintiffs sold said business to Sterling Jewelry Company, a corporation owned and controlled by the named defendants; that the written contract of sale, signed by both corporations through plaintiff Kapiloff as president of Macey's, Inc., and defendant Clein as vice-president of Sterling Jewelry Company, Inc., contained the following covenant:

> "4. *Restrictive Covenants.* Seller covenants and agrees that it will not, throughout the term of the lease assigned hereunder [July 31, 1959], engage in the retail jewelry business, or in the sale of any items normally sold by a retail jewelry company, other than television sets, within a radius of one mile from the premises herein described, and *Buyer covenants that it will not engage in the operation of a retail clothing business on the premises, nor will it engage in the sale of items normally sold in a retail clothing store on the premises or within a radius of one-half mile of the premises, throughout the term of the lease* [July 31, 1959] *herein assigned.*" (Italics and parenthesis supplied)

Following the corporate signatures in the contract of sale, all of the named plaintiffs and defendants agreed in writing that the "restrictive covenants mentioned in paragraph 4 of the within agreement are hereby adopted and agreed to by us individually, and any one acting for us, or any firm, corporation, or partnership in which any of us may have an interest." The seller conveyed to the buyer all of his accounts receivable, the plaintiff Kapiloff agreed to assign the lease in 110 Whitehall Street to the buyer, and the defendant Clein agreed to endorse the purchase money notes. At the time of the sale, the plaintiffs were engaged in the retail clothing business at 114 Whitehall Street under the trade name of Hollywood Credit Clothiers. It was alleged that, at the time of the sale, the defendants "knew that the accounts of customers of said jewelry

business were in a great part the same as the accounts of the petitioners' retail credit clothing business and petitions as a consideration of said sale and agreement insisted that defendants covenant not to engage in the clothing business because a great number of the accounts of the two said stores were of the same customers. Petitioners show that defendants knew that if they were allowed to sell clothing to petitioners' jewelry accounts after said jewelry business was sold to them, that they would be dealing with many of the customers of petitioners' said credit clothing business, as aforesaid, and they knew that petitioners insisted upon said covenant to protect themselves from that situation." It was further alleged that the defendant Clein is now engaged in the business of selling clothing at retail at 132 Whitehall Street, which is within one-half mile of the premises at 110 Whitehall Street, in violation of this covenant, and that the defendant Clein, by engaging in the retail clothing business in competition with the plaintiffs, will cause them irreparable damage and injury.

[*Reasonableness of Restraint*]

1. As a general rule, a contract in general restraint of trade is void, but a contract only in partial restraint may be upheld provided the restraint is reasonable and the contract is valid in the other essentials. In determining the reasonableness of a restrictive covenant, a greater latitude is allowed when the covenant relates to the sale of a business than in cases where the covenant is ancillary to a contract of employment. *Orkin Exterminating Co. v. Dewberry*, 204 Ga. 794, 802 (51 S. E. 2d 669); *Griffin v. Vandegriff* [1948-1949 Trade Cases ¶ 62,407], 205 Ga. 288, 195 (53 S. E. 2d 345). The agreement must be considered with reference to the situation, business and objects of the parties in light of all of the surrounding circumstances. The restrictive covenant in the instant case is reasonable as to time and territory, its area of operation being within a radius of one-half mile, and its time being limited to July 31, 1959. The true test of the validity of the contract is whether it is supported by a sufficient consideration and whether the restraint is reasonable. In determining whether the covenant is "otherwise reasonable," the covenant must be reasonably necessary to protect the interests of the party in whose favor it is imposed, and must not unduly prejudice the interests of the public, and must not impose greater restrictions than are necessary for the protection of the promisee. *Rakestraw v. Lanier*, 104 Ga. 188, 197 (30 S. E. 735).

In this case, the plaintiffs bound themselves not to compete with the defendants in the retail jewelry business within one mile of 110 Whitehall Street during a period ending July 31, 1959, and the defendants, knowing that the plaintiffs were then engaged in the retail clothing business at 114 Whitehall Street, agreed that, within a like period of time, they would not engage in the retail clothing business within one-half mile of 110 Whitehall Street. The covenant is reasonable in all respects, and there are no allegations in the petition which indicate that the public would suffer in having one less retail clothing store in this limited area for the time specified. We have here simply a case where the sellers and the buyers of a business have entered into a valid contract containing mutual obligations, and one party has chosen to ignore his obligation. In such a case, equity will exercise its restraining arm and require him to abide by his promise.

The petition sets forth a cause of action for the relief prayed, and the court did not err in overruling the general demurrers of Clein.

[*Injunction*]

2. On the interlocutory hearing, the case was submitted upon an agreed stipulation of facts. Under the evidence submitted, the court did not err in granting an interlocutory injunction.

Judgment affirmed. All the Justices concur.

[¶ 68,748] J. H. Whiteley and Wayne Whiteley v. Foremost Dairies, Inc., Guy Horner, and Keith Skelton.

In the United States District Court for the Western District of Arkansas, Fayetteville Division. Civil Action No. 334. Dated June 19, 1957.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Practices—Refusal to Deal—Conspiracy Within Corporation—A corporate dairy and one of its employees did not violate

Section 1 of the Sherman Act by informing a milk hauler that the dairy would no longer purchase milk from the hauler and by arranging for another hauler to take over the route of the former hauler upon learning that the hauler was about to have his milk permit suspended and that many of the milk producers from which he collected milk were dissatisfied with his services. There was no conspiracy or combination by the dairy and its employee to convert the hauler's route to the dairy's own use. The dairy's employee could not conspire with the dairy in violation of the Sherman Act because a conspiracy under the Act cannot be committed by a corporation and its agent when the agent is acting for the corporation in the ordinary scope of his duties.

Furthermore, there was no evidence that the dairy and its employee either intended to or did monopolize any part of trade or commerce in violation of Section 2 of the Sherman Act. They did not receive more milk as a result of the alleged conversion, the alleged conversion only brought about a change in the person hauling the milk, and the new hauler was not shown to be an agent or employee of the dairy.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.400, 2005.785; Monopolies, Vol. 1, ¶ 2610.720.

For the plaintiffs: James R. Hale and Rex W. Perkins, Fayetteville, Ark.

For the defendants: Barber, Henry, Thurman & McCaskill, Little Rock, Ark.; Greenhaw & Greenhaw, Fayetteville, Ark.; John H. Joyce, Fayetteville, Ark.; and Harper, Harper & Young, Fort Smith, Ark.

Abstract of Pleadings

[*Defendant*]

JOHN E. MILLER, District Judge [*In full text except for omissions indicated by asterisks*]: The complaint was filed December 15, 1956. The plaintiffs asserted jurisdiction upon two grounds: (1) diversity and the amount involved, and (2) the provisions of the Sherman Antitrust Act, Title 15, U. S. C., Sections 1, 2, 12, and 15. The plaintiffs alleged that the defendant dairy at all times material had been engaged "in the purchase, collection, and transportation of whole milk produced by farmers, dairymen and other producers, and the transportation of said milk in interstate commerce, in its trucks and other equipment, from Springdale, Arkansas, to Dallas, Texas, and to other points outside the State of Arkansas."

[*Milk Routes*]

That there had been for many years various milk routes throughout Washington County, Arkansas, on which the "owners gather, collect and transport whole milk from the farmers, dairymen and other producers, and which said whole milk is transported and delivered to various milk buyers, outlets, and consumers located outside the State of Arkansas." That under the long and well-established custom all of said milk routes, including the milk route herein involved, have become and are valuable property rights "belonging to the person who operates the trucks and other vehicles thereon for the gathering, collection, picking up and transportation of the whole milk from the farmers, dairymen and producers thereon."

Prior to November 1, 1954, Lloyd Sloan and O. J. Snyder owned and operated milk route No. 800, having purchased the same from the original operator of the route; that the said Sloan and Snyder throughout the period of their operation of the route delivered the Grade A milk collected thereon to the defendant dairy's place of business in Springdale, Arkansas.

That on or about November 1, 1954, the plaintiffs purchased the said route for a cash consideration of $6,000, which purchase by the plaintiffs and sale by Sloan and Snyder was well known and consented to by the defendant dairy.

[*Contemplated Sales*]

During the latter part of 1955, one Carl Ishmael offered to pay plaintiffs $7,000 in cash for said route, and at the request of plaintiffs the defendant dairy gave its consent for the sale of said route to the said Ishmael, but the said Ishmael could not raise the necessary $7,000, and the contemplated sale was not consummated.

In the early part of January, 1956, the plaintiffs began negotiations with one Robert Oxford for the sale of the route for the sum of $7,500, whereupon all of the

defendants refused to give their consent to the sale of the said route to the said Oxford, and by reason of the wrongful and unlawful conduct on the part of the defendants the plaintiffs lost the sale of the said route to the said Oxford. On or about January 9, 1956, the defendants orally notified plaintiffs that they "intended to take possession of and assume operation of said milk route themselves, beginning on the morning of January 10, 1956; and on January 10, 1956, the defendants did wrongfully and unlawfully take possession of said milk route and began the operation of their own milk trucks thereon and wrongfully and unlawfully ejected the plaintiffs from said milk route and prevented and prohibited the plaintiffs from operating their trucks on said milk route and from picking up the milk from same, and converted said milk route to their own use".

That the said Sloan and Snyder from whom plaintiffs acquired the route had acquired, encouraged, arranged, solicited, induced, and procured the business and good will of the producers on the said milk route, and had by reason of such efforts caused the producers to sell their milk to the defendant dairy.

[*Alleged Antitrust Violations*]

"On and prior to January 9, 1955, the defendants, in violation of the Sherman Antitrust Act, Title 15, U. S. C., Sections 1, 2, 12, and 15, combined, confederated, and conspired among themselves and with other parties at present to the plaintiffs unknown, with the wrongful and unlawful intent and purpose to convert the said milk route No. 800 to their own use and thereby to hinder, burden, restrain, and interfere with the flow of and interstate commerce in said milk from the State of Arkansas to other states, and the actions of the said defendants in the conversion of said milk route to their own use and in depriving the plaintiffs of the benefits and enjoyment thereof has constituted and now constitutes a serious and material hindrance, burden, restraint, and interference with trade and commerce in said milk between the State of Arkansas and other states, and on account of said conversion the plaintiffs herein have been injured and damaged in their business and property in the sum of $7,500, which was the actual, fair market value of said milk route at the time of the wrongful conversion thereof by the defendants."

The plaintiffs pray for the recovery of $7,500 as their actual damages and for treble damages under Title 15, U. S. C., Section 15, in the sum of $22,500.

[*Amendment to Complaint*]

On February 26, 1957, the plaintiffs filed an amendment to their complaint by adding thereto numbered paragraphs 12, 13, and 14.

In numbered paragraph 12 of the amendment to the complaint the plaintiffs alleged that the defendants owned and operated a number of other milk routes in Washington County, Arkansas, from which they collected, acquired, and purchased whole milk; that the amount of milk so obtained by defendants constitutes a substantial and material amount of the whole milk produced in Washington County, Arkansas, and in Northwest Arkansas.

In numbered paragraph 13 the plaintiffs alleged that the 26 farmers, dairymen, and other producers on milk route No. 800 herein involved produced a material and substantial amount of all the whole milk produced in Washington County, Arkansas.

In numbered paragraph 14 the plaintiffs alleged that the conversion by the defendants of milk route No. 800 herein involved "was but part and parcel of the said combination, confederation, and conspiracy by the defendants hereinabove mentioned, and the said milk route No. 800 was so converted by the defendants to their own use with the wrongful, willful, arbitrary, capricious, and unlawful intent and purpose to cause and result in, and has caused and resulted in, all of the following, in violation of the provisions of the Sherman Antitrust Act:

"(a) The creation and establishment by the defendants of a monopoly in the purchase, acquisition, picking up and transportation in interstate commerce of all of the whole milk produced by all of the farmers, dairymen, and other producers of whole milk in Washington County, Arkansas, and in Northwest Arkansas.

"(b) The destruction of all competition with the defendants in the purchase, acquisition, picking up and transportation in interstate commerce of all of the whole milk produced by all of the farmers, dairymen, and other producers of whole milk in Washington County, Arkansas, and in Northwest Arkansas.

"(c) The destruction of the said milk route No. 800 belonging to the plaintiffs,

and the denial of the right of the plaintiffs to acquire and pick up all of the whole milk produced by all of the producers situated thereon and to transport said milk, or to cause said milk to be transported, in interstate commerce by persons or firms other than the defendants.

"(d) The narrowing and restraint of the market for all of the whole milk produced by all of the producers of whole milk located upon and along the said milk route No. 800.

"(e) The narrowing and restraint upon the transportation in interstate commerce of all of the whole milk produced by all of the producers of whole milk located in Washington County, Arkansas, and Northwest Arkansas."

[*Answers*]

On April 24, 1957, the defendant Keith Skelton filed his separate answer in which he admitted the allegations of citizenship contained in the complaint of plaintiffs, but denied that the Court has jurisdiction under the provisions of Title 15, Sections 1, 2, 12, and 15, U. S. C. He denied that he is or has been at any time an agent, servant, or employee of the defendant dairy. He denied specifically all other allegations in the complaint.

On April 25, 1957, the defendants, Foremost Dairies, Inc., and Guy Horner, filed their joint answer in which they admitted the residence of the parties and the presence of an amount in excess of $3,000, but denied that the Court has jurisdiction of the action under the provisions of Title 15, U. S. C., Sections 1, 2, 12, and 15. They denied that they had converted said alleged milk route or that they had done any act in contravention of the terms and provisions of the Sherman Antitrust Act.

They further alleged that the plaintiffs by verbal arrangement with the defendant began delivering Grade A milk to the defendant dairy on or about November 1, 1954; that the plaintiffs were to furnish a properly equipped truck for the transportation of said milk, and that such arrangement continued until about January 9, 1956, at which time the defendant dairy advised the plaintiffs that "it no longer could purchase milk which plaintiffs hauled on the route in question for the reason that at the instance of the producers on said route, Skelton Brothers would become a hauler of the milk on the route in question and the defendant, Foremost Dairies, Inc., would not receive and purchase any further milk hauled by the plaintiffs on said route."

During the period of operation by the plaintiffs the producers made many complaints with reference to the manner in which plaintiffs transported their milk, stating "that the truck operated by plaintiffs was kept in an unsanitary condition, that the driver thereof was likewise unsanitary in his operations, that plaintiffs carelessly and negligently spilled the milk of the producers, lost their containers filled with milk, and failed to pick up the milk at the time or times when it was necessary to do so in order to maintain the quality of the milk, and failed to deliver to producers weight records of their milk, and the producers advised the defendant that unless some other arrangement was made for transporting their milk that they, the producers, would sell their milk to other dairies and cause same to be transported in a proper manner. The complaints as set forth herein were made not only to the defendant, Foremost Dairies, Inc., but likewise to the plaintiffs herein on many occasions, and thereafter plaintiffs failed and refused to change their method of operation to the satisfaction of the said producers."

That prior to the time plaintiffs purchased the equipment from Sloan and Snyder, they were advised that the said Sloan and Snyder did not own a route and that all plaintiffs would acquire would be the equipment for hauling milk.

"That the plaintiffs had no contract, either written or oral, with the producers for hauling said milk, and the producers could at any time they saw fit haul their milk with their own equipment or employ anyone else other than plaintiffs to haul it, and the defendant, Foremost Dairies, Inc., further states that the plaintiffs had no route which they could sell and none which the defendants could convert, and this defendant denies that it ever converted any route as alleged in the complaint." The defendant dairy further alleged:

"That at the time plaintiffs herein ceased to serve the route of the producers in question in a satisfactory manner to said producers that Skelton Brothers took over and began the hauling of milk on the route in question at the instance of the producers, and on the same terms and conditions as had been in effect with the plaintiffs and the defendant, Foremost Dairies, Inc., during the period in which the plaintiffs served said route, and that

the defendant, Foremost Dairies, Inc., had no interest in the matter other than that the producers be properly served to the end that it, the defendant, would receive Grade A milk in a proper manner and in such condition as to meet the inspection and approval of the health inspectors of said products."

That the plaintiffs breached the terms of the contract with the defendant by failing to perform thereunder, and as a result of said breach said contract was terminated by the defendant on the 9th day of January, 1956.

The defendant, Guy Horner, alleged that at all times during the period in question he was an employee of the defendant, Foremost Dairies, Inc., and that his efforts on behalf of the defendant, Foremost Dairies, Inc., "was attempting to aid the producers and the haulers of their milk to the end that the highest quality of milk would be produced, maintained by said producers and delivered to Foremost Dairies, Inc., in Dallas, Texas, in a manner that would meet inspection of the health authorities and that producers would receive therefrom proper compensation for their products".

[*Dismissal of Defendant*]

Upon the issues as joined by the pleadings, the case proceeded to trial on May 14 and 15, 1957, to the Court without a jury. At the conclusion of the introduction of all the evidence, the plaintiffs dismissed their complaint and amendment thereto as against the defendant, Keith Skelton, leaving only before the Court the claims of plaintiffs as against the defendants, Foremost Dairies, Inc., and its employee, Guy Horner. The Court took the case under advisement pending receipt of briefs from the parties in support of their respective contentions. The briefs have been received and considered along with the pleadings and evidence, and the Court now makes and files herein its Findings of Fact and Conclusions of Law, separately stated.

Findings of Fact

1.

Plaintiffs are citizens and residents of the State of Oklahoma. The defendant, Guy Horner, is a citizen and resident of the State of Arkansas, and the defendant, Foremost Dairies, Inc., (hereinafter referred to as defendant dairy) is a New York corporation doing business in the State of Arkansas.

2.

In the spring of 1951 the defendant dairy explored the possibility of opening a milk route in Washington County, Arkansas, to obtain Grade A milk for sale in the City of Dallas, Texas. Various producers were contacted, and several meetings were held with producers and prospective producers of Grade A milk in the area. At these meetings various things were discussed, such as how the milk would be hauled, and what requirements would have to be met by the producers in order that their milk might meet the specifications of Grade A milk. These requirements included, in many instances, major changes in dairy barns and equipment. It was decided that the milk route would be feasible, and in the spring or summer of 1951 such a route was initiated.

The first milk hauler was a man named Ross Reed. Subsequently he sold whatever rights he had to Lloyd Sloan and O. J. Snyder. These two men operated the route until November 1, 1954, on which date they sold their equipment used on the route to plaintiffs herein, Wayne Whiteley and J. H. Whiteley, as evidenced by the following instrument (plaintiffs' Exhibit 1):

"We, Lloyd Sloan and O. J. Snyder, party of the first part, agree not to pickup any milk in the territory that is served by them, in what is called the Lincoln route or #800 Route. Now located south of #62 highway and East of Arkansas #59 highway. This territory is being sold to Wayne Whiteley of Westville, Oklahoma.

Signed by /s/ Lloyd Sloan
/s/ O. J. Snyder

My Commission Expires 8-15-57
/s/ L. J. Simmons
L. J. Simmons, A Notary Public

Bill of Sale

We, Lloyd Sloan and O. J. Snyder of Westville, Oklahoma, sell and Transfer their ownership of Milk Route #800 with 1953 G. M. C. Truck, to Wayne Whiteley of Westville, Oklahoma, effective of Nov. 1, 1954.

Signed by /s/ Lloyd Sloan
/s/ O. J. Snyder

My Commission Expires 8-15-57
/s/ L. J. Simmons
L. J. Simmons, A Notary Public."

3.

As a matter of fact, Wayne Whiteley was purchasing the route and equipment for himself and his father, J. H. Whiteley, as partners. The amount paid for the route and equipment was $6,000.00, which was substantially in excess of the value of the equipment alone.

Such milk routes are often bought and sold in northwest Arkansas, and it is quite common for a buyer to pay more than the value of the equipment, the excess payment being for the good will and agreement of the seller not to pick up any milk produced on the route.

4.

Plaintiffs hired drivers to operate the milk route in question. There were approximately 25 to 27 milk producers on the route, and each day plaintiffs' driver would pick up the milk from each of the producers. He would drive the milk truck up to the producer's dairy barn and put the milk on the truck, the milk being in ten-gallon metal cans. Since the milk was Grade A milk, it was necessary at all times to keep the temperature of the milk below 50 degrees.

After the driver collected the milk from all the producers, he would take the milk to Springdale, Arkansas, where it would be loaded on large semi-trailer trucks belonging to Skelton Brothers, Inc. Milk was taken from there to the defendant dairy's place of business in Dallas, Texas, where it was ultimately sold to consumers.

At Dallas, Texas, the milk would be weighed and graded. Weight tickets would be made out for each producer showing the amount of milk received from him. Also, the milk cans would be washed.

Then the empty milk cans and weight tickets would be returned by semi-trailer truck to Springdale, Arkansas, where they would be picked up by plaintiffs' driver and returned to the producers.

5.

There are approximately 235 Grade A milk producers in Washington County, Arkansas, and of this amount approximately 110 sell their milk to the defendant dairy. The remainder of the Grade A producers sell their milk to other companies, such as College Club and Meadow Gold.

In addition to the Grade A producers, there are approximately 1,500 Grade C milk producers in Washington County, Arkansas.

6.

The defendant dairy employed a field representative in the area, and at the times material herein the defendant, Guy Horner, was the field representative. His duties included the obtaining of new producers, working with the Dallas Health Department in seeing that the requirements of that department were met, and working with the milk producers, particularly in advising them of the equipment, etc., necessary for production of Grade A milk.

7.

Since the milk was ultimately sold in Dallas, Texas, the Health Department of that City employed an inspector who made periodic checks of conditions in Washington County with respect to the handling of the milk in order to determine whether the Grade A requirements were being met. During the time in question Percy J. Leach was the inspector for the City of Dallas. All the producers and haulers of Grade A milk for consumption in Dallas were required to have permits from that City and to comply with the requirements of the Milk Ordinance and Code of the City. Plaintiffs in the instant action had such a permit.

8.

The charge for the hauling of the milk was paid by the producers. The total cost was $1.00 per hundred pounds, 60 cents of that amount being for the haul from Springdale, Arkansas, to Dallas, Texas, and 40 cents being for the milk hauler who picked up the milk from the producers and took it to Springdale.

9.

Plaintiffs, through their employees, began operating the milk route on November 2, 1954, and continued to operate it until January 10, 1956. During that time their service became progressively worse, and they received many complaints from producers. A few of the producers even made trips to the home of the plaintiff, Wayne Whiteley, in Westville, Oklahoma, to discuss various complaints. Among other things the producers complained that plaintiffs spilled substantial amounts of milk; failed to return weight tickets in order that the producers would have a record of the milk sold by

them; lost the producers' milk cans; mixed up the milk cans and lids of different producers; returned the cans in a dirty condition; picked up the milk at irregular hours, thus making it difficult to keep the milk at proper temperatures; allowed the trucks to become dirty; failed to put the empty cans in proper racks; and were generally negligent and unsanitary.

In addition to registering complaints with plaintiffs, a substantial majority of the producers also complained to the defendant, Guy Horner, to the inspector, Percy Leach, and apparently to anyone else who might be able to do anything about the unsatisfactory situation.

Keith Skelton (who was originally a defendant in this action) operated a milk route near the route being operated by plaintiffs. A number of the producers on plaintiffs' route talked to Skelton and attempted to get him to haul their milk. At first Skelton refused to do so, since the producers were not on his route and since his route was already full.

As a general rule a milk hauler will not invade the territory of another milk hauler who is hauling milk to the same company.

Some of the producers contacted the defendant Horner and requested him to obtain a new hauler. Some of them recommended that he get Keith Skelton as a hauler.

The producers did not care who hauled their milk as long as the hauling was done properly.

10.

In the latter part of 1955 plaintiffs had negotiations with Carl Ishmael concerning the possible sale of the milk route by plaintiffs to Ishmael. Ishmael contacted the defendant Horner, and was advised that said defendant had no objection to Ishmael's purchase of the milk route. However, Ishmael was unable to raise the money and the sale was never consummated.

11.

Around the last of December, 1955, or first of January, 1956, the inspector, Leach, after having failed in previous attempts to get plaintiffs to comply with all pertinent regulations, informed the defendant Horner that he was going to suspend plaintiffs' permit. As a result of this information from Leach and the various requests from producers, Horner arranged with Keith Skelton or Skelton Brothers, Inc., to have said Skelton begin picking up milk on the route in question on Tuesday, January 10, 1956.

In the meantime, plaintiffs had been negotiating with Robert Oxford for the sale of the milk route to the said Oxford. Oxford tentatively agreed to pay $7,500 for the route and equipment. He was of the opinion that the equipment was worth approximately $3,500, and the remainder of the purchase price would have been for the route. On Sunday, January 8, Oxford contacted the defendant Horner to ascertain whether he had any objection to Oxford's purchase of plaintiffs' route. The defendant Horner advised Oxford that arrangements had been made for Skelton to operate the route beginning on Tuesday. After receiving this information Oxford did not proceed further with the purchase of the route.

On Monday, January 9, 1956, the plaintiffs went to see the defendant Horner and were told by Horner of the plan to have Skelton operate the route. Plaintiffs stated that they would also operate on the route, but they were advised by Horner that if they did so operate, he would not purchase the milk hauled by them. Plaintiffs also asked the defendant Horner to give them something in writing showing that the route was being taken over by defendant, but Horner refused to do so.

Skelton, in fact, began picking up the milk on January 10, 1956, and plaintiffs made no further effort to pick up milk on this route.

12.

The producers would not have objected to the sale of the route by plaintiffs to Oxford provided Oxford did a proper job of handling their milk.

The producers had been well satisfied with the previous haulers, Reed, Sloan, and Snyder. They have also been well satisfied with the service of Keith Skelton or Skelton Brothers, Inc., since January 10, 1956.

13.

Plaintiffs had no written contract with any of the producers, and in fact did not even contact the producers prior to purchasing the route. Likewise plaintiffs had no written contract with the defendant dairy.

The defendant dairy has never recognized the ownership of a route by a milk hauler.

14.

For various economic reasons producers are usually reluctant to stop selling milk to one company and to begin selling to another.

15.

Skelton Brothers, Inc., or Keith Skelton, now receives from the producers the same amount for picking up and hauling the milk that was received by plaintiffs when they were operating the route. Neither the defendant dairy nor the defendant Horner received any money by reason of the route being taken over by Skelton Brothers, Inc., or Keith Skelton. However, by the change in the haulers, the defendant dairy received assurance that the milk would be delivered in accordance with the requirements of the Dallas Health Department and in such a manner as to meet the specifications of Grade A milk. Likewise the producers were assured of a continuing market for their Grade A milk because of the readiness and willingness of Skelton Brothers, Inc., or Keith Skelton, to meet all requirements in the hauling and handling of Grade A milk.

16.

The plaintiff, Wayne Whiteley, testified that the plaintiffs received a gross income of from $600 to $900 per month while they operated the route. However, there was no positive testimony as to the net income received by plaintiffs but it seemed to be conceded by all parties that they did receive a substantial net income from the operation of the route.

Discussion

[*Causes of Action*]

Plaintiffs contend that they are entitled to recover against the defendants under either of two theories: (1) the law of conversion, and (2) an intentional invasion or interference by the defendants with the property and property rights of the plaintiffs. Plaintiffs also contend that the defendants acted in violation of the Sherman Antitrust Act and plaintiffs are entitled to recover treble damages.

The defendants contend that they did no unlawful or wrongful act and that they are not liable to the plaintiffs under any possible theory of law.

[*Sherman Act*]

Little need be said with regard to plaintiffs' contention that defendants violated the Sherman Antitrust Act. There was absolutely no evidence that the defendants either intended to or did monopolize any part of the trade or commerce among the several states. As a matter of fact, insofar as the record shows defendants have not received one ounce more milk since the alleged conversion than they received prior thereto. The only change brought about by the alleged conversion was a change in the person hauling the milk, and the new hauler was not shown to be an agent or employee of the defendant.

Moreover, the only defendants now before the Court are the corporation, Foremost Dairies, Inc., and its agent, Guy Horner. Plaintiffs' theory is that Horner and the corporation were engaged in a conspiracy in restraint of commerce, but it is well settled that a violation of the conspiracy portions of the Sherman Antitrust Act cannot be committed by a corporation and its agents when said agents are acting for the corporation in the ordinary scope of their duties. *Marion County Co-Op Asso. v. Carnation Co.*, D. C. W. D. Ark. [1953 TRADE CASES ¶ 67,556], 114 F. Supp. 58, 63. In the instant case Horner at all times was acting for the defendant dairy, and thus defendants could not be engaged in a conspiracy within the meaning of the Sherman Antitrust Act.

* * *

In the last analysis the Court is inclined to agree with the statement in defendants' brief that "the plaintiffs were the architects of their own misfortune". Plaintiffs' own mismanagement of the route was the sole proximate cause of any loss sustained by them, and there is no legal theory by which plaintiffs can shift their loss to the defendants.

Conclusions of Law

1. The Court has jurisdiction of the parties and the subject matter herein.

2. The defendants did not violate the provisions of the Sherman Antitrust Act.

3. The defendants did not convert any property owned by plaintiffs and did not invade or interfere with any property or property rights of the plaintiffs.

4. Plaintiffs are entitled to recover nothing of and from the defendants.

5. The complaint of the plaintiffs should be dismissed with prejudice.

A judgment in accordance with the above should be entered.

[¶ 68,749] Hudson Mattress Mfg. Co., Inc. v. Harvard Manufacturing Company, Sedgwick Furniture Corp., Vic B. Segal and Steve B. Segal.

In the United States District Court for the Eastern District of New York. Civil Action No. 17,233. Dated June 7, 1957.

Sherman Antitrust Act

Combinations and Conspiracies — Elements of Unlawful Conspiracy — Conspiracy Within Single Corporation.—A manufacturer's counterclaim alleging that a corporate distributor conspired with two of its officers to disrupt its business of manufacturing metal bed frames was held insufficient since a conspiracy was not alleged. A corporation cannot conspire with its own agents, that is, it cannot conspire with itself. Legally, no conspiracy was pleaded, there being no allegation of monopoly on the part of the distributor.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.400.

For the plaintiff: Erwin L. Corwin.

For the defendants: Jack H. Hantman, and Mendelsohn, Krotinger & Lane (Myron N. Krotinger, of counsel).

[*Motion*]

BYERS, District Judge [*In full text*]: Here the defendant, Harvard Manufacturing Company, to be called Harvard, seeks leave to file an amended answer and counterclaim, in a diversity of citizenship action which purports to assert a Sherman Act conspiracy on the part of Harvard, and two individuals described in an affidavit as their New York sales representatives.

The complaint was filed January 25, 1957.

[*Proposed Pleading*]

The proposed pleading contains a prolix assertion in which much evidentiary matters are set forth, to the general effect that the plaintiff and two of its officers, Stillman by name, entered into a tortious conspiracy to injure Harvard, i.e., to effect a disruption of its business in the Metropolitan area.

It is said (Para. 9(o)) that the filing of this suit by the plaintiff was in pursuance of the alleged conspiracy.

It is also sought to bring in the two Stillmans as additional parties.

The somewhat complex recitals in the various papers can thus be stated in lowest terms.

Harvard is an Ohio corporation which manufactures a metal bed frame.

The plaintiff, Hudson etc. Co., to be called Hudson, a New Jersey corporation, has been distributing the Harvard product in New Jersey, apparently under a special agreement; whether that was written does not appear, nor whether it was limited in duration or territory.

Sedgwick Furniture Corp., a New York corporation, is also a distributor of the Harvard product in New York, but again the terms and conditions of the relationship are not disclosed.

Seemingly in 1956 Hudson, the plaintiff, successfully sought to do business in New York, in the Harvard product, through a clandestine arrangement involving one Francois and an alleged secret partnership with an undisclosed resident of Brooklyn.

This activity interfered with Sedgwick's business, and was protested to Hudson by the individual defendants Segal.

Seemingly the friction so engendered between Hudson and Sedgwick was deemed by Harvard to be inimical to its general pattern of distribution.

The matter was discussed between Hudson and Harvard, but was not adjusted. In November of 1956 Harvard in effect discontinued relations with Hudson. Why it was not entirely free to do so is not disclosed or even discussed in the papers now before the court.

[*Complaint*]

Hudson filed this complaint as stated, charging a conspiracy on the part of the defendants named, to eliminate Hudson as a competitor of Sedgwick in the business of selling Harvard products.

[*Original Answer*]

The original answer of Harvard and the Segals is said to have been filed on February 20, 1957, but the Clerk's Office seems to contain no such pleading.

[*Conspiracy Within Corporation*]

Sufficient for present purposes has been stated concerning the proposed counterclaim. As to the conspiracy aspect of Paragraph 8, it will be seen that Hudson is charged with conspiring with its own officers and directors, the Stillmans; in other words, with itself. Legally, no conspiracy is thus pleaded, there being no allegation of monopoly on the part of the plaintiff.

See *Nelson etc. v. Motorola etc.* [1952 TRADE CASES ¶ 67,386], 200 Fed. (2) 911; *Cott etc. v. Canada Dry etc.* [1957 TRADE CASES ¶ 68,699], 146 Fed. Supp. 300.

[*Other Allegations*]

The subject matter of paragraph 9, subdivisions (a), (b), (c), (d) and (f) are properly matters of defense. Other matters in this paragraph are largely evidentiary and do not tender issues respecting the alleged conspiracy attributed to Hudson.

[*Counterclaim Insufficient*]

It thus appears that the opposition to the proposed counterclaim must be sustained.

Since the only reason for adding the Stillmans as individual defendants, is to identify them as parties to an alleged conspiracy with the corporation of which they are officers and directors, that aspect of the motion is also denied.

Settle order.

[¶ 68,750] Charles D. Bender v. The Hearst Corporation.

In the United States District Court for the District of Connecticut. Civil Action No. 6408. Filed June 19, 1957.

Sherman Antitrust Act

Combinations and Conspiracies—Practices—Acquisition of Assets of Competitor—Legality.—A publisher of an automobile repair cost manual and other publications did not violate Section 1 of the Sherman Act when it acquired all of the assets of a publisher of a competing automobile repair cost manual and discontinued the publication of its own manual. The merger did not result in an unreasonable restraint on commerce. Competition remained vigorous after the merger, and the merger did not put the acquiring publisher in a position of dominance in the trade to affect its flow, to divert it, or to dictate prices. The probable immediate consequence of the merger was to spur improvement of the product sold by competitors. The fact that the acquiring publisher refused to deal with a distributor of the acquired publisher after the merger was not sufficient to constitute a violation of Section 1 of the Sherman Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.600, 2005.785.

Monopolies—Monopolization, Attempt To Monopolize, Conspiracy To Monopolize—Acquisition of Assets of Competitor—Legality.—A publisher of an automobile repair cost manual and other publications did not violate Section 2 of the Sherman Act when it acquired all of the assets of a publisher of a competing automobile repair cost manual. The acquiring publisher, as a result of the merger, acquired no power to fix prices or to exclude competition, nor could it lessen quality or restrict production throughout the industry in the relevant market. Furthermore, the acquiring company did not exercise or attempt to exercise the power to compel the acquired publisher to choose between selling out or being run out of business. There was no attempt to monopolize because there was no evidence that the publisher intended to use the acquisition itself to monopolize the field. Although the two publishers acted in agreement in bringing about the merger, their actions and purposes were not those of a conspiracy to monopolize the field. They neither expected nor intended to dominate the field. The refusal of the acquiring company to sell its new manual to a person who had been a distributor of the acquired company was not unlawful. The acquiring company had its own sales staff and no longer needed a distributor through which to make its sales, and it had no dominance in the field nor price fixing purpose.

See Monopolies, Vol. 1, ¶ 2510.500, 2515.40, 2520.30, 2610.120, 2610.720.

Clayton Antitrust Act

Acquisitions of Stock or Assets—Asset Acquisition—Applicability of Clayton Act to Acquisition of Individually Owned Assets—Corporate Assets Constituting Insignificant Part of Sale.—A corporate publisher of an automobile repair cost manual and other publications did not violate Section 7 of the Clayton Act when it acquired all of the assets of an unincorporated publisher of a competing automobile repair cost manual. Sec. 7 was not applicable since it applies only to the acquisition by a corporation of the stock or assets of another corporation. The assets acquired by the corporate publisher were those of an individual and not those of a corporation. There was insufficient evidence that a sales corporation, which was created by the individual publisher, owned some of the assets which eventually went to the corporate publisher as a result of the merger. In view of the nature and function of this corporation and the circumstances surrounding its existence, it was concluded that this ancillary and wholly dependent entity was not the kind of corporate entity, nor was its temporary handling of any of the individual's business property the kind of ownership of assets, contemplated by Congress for the purposes of Section 7. The corporation neither owned nor transferred to the corporate publisher any assets which were of any significance. However, this does not mean that a family corporation or a corporation owned or controlled by a single individual is not subject to this section of the Clayton Act.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4205, 4207.

For the plaintiff: Lewis E. Caplan, of Caplan & Garvey, New Haven, Conn.

For the defendant: Morris Tyler, New Haven, Conn.

Findings of Fact

[*Nature of Publications*]

ROBERT P. ANDERSON, District Judge [*In full text except for omissions indicated by asterisks*]: 1. In 1953 Edmund J. Riedl of Milwaukee, Wisconsin, individually, under the trade name of Crash Book Service, published and offered for sale to those interested in current costs of automobile repairs, a reporting service in the form of a loose-leaf book entitled Crash Book Service.

2. At that time and at all times up to October 10, 1956 there were four competing publications: Motor's Body Shop Flat Rate and Parts, published by the defendant; National Parts and Labor; Chilton; and Glenn-Mitchell.

3. Glenn-Mitchell was distributed almost entirely in western states with very few subscribers in the east.

4. Only Crash Book Service and National Parts and Labor were loose-leaf; and Crash Book was distinguishable from the others by presenting all necessary cost items for parts and labor for each model of each kind of car for a particular year on one page and by furnishing revisions containing current price corrections at least once each month and more frequently if necessary. The other publications made such corrections at longer intervals.

5. The principal users of these publications were insurance companies, automobile repair shops and automobile damage appraisers.

6. Early in December 1953 the plaintiff, who was an expert automobile damage appraiser and who was forty years of age, became a part-time distributor of Crash Book Service. He continued in this status until October 1, 1954 when he was persuaded by Riedl to give up his well paying appraisal work to become a full time distributor of Crash Book Service.

7. The plaintiff thereafter devoted his full time and effort to this work until October 8-10, 1956. He had three full time and twenty part time employees or agents.

8. The distributorship agreement between the plaintiff and Riedl, at its inception, was partly established through letters and partly through oral conversations. On April 20, 1955 Riedl drafted in letter form and sent to the plaintiff a detailed statement of the terms of the distributorship agreement (Plaintiff's Exhibit B). This was signed by Riedl but, although written acceptance was added for the plaintiff's signature, he would not sign it at that time without certain modifications as to the territory which in Riedl's letter was described as follows:

> " . . . on the north by the Canadian border; on the south by the state line separating Virginia and North Carolina and on the west by a straight line drawn south from the point where Lake Champlain meets the Canadian border, continuing south through Harrisburg, Pennsylvania and continuing south from there to the

point where it would intersect the state line dividing Virginia and North Carolina."

9. Shortly thereafter the plaintiff and Riedl orally agreed upon an amendment of the territorial provision by adding western New York State, exclusive of the City of Buffalo. The plaintiff agreed to sign the agreement as amended, but Riedl said it was not necessary. The terms set forth in Riedl's letter of April 20, 1955 with the amendment as to territory then became the contract between Riedl and the plaintiff concerning the plaintiff's distributorship; and, except for a minor modification relative to handling and recording of renewals by the home office of Crash Book Service in Milwaukee instead of by the plaintiff at his office in Guilford, Connecticut, this contract remained operative until October 6, 1956.

10. In effect the agreement substantially put into express terms what the plaintiff and Riedl had been doing since October 1, 1954.

11. The pertinent provisions of the agreement for the purpose of this case include: the territorial limits of the distributorship; the retail price for the service of $25. with $20. for renewals, and the price to the distributor of $15. apiece for both original and renewal subscriptions which carried one year of revision service; special wholesale prices for volume sales for which the distributor received $3. per volume on original sales and $1. on renewals; and a special retail price limit of $20. for the original and $17.50 for renewal by an insurance company in automobile damage claim work and the same for appraisers of automobile damage.

12. The agreement was to continue so long as the distributor remained active in his territory to be evidenced by maintaining a reasonable number of subscribers. Upon the death of a distributor the agreement terminated, but the distributor's widow and children were to be paid for a period of two years following the distributor's death a distributor's share of the return from renewals of sales made by the decedent in his lifetime. A distributor could withdraw from his distributorship and thereafter would be entitled to his share of the return from renewals for one year. There were general provisions concerning records, accounting, handling of Crash Books on consignment and on open account, etc.

[*Volume of Sales*]

13. As of October 1, 1954 in the territory covered by the plaintiff's distributorship: 99% of Insurance Companies used National Parts & Labor; 20-25% of Automobile Repair Shops and Appraisers used Chilton; 50-60% of Automobile Repair Shops and Appraisers used National Parts & Labor; 20-25% of Automobile Repair Shops and Appraisers used Motor's Body Shop Flat Rate and Parts; and 1% of Automobile Repair Shops and Appraisers used Glenn-Mitchell.

14. As of October 1, 1956 in the territory covered by the plaintiff's distributorship: 90% of Insurance Companies used National Parts & Labor; 10% of Insurance Companies used Crash Book Service; 25-30% of Automobile Repair Shops and Appraisers used National Parts & Labor; 50% of Automobile Repair Shops and Appraisers used Crash Book Service; 10% of Automobile Repair Shops and Appraisers used Chilton; 10% of Automobile Repair Shops and Appraisers used Motor's Body Shop Flat Rate and Parts; and 1-2% of Automobile Repair Shops and Appraisers used Glenn-Mitchell.

15. The plaintiff in his territory during 1953 sold 64 Crash Book Services, in 1954 he sold 275 Crash Book Services, in 1955 he sold 1725, and between January 1 and August 31, 1956 he sold 1850. There were also renewals which annually ran in excess of 75% of the Crash Book Services outstanding at the end of the previous year.

16. The total national outstanding distributions of Crash Book Service for the period January 1, 1956 to October 1, 1956 was 6891 of which approximately 3755 were sales by the plaintiff in his territory.

17. In 1953 Riedl doing business as Crash Book Service lost $5053.83; in 1954 he made a profit of $684.31; in 1955 he made a profit of $22,317.18; and for the first six months of 1956 he made a profit of $30,818.36.

18. The approximate total national circulation of each of the publications in this field on October 1, 1956 was: National Parts and Labor—30,000; Chilton—10,000; defendant's Motor Body Shop and Flat Rate Manual—10,000; Glenn Mitchell—7500; and Crash Book Service—7000.

19. Of the individuals or corporations producing these publications all except Riedl sold the publication as only one of

a multiple line of publications designed for sale to the automotive trade.

20. It was a part of the understanding between Riedl and the plaintiff in establishing plaintiff's distributorship that it would be to their mutual advantage in quickly achieving a wide distribution of Crash Book Service for the plaintiff to give to his agents the whole or a substantial part of the commissions on the original sales and to depend, himself, upon getting his return from renewals.

21. Riedl represented to the plaintiff that selling Crash Book Service was like selling insurance, that in the first few years the plaintiff would not make any money but that the percentage of renewals was very high and after the first few years the plaintiff would make his money from the repeat business.

22. The plaintiff, therefore, ploughed back into the distributorship all of his profit by paying large commissions to his salesmen and incurring other expenses in pushing the distribution of Crash Book Service so that by September 30, 1956 his two years of full time work showed a cash loss of a few hundred dollars but he had produced over a half of all of Crash Book Service sales.

[*Sales Corporation*]

23. In March of 1956 Riedl organized a corporation under the laws of the State of Wisconsin, named Crash Book Sales, Inc.

24. Riedl intended that temporarily and on an experimental basis the corporation would act as sole sales agent for Crash Book Service. It did some printing and it gathered together in the loose-leaf folders material prepared and owned by Crash Book Service; it mailed the volumes out to subscribers and took care of accounts with subscribers. It retained as a commission for performing these functions the difference between what it collected from a subscriber and what it paid to Crash Book Service, which in an ordinary transaction were respectively $25. and $16. It had the use of Crash Book Service's subscription and renewal records and lists. It did not act as agent for sales made by plaintiff's distributorship.

25. Riedl's purposes in experimenting with the corporate entity were to attempt to achieve tax savings for himself and to divert income to members of his immediate family.

26. The corporation owned nothing by way of tangible property and only $1,000, was paid in for its organization. It was owned by Riedl and the members of his immediate family and was wholly under his control. It had the sole right as agent to sell Crash Book Service except for plaintiff's distributorship but Riedl could revoke this agency at will. Riedl decided to terminate its existence at the time an agreement was made with the defendant on September 25, 1956 and it was dissolved in October 1956.

[*Defendant's Acquisition*]

27. In March 1956 the defendant Hearst Corporation concluded that its Motor Body Shop and Flat Rate manual was not meeting the needs of subscribers; and it decided to discontinue it in its then existing form and to put out in place of it a loose-leaf volume with costs of parts and labor for particular automobiles quickly ascertainable and with monthly revisions.

28. The defendant estimated that it would take about two years to accomplish this change to produce a manual similar to that of Crash Book Service, which it considered the best of that type of publication. To obviate this delay and avoid the adverse effect of competition meanwhile, the defendant, which put out many publications and had resources running into many millions of dollars, decided to negotiate with Riedl, a small independent publisher with a single line product, to purchase Crash Book Service.

29. Negotiations with this end in view were commenced in May 1956 and culminated in a written contract for the sale of Crash Book Service to the defendant, entered into, drafted and executed at Milwaukee, Wisconsin on September 25, 1956.

30. In the course of the negotiations the defendant learned that while Riedl was fully aware that Crash Book Service had become overwhelmingly successful and was rapidly taking business away from its competitors, he was very fearful of the ultimate competition which he would have to meet when the other publishers in the field adopted in their own manuals the unique advantages which Crash Book Service possessed. The competitors had already adopted plans to change

their publications by incorporating these advantageous features as soon as they could do so.

31. The defendant concurred in the prospect for competition from other publishers and mentioned its own plans for a new manual. It persuaded Riedl that with Crash Book Service in the defendant's hands with its very large sales force covering the whole country with multiple lines of publications, they could get ahead of the competition.

32. Under the contract Riedl received $42,500 for the trade names, copyrights, technical data, records and printed forms and good will; the defendant received an option to purchase the furniture and equipment. It agreed to pay Riedl a royalty of fifty cents per volume for Crash Book Service sold for the next ten years or until the payments totalled $100,000. whichever might first occur, and to hire Riedl as editor for two years at a salary of $10,000. per year.

[*Termination of Distributorship*]

33. In the course of the negotiations between May and September 25, 1956, the defendant learned of the distributorship contract existing between Riedl and the plaintiff and was familiar with its terms.

34. Although Riedl made some effort to preserve the rights of the plaintiff and some others to continue to deal in Crash Book Services, the defendant induced Riedl to repudiate his contract with the plaintiff.

35. Riedl was induced to breach the distributorship agreement with the plaintiff by the considerations given Riedl by the defendant in the contract of September 25, 1956 for the purchase of Crash Book Service and by a specific provision therein that the defendant would pay up to $2500. on any amount recovered by the plaintiff in any legal action against Riedl brought by the plaintiff on the claim arising out of his distributorship agreement, and the defendant further agreed to defend such action and if this occurred, Riedl agreed to assign to the defendant any claims Riedl had against the plaintiff.

36. The defendant, at the time it induced Riedl to repudiate and breach his contract with the plaintiff, knew the number of sales of Crash Book Service made by the plaintiff in his territory and knew the number of subscriptions then and there in force.

37. The defendant also knew that the plaintiff had a reasonable expectancy of profit from the renewals of these outstanding subscriptions in his territory and a probable return of substantial proportions. It also knew that the plaintiff had a reasonable expectancy of and probable profits from additional sales in his territory.

38. By the terms of the contract of September 25, 1956 with Riedl, the defendant became entitled to the portion of the profit on the renewals of outstanding subscriptions which otherwise would have gone to the plaintiff.

39. The defendant induced the breach of Riedl's contract with the plaintiff wilfully and maliciously and with the specific intent of garnering for itself the harvest which the plaintiff in more than two years of work and sacrifice of profit had labored to prepare. It was the defendant's purpose to gain for itself the very benefits which were insured to the plaintiff by the contract.

40. The plaintiff was not notified of the sale of Crash Book Service by Riedl to the defendant or of Riedl's repudiation of the distributorship agreement with the plaintiff until sometime shortly after October 6, 1956.

41. Upon acquiring Crash Book Service, the defendant changed the name of the service and the title on the volumes to "Motor's Crash Book Service" and on October 11, 1956 the defendant sent written notices to all subscribers for Crash Book Service, including the plaintiff's customers, concerning the change of name and instructing them to have no subscription dealings with or to pay any money due to anyone other than an authorized representative of Motor. The defendant refused to deal with the plaintiff.

42. The plaintiff was neither paid nor credited with any of the profit due him on renewals under his contract with Riedl after August 31, 1956.

43. The plaintiff at the time of the breach had Crash Book Service volumes in his possession on consignment all of which together were carried as an inventory of $4,275.00.

44. The action of Riedl and the defendant in changing the name of the service and the title of the volumes, in causing the breach of the distribution contract, and in refusing to deal with the plaintiff and furnish him

revision material rendered these volumes obsolete, in whole or in part, and of no value.

45. On September 25, 1956 the plaintiff was continuing to fulfill his duties under his distribution contract with Riedl and he had done nothing during the life of the contract to cause a breach thereof or to terminate said contract or justify a repudiation by Riedl or to participate in or work a rescission of said contract.

Conclusions

1. As to all four counts the court has jurisdiction of the subject matter and the parties.

2. As to the first count it is concluded that a valid and enforceable contract existed between the plaintiff and Edmund J. Riedl on September 25, 1956; that the defendant on said date wilfully and maliciously, without justification or excuse, induced Riedl to breach that contract in consequence of which the plaintiff has been damaged in the amount of $87,500.00. Judgment may enter for said sum with interest from September 25, 1956 and costs in favor of the plaintiff.

3. Damages provide an adequate remedy for the violation of the plaintiff's rights as alleged and proved under the first count.

4. The second count may be dismissed without costs.

5. As to counts three and four it is concluded that the defendant did not violate any of the provisions of the Sherman Act or the Clayton Act and those counts may be dismissed without costs.

Discussion

[*Causes of Action*]

The complaint is in four counts. Recovery is granted on the first count and the other three are dismissed; the third and fourth for insufficient supporting evidence and the second, because it is largely repetitious of the first which alleges a cause of action for tortious inducement of a breach of contract. The evidence amply supports the plaintiff's claim.

* * *

[*Antitrust Claims*]

Counts three and four describe causes of action based upon alleged violations of Section 1 and 2 of the Sherman Act (15 U. S. C. A. Sections 1 and 2) and the 1950 Amendment to Section 7 of the Clayton Act (15 U. S. C. A. Section 18). It has been concluded that the evidence did not fully support the claims made in these two counts and they are dismissed.

[*Restraint of Trade*]

As to Section 1 of the Sherman Act it is apparent that the merger of Crash Book Service into the defendant corporation did not result in an unreasonable restraint on commerce among the states. The area of effective competition between Bender's Crash Book Service and the defendant's Motor Body Shop Flat Rate and Parts market consisted of those states in the plaintiff's distributorship territory, the remaining portions of states a part of which was in the plaintiff's territory, and Arizona, Colorado, Florida, Illinois, Indiana, Iowa, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Ohio, Tennessee, Texas and Wisconsin. As a result of the merger Motor Body Shop Flat Rate and Parts has been eliminated and Crash Book Service is now distributed in the District of Columbia and in all of the states except Montana and is now pitted in competition in a nation-wide market against National Parts and Labor, the leader in this field, and against Chilton and, in the west against Glenn-Mitchell. Following the merger Crash Book Service, with Motor's Body Shop Flat Rate and Parts eliminated, constituted about 28% of the national market. But even in the relevant market area where, as may be inferred from distributorship area and nation-wide sales figures, Crash Book Service prior to the merger had made significant inroads on the older publications, there was still a vigorous competition left. This was also true of the nation-wide competition after the merger. Moreover, competitors were in the process of changing their publications to include the advantageous features of Crash Book and by late 1957 or shortly thereafter Motor's Crash Book Service could look forward to intensified competition. Riedl and the defendant in merging brought together Riedl's superior product with the defendant's nation-wide sales force, which could distribute Crash Book Service much more cheaply than Riedl could because defendant's salesmen handled several other publications at the same time, and defendant's other publications could be used as advertising media for Crash Book Service. It was this awareness of mutual advantage which ultimately brought about the merger.

The combination gave Motor's Crash Book Service a temporary jump on others in the field. But it did not put the defendant in a position of dominance in the trade to affect its flow or to divert it or restrain it or to dictate prices, and its probable immediate consequence was to spur improvement of the product sold by competitors. With the continued increase in motor vehicles on the highways, it appears that there was at the time of the merger an expanding market with an increase in consumer demand. There is nothing to indicate that the defendant had acquired any control over the sources of supply to meet that demand.

After the merger, as before, consumers could get as many Crash Book Services or competitors services as they wanted even though the plaintiff was no longer able to sell Crash Book Service. Violated as the plaintiff's rights were, there was no unreasonable restraint of trade under Section 1 of the Sherman Act. *United States v. Columbia Steel Co.* [1948-1949 TRADE CASES ¶ 62,260], 334 U. S. 495, 527.

The fact that Motor's Body Shop Flat Rate and Parts was discontinued, the fact that its planned successor in imitation of Crash Book Service never saw the light of day and thus never got into competition, and the fact that the defendant after the merger refused to deal with the plaintiff are not sufficient in the circumstances of this case to constitute a violation of Section 1 of the Sherman Act. These conditions did not have sufficient harmful effect on freedom of commerce and vigor of competition in the auto body manual industry in the relevant market to be regarded as "restraint of trade or commerce" within the intent of Section 1. *United States v. Columbia Steel Co., supra; Apex Hosiery Co. v. Leader* [1940-1943 TRADE CASES ¶ 56,039], 310 U. S. 469, 493; *Standard Oil of New Jersey v. United States,* 221 U. S. 1.

[*Monopoly*]

With regard to the allegations under Section 2 of the Sherman Act, it does not appear that the defendant has by the merger monopolized or attempted to monopolize or combined or conspired to do so. The defendant, as a result of the merger, acquired no power to fix prices or to exclude competition, *United States v. E. I. DuPont de Nemours & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 389; *American Tobacco Co. v. United States* [1946-1947 TRADE CASES ¶ 57,468], 328 U. S. 781; nor could it lessen quality or restrict production throughout the industry in the relevant market. *Apex Hosiery Co. v. Leader* [1940-1943 TRADE CASES ¶ 56,039], 310 U. S. 469. While an effect of the merger was to eliminate Riedl as a competitor, this came about through negotiation and an agreement voluntarily entered into for business reasons of mutual advantage. Defendant neither had nor attempted to exercise the power to compel Riedl to choose between selling out or being run out of business.

Nor is there any evidence here of an attempt to monopolize. Since it has been found that there was no monopolization, a finding of an attempt to monopolize would have to rest on a showing that there was a plan to reach out beyond this acquisition by additional mergers or the equivalent or that the defendants intended to use the acquisition itself to monopolize even though it did not in fact achieve its goal. *United States v. Griffith* [1948-1949 TRADE CASES ¶ 62,246], 334 U. S. 100, 107; *United States v. Columbia Steel Co.,* 334 U. S. 495 [1948-1949 TRADE CASES ¶ 62,260], 531-33; *United States v. Aluminum Co. of America* [1944-1945 TRADE CASES ¶ 57,342], 148 F. 2d 416. 431-432 (2nd Cir. 1945). Similarly, though Riedl and the defendant acted in agreement, their actions and purposes were not those of a conspiracy to monopolize the auto body manual industry. They neither expected nor intended to dominate that field.

Defendant's refusal to sell its particular publication to plaintiff in wholesale lots is the ordinary business consequence of the fact that it has its own sales staff. Here defendant has no dominance of the industry nor price-fixing purpose such as existed in *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U. S. 359. Moreover, Hearst was never contractually obligated to Bender and appears from the evidence not to deal at all through distributors but rather entirely through employee-salesmen.

There is not apparent in the evidence concerning this merger and its surrounding circumstances anything from which it can be said that there is a violation of Sections 1 or 2 of the Sherman Act.

[*Applicability of Clayton Act*]

Section 7 of the Clayton Act does not apply to this case as the provisions of the

section extend only to the acquisition by a corporation of the stock or assets of another *corporation*. The assets conveyed by Riedl to the defendant were owned by Riedl as an individual; and Congress did not include within the terms of this statute the transfers of *individually* owned assets to a corporation. There was Crash Book Sales Inc. which, the plaintiff claims, owned some assets which eventually went to the defendant as a result of the merger, but there is not sufficient evidence to find this. Crash Book Sales Inc. was organized as an experiment to be tried out for a short while by Riedl. It was designed to act as sole distributor and sales agent. It collected accounts receivable which were owned by Riedl, doing business as Crash Book Service. In anything it did, it was really acting as agent for Riedl, an individual. It was entirely his creature and separated from him, as Crash Book Service, it had no life. The contract which gave it sustenance could be cancelled by Riedl on ten days notice. Considering the nature and function of this corporation and the circumstances surrounding its existence, it must be concluded that this ancillary and wholly dependent entity unable to stand on its own feet, was not the kind of corporate entity nor was its temporary handling of any of Riedl's Crash Book Service property the kind of ownership of assets contemplated by Congress for the purposes of Section 7 of the Clayton Act. This is not to say that a family corporation or a corporation owned or controlled by a single individual is not within the terms of the Clayton Act. Such is by no means the law. The distinguishing characteristics of Crash Book Sales Inc. which remove it from the application of the statute are its temporary, limited functions as an agent for Riedl coupled with the fact that it neither owned nor transferred to the defendant any assets which were of any significance as sinews of war in the field of trade and competition involved.

Except for this it is apparent that this case would fall within that class of mergers which have not attained the effects which bring them within the provisions of the Sherman Act, but which may have the effect of substantially lessening competition within the terms of the 1950 amendment to Section 7 of the Clayton Act. *Transamerica Corp. v. Board of Governors of Federal Reserve System* [1953 Trade Cases ¶ 67,536], 206 F. 2d 163, 169 (3rd Cir. 1953); *Hamilton Watch Co. v. Benrus Watch Co.* [1953 Trade Cases ¶ 67,485], 114 F. Supp. 307, Dist. of Conn. 1953, Affirmed [1953 Trade Cases ¶ 67,517] 206 F. 2d 738 (2nd Cir. 1953).

[¶ 68,751] United States v. Retail Liquor Dealers Association of Chattanooga, Chattanooga Wholesale Liquor Dealers Association, United Liquors Corporation, Chattanooga Wholesale Company, Monarch Distributors, Inc., Union Wholesale Liquor Co., Inc., Isadore S. Deitch, Charles W. Hines, Ray H. Daley, James W. Rogers, Coke Bowman, Daniel Perlberg, William L. Springer, Harry D. Fielder, and Dan Daniels.

In the United States District Court for the Eastern District of Tennessee, Southern Division. Civil Action No. 2554. Filed June 20, 1957.

Case No. 1248 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Price Fixing—Resale Prices—Alcoholic Beverages.—Wholesalers and retailers of alcoholic beverages and two trade associations were prohibited by a consent decree from entering into any understanding (1) to control prices, discounts, mark-ups, margins of profit, or terms at which alcoholic beverages are sold, (2) to induce or coerce any person to (a) adhere to prices, terms, or conditions at which such beverages are sold or (b) issue, print, or disseminate any price lists or other price information containing minimum or suggested resale prices, or (3) to communicate with any manufacturer or wholesaler for the purpose of inducing or coercing such manufacturer or wholesaler to establish minimum or suggested resale prices. The retailers were further prohibited from posting or adhering to any price lists

containing minimum or suggested resale prices, mark-ups, or margins of profit. Also, the defendants were ordered to cancel all fair trade contracts.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.091, 2011.181; Resale Price Fixing, Vol. 1, ¶ 3015.80.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Exchange of Price Information—Trade Association Membership.—Wholesalers and retailers of alcoholic beverages and two trade associations were prohibited by a consent decree from (1) circulating or exchanging price lists or other price information containing minimum or suggested resale prices, mark-ups, or margins of profit for alcoholic beverages, (2) belonging to or participating in any organization or program for (a) policing or reviewing prices or (b) restricting or preventing the distribution or sale of any brand of alcoholic beverage, or (3) organizing, becoming a member of, or participating in the activities of any trade association or other organization, the purpose of which relates to the distribution or sale of alcoholic beverages contrary to the provisions of the consent decree.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.218, 2017.121.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Cancellation of Fair Trade Contracts.—Alcoholic beverage retailers and wholesalers were directed to cancel their fair trade contracts which fix the resale price of any alcoholic beverage in the Chattanooga trading area. Also, the wholesalers were required to withdraw all outstanding price lists for alcoholic beverages.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.45, 8421.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Dissolution of Trade Association.—Where a consent decree prohibited wholesalers and retailers of alcoholic beverages from engaging in price fixing practices, the decree also ordered the dissolution of a wholesale liquor dealers' trade association.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.10.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Legislative Activities.—A consent decree entered against retailers and wholesalers of alcoholic beverages provided that nothing contained in the decree shall prohibit them from proposing or supporting legislation or the adoption of local, state, or federal regulations relating to the purchase, sale, or distribution of alcoholic beverages or from individually taking action required by legislation or regulation.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.48.

For the plaintiff: Raymond K. Carson and Walter W. Dosh.

For the defendants: D. L. Lansden, Nashville, Tenn., for Monarch Distributors, Inc., and Harry D. Fielder; John J. Hooker, Nashville, Tenn., for Chattanooga Wholesale Company and Dan Daniels; Vaughn Miller (Miller, Martin, Hitching & Tipton), Chattanooga, Tenn., for Coke Bowman and Chattanooga Wholesale Liquor Dealers Association; Harry Weill, Chattanooga, Tenn., for Retail Liquor Dealers Association of Chattanooga, Isadore S. Deitch, Charles W. Hines, Ray H. Daley, and James W. Rogers; and Charles A. Noone (Noone & Noone), Chattanooga, Tenn., for United Liquors Corporation, Union Wholesale Liquor Company, Inc., Daniel Perlberg, and William L. Springer.

Final Judgment

LESLIE R. DARR, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on June 30, 1955, and the defendants having appeared and filed their several answers to said complaint denying the substantive allegations thereof and any violation of law; and the said defendants, by their respective attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without admission by any party in respect to any such issue; and the plaintiff, by its attorneys, not objecting to the form of this Final Judgment; and the Court having considered the matter and being duly advised:

Now, therefore, without the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, it is hereby

Ordered, adjudged and decreed, as follows:

I

[*Sherman Act*]

This Court has jurisdiction of the subject matter hereof and of all parties hereto. The complaint states a claim upon which relief may be granted against the defendants under Section 1 of the Act of Congress of July 2, 1890 entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Person" shall mean an individual, partnership, firm, corporation, association, trustee or any other business or legal entity;

(B) "Alcoholic beverage" shall mean any whiskey, rum, gin, brandy, cordial, wine, cider, alcohol or any other spiritous, vinous, malt or fermented liquor, liquid or compound, by whatever name called, containing one-half of one per cent or more of alcohol by volume, which is fit for beverage purposes, except beer;

(C) "Manufacturer" shall mean any person who distills, rectifies, blends, ferments or bottles any alcoholic beverage, or imports into the United States any alcoholic beverage from outside the United States, or who, as a distributor of alcoholic beverages, sells to a wholesaler for resale to a retailer;

(D) "Chattanooga Trading Area" shall mean Hamilton County, Tennessee, and other counties in the State of Tennessee supplied with alcoholic beverages by Chattanooga wholesalers.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to any of the defendants shall apply to such defendants, their officers, agents, servants and employees, and to those persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Price Fixing Practices*]

The defendants are jointly and severally enjoined and restrained from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, understanding, plan or program among themselves or with any other person to:

(A) Control, fix, raise, adopt, stabilize or maintain prices, mark-ups, margins of profit, terms or conditions at which alcoholic beverages are sold or offered for sale to third persons;

(B) Control, fix, raise, adopt, stabilize, maintain or eliminate discounts at which alcoholic beverages are sold or offered for sale to third persons;

(C) Induce, compel or coerce, or attempt to induce, compel or coerce any person to adhere to, or to police or enforce adherence to, prices, terms or conditions at which alcoholic beverages are sold or offered for sale to third persons, or to any group or class of persons;

(D) Induce, compel or coerce, or attempt to induce, compel or coerce any person to issue, print, write or disseminate any price lists or other price information containing minimum or suggested resale prices at which alcoholic beverages are to be sold or offered for sale to third persons, or to any group or class of persons;

(E) Communicate, directly or indirectly, with any manufacturer or wholesaler for the purpose of inducing, compelling or coercing such manufacturer or wholesaler to establish, adopt, issue or enforce minimum or suggested resale prices, mark-ups, margins of profit or discounts at which alcoholic beverages are sold or offered for sale to third persons.

Nothing in this Section IV shall be deemed to prohibit defendants from proposing or supporting legislation or the adoption of local, state, or federal regulations relating to the purchase, sale or distribution of alcoholic beverages or from individually taking action required by local, state or federal legislation or regulation.

V

[*Minimum Retail Prices*]

Each of the defendant retailers is enjoined and restrained from maintaining, posting, or adhering to any price lists or

other price information prepared, issued or circulated by any other person, containing minimum or suggested retail prices, mark-ups or margins of profit for alcoholic beverages.

VI

[*Price Lists—Concerted Activities*]

(A) Each of the defendants is enjoined and restrained, for a period of five years from the effective date of this Final Judgment, from disseminating, circulating or exchanging, or preparing for dissemination, circulation or exchange, to or with any other person, price lists or other price information containing minimum or suggested resale prices, mark-ups or margins of profit for alcoholic beverages sold or offered for sale to third persons;

(B) Each of the defendants is enjoined and restrained from belonging to or participating in any organization, plan or program for policing or reviewing prices at which alcoholic beverages are sold or offered for sale by any person;

(C) Each of the defendants is enjoined and restrained from belonging to or participating in any organization, plan or program for restricting, hindering or preventing the introduction of, or decreasing or eliminating the distribution or sale of, any brand of alcoholic beverage in the Chattanooga trading area, under threat of boycott or otherwise.

VII

[*Withdrawal of Price Lists*]

Each of the defendant wholesalers is ordered and directed to:

(A) Withdraw from the possession or custody of retailers and other wholesalers, by written request personally delivered to each customer and other wholesaler, not later than fifteen (15) days from the effective date of this Final Judgment, all outstanding price lists and other documents or data previously issued or circulated by each such wholesaler which list, or contain any reference to, any minimum or suggested retail prices, mark-ups or margins of profit for alcoholic beverages;

(B) Not later than thirty (30) days from the effective date of this Final Judgment, furnish to each retailer in the Chattanooga trading area a written notification that, pursuant to the terms of this judgment, (1) any and all minimum or suggested retail prices, mark-ups and margins of profit for alcoholic beverages, previously issued or furnished by such wholesaler, have been withdrawn and cancelled, and (2) for a minimum period of five years from the effective date of this Final Judgment, such wholesaler will not issue, circulate or furnish to retailers any minimum or suggested retail prices, mark-ups or margins of profit for alcoholic beverages;

(C) Within sixty (60) days after the effective date of this Final Judgment, file an affidavit with this Court, and send a copy thereof to the plaintiff herein, setting forth the steps taken to comply with the terms of this Section VII.

VIII

[*Fair Trade Contracts—Cancellation*]

(A) Each defendant is ordered and directed (1) to cancel all fair trade contracts to which he is a party and which fix or control the resale price of any alcoholic beverage in the Chattanooga trading area, and (2) to the extent that such defendant elects to sell alcoholic beverages in the Chattanooga trading area, during the period of five years from the effective date of this Final Judgment, to do so at prices individually determined by himself, without reference to fair trade prices established thereon.

(B) Each of the defendants is enjoined and restrained for the five year period provided for in sub-section (A) of this Section VIII, from urging, suggesting, persuading or coercing any manufacturer or wholesaler to establish, adopt, issue or enforce minimum or suggested resale prices for alcoholic beverages.

IX

[*Trade Association—Dissolution*]

(A) Defendant Chattanooga Wholesale Liquor Dealers Association is ordered and directed to cause, within thirty (30) days after the date of entry of this Final Judgment, the dissolution of the Association and, within sixty (60) days after the date of entry of this Final Judgment its secretary or members shall file an affidavit with this Court, and send a copy thereof to the plaintiff herein, setting forth the steps taken to comply with the terms of sub-section (A) of this Section IX;

(B) Defendant Retail Liquor Dealers Association of Chattanooga having dissolved as a corporation *pendente lite,* all of the defendants are jointly and severally enjoined and restrained from organizing, becoming a

member of, or participating, directly or indirectly, in the activities of any trade association or other organization, the purpose or functions of which relate to the distribution or sale of alcoholic beverages contrary to any provision of this Final Judgment.

X

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant, made to its principal office or place of business, be permitted:

(A) Access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment, and

(B) Subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matter.

No information obtained by the means provided in this Section X shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XI

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

[¶ 68,752] Aljan Camera Co., Inc. and Michael Schwartz, doing business as Aljan Camera Company v. Eastman Kodak Company and Eastman Kodak Stores, Inc.

In the United States District Court for the Southern District of New York. Civ. No. 113-90. Filed June 25, 1957

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Plaintiffs—Assignor of Antitrust Claims.—An individual who assigned his claimed rights in causes of action under the Sherman Act to a corporation was a proper party plaintiff in the corporation's suit based on the assigned claims. The retention, in the corporation's suit, of the individual as a plaintiff and of claims made on behalf of the individual could not prejudice the defendants. The individual had asserted that the assignment to the corporation might be invalid.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Pretrial Procedures—Striking Immaterial or Prejudicial Matters—Claims on Behalf of Public and Historical Material.—Where a retailer's complaint alleged past and future damages to itself and also sought injunctive relief in favor of all retail customers of the defendant, a motion to dismiss the complaint on the ground that it set forth claims on behalf of the public was denied. The paragraphs of the complaint concerning injury and damages related to the retailer alone, and the prayer for injunctive relief also was made in favor of the retailer. Also, motions to strike portions of the complaint purportedly dealing with claims made on behalf of the public and dealing with the defendants' operations in other areas of the country were denied since no prejudice to the defendants was shown.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.595, 9022.

Private Enforcement and Procedure—Suit for Civil Damages—Evidence—Government Antitrust Consent Decree.—In a suit for treble damages, it was improper to allege in the complaint that a consent decree had been entered against the defendant in a Government antitrust action since Section 5 of the Clayton Act prevents the consent decree from being used as prima facie evidence against the defendant. Also, it was held that a date may be used in place of a reference to the decree for the purpose of indicating the point of time when the defendant ceased certain acts, and that the use of the decree as an admission against interest was an evidentiary matter and should be left to the discretion of the trial court.

See Private Enforcement and Procedure, Vol. 2, ¶ 9012.260.

For the plaintiffs: Hoffman, Buchwald, Nadel, Cohen & Hoffman, New York, N. Y.

For the defendants: Donovan, Leisure, Newton & Irvine (White & Case, New York, N. Y., and Nixon, Hargrave, Devans and Dey, Rochester, N. Y., of counsel), New York, N. Y.

Opinion

[*Defendants' Motion*]

GREGORY F. NOONAN, District Judge [*In full text*]: Defendants herein have moved this court pursuant to Rules 12(b)(6) and 12(f) of the Federal Rules of Civil Procedure, 28 U. S. C., for an order dismissing the complaint in part, and/or striking certain portions of the complaint in the plaintiffs' private anti-trust suit.

Specifically, and in addition to a general prayer for relief, the defendants seek:

1. To dismiss the complaint insofar as it asserts a claim on behalf of plaintiff Michael Schwartz, on the ground that Mr. Schwartz, prior to the commencement of this action, assigned all claims herein to the corporate plaintiff;

2. To dismiss the complaint insofar as it purports to set forth a claim on behalf of the public, on the ground that plaintiffs have no right to sue therefor;

3. To strike from the complaint certain portions thereof alleging claims on behalf of the public, as immaterial and prejudicial;

4. To strike from the complaint certain portions thereof on the ground of immateriality and prejudice; and

5. To strike from the complaint portions thereof on the ground of immateriality and prejudice, and as being outside the scope of Section 5 of the Clayton Act.

[*Assignor as Proper Party*]

Taking these motions seriatim, we turn first to the motion to dismiss as to Michael Schwartz. He asserts that although he intended and attempted to assign his rights in the causes of action to the corporate plaintiff, such assignment may not have been valid in law. At all events, he asserts, he is at least a "proper party" to the action and his retention as a party cannot possibly prejudice the defendants. The court agrees.

While a treble damage action under the Sherman Act appears to this court to be lawfully assignable, it is possible that for some reason, the assignment herein may have been invalid. At any rate, no harm can befall the defendants by the retention of the individual plaintiff as a party herein; in fact, as urged by that party, the defendants not only are not prejudiced thereby, they are protected against a possible future action by the individual plaintiff, and hence are assured of litigating the claim once and for all at this time. This portion of defendants' motion should be denied.

[*Relief in Favor of Others*]

In the second phase of their motion, the defendants urge that plaintiffs are attempting to set forth claims on behalf of the public. This clearly may not be done, but the plaintiffs deny that any such claims are made.

While it is true that the paragraphs alleging injury and damage (pars. 42, 43 and 44) allege past and future damages to the plaintiffs, and seek treble damages in favor of the plaintiffs certain sections of the plaintiffs' "wherefore" clause seek injunctive relief in favor of all retail store customers (Sections 3 through 6 thereof), and a large portion of the complaint deals with the defendants' relations with others.

Inasmuch as those paragraphs of the complaint concerning injury and damages assert such to the plaintiffs alone, and since the "wherefore" clause does seek relief in favor of the plaintiffs themselves, we do

not believe that the complaint should be dismissed as failing to state a claim upon which relief can be granted.

In the recent case of *Radovich v. National Football League* [1957 TRADE CASES ¶ 68,628], 352 U. S. 445, at page 453, the Supreme Court, in discussing technical objections to the pleading therein, quoted from the opinion of Mr. Justice Holmes in *Hart v. B. F. Keith Vaudeville Exchange,* 262 U. S. 271, 274, to the effect that, "we are not prepared to say that nothing can be extracted from this bill that falls under the act of Congress * * *". Clearly such broad wording is sufficient to sustain the plaintiffs' position and this portion of defendants' motion should be denied.

The third part of the motion seeks to strike certain portions of the complaint (on the ground of immateriality) purportedly dealing with claims made on behalf of the public and of the plaintiff Michael Schwartz. Penetrating the verbiage, and based on past experience with these types of cases, it is apparent that the plaintiffs are asserting as broad a claim as possible in order to justify future requests for extremely broad discovery proceedings, and the defendants are seeking to limit the complaint in order to avoid having to open huge portions of their business records to hostile scrutiny.

Insofar as this motion deals with the claim of Mr. Schwartz, that portion was dealt with earlier.

Insofar as it deals with claims purportedly made for the benefit of the public, it is the opinion of this court that the portions thus attacked do not prejudice the defendants. Although the defendants state that these allegations are prejudicial, they do not state in what way they are, and no such prejudice appears evident to the court.

Insofar as the motion attempts to have stricken those portions of the "wherefore" clause referred to earlier herein as dealing with relief to other retail customers, the defendants can be sure that any relief that ultimately may be granted to these plaintiffs will be only that to which the court concludes they are entitled.

> "It cannot be said that the allegations have no relation to the controversy or that a failure to strike will unduly prejudice the defendants."

Citrin v. Greater New York Industries, 79 F. Supp. 692, 696.

> "Matter will not be stricken from a pleading unless it is clear that it can have no possible bearing upon the subject matter of the litigation. If there is any doubt as to whether under any contingency the matter may raise an issue, the motion should be denied."

American TCP Corporation v. Shell Oil Company [1955 TRADE CASES ¶ 67,938], 127 F. Supp. 208, 209, quoting 2 *Moore's Fed. Prac.,* 2d Ed. (1948) Par. 12.21 (2), pp. 1217-1218.

In this respect, it is regarded as so basic that prejudice must be shown in order to successfully move to strike on such grounds, that the Supplement to the Moore volume page reference set forth above cites several recent cases in point and then states:

> "This proposition is so firmly established in the law that further annotation is deemed unnecessary."

Supplement to Volume 2, p. 189.

Accordingly, the defendants' motion in this respect also should be denied.

[*Geographical Scope of Complaint*]

The fourth part of the motion seeks to strike certain portions of the complaint, again for alleged immateriality and prejudice, dealing with defendants' operations in other areas of the country.

Again, as in the part of the motion immediately preceding this portion, no prejudice is shown beyond the bare allegation that it exists. The motion and trial judges are well able to prevent abuse of discovery proceedings and introduction of immaterial matter as evidence. Further, the plaintiffs assert that operations in other areas of the country may cut into possible mail order sales.

On the grounds set forth above, the reasoning and authorities given in the preceding paragraphs, and also for the reason that such allegations are permissible as background material in a complaint of this nature, this section of the motion should be denied.

[*Consent Decree*]

Turning now to the last portion of the motion, seeking to strike from the complaint reference to a consent decree entered in favor of the United States against the first-named defendant, clearly section 5 of

the Clayton Act (15 U. S. C. Sec. 16) prevents the consent decree from being used as prima facie evidence against that defendant. Prejudice to that defendant is apparent.

Furthermore, while the plaintiffs assert that they refer to the decree largely for convenience in indicating a point of time when the defendant ceased certain acts, and also as a form of admission against interest, the former purpose may be served by using a date in place of the reference to the decree, and the latter function is purely evidentiary and ought best be left to the discretion of the trial judge.

In short, it would appear that no useful purpose is served by the reference, the possibility of prejudice is apparent, and the materiality is not apparent.

[*Complaint To Be Amended*]

Accordingly, and on the reasoning of *Alden-Rochelle v. American Soc. of C. A. & Publishers,* 3 F. R. D. 157, the motion to strike that portion of paragraph 41 of the complaint set out in paragraph 5 of the defendants' motion paper should be granted, and the plaintiffs should have leave to amend their complaint, substituting a date in place thereof.

The defendants' motion is denied except as specified in the preceding paragraph, in which respect the motion is granted with leave to the plaintiffs to amend paragraph 41 of their complaint in accordance with this opinion.

So ordered.

[¶ 68,753] Frederick V. Fowler, et al. v. Sponge Products Corporation, et al.

In the United States Court of Appeals for the First Circuit. No. 5210. Dated June 25, 1957.

Appeal from the United States District Court for the District of Massachusetts. Ford, District Judge.

Sherman Antitrust Act

Private Enforcement and Procedure—Counterclaim for Damages Under Antitrust Laws—Right To File in Patent Infringement Action.—In a patent infringement suit, a trial court did not abuse its discretion in denying the defendants' motion to amend their pleadings to conform to the proof by adding an antitrust damage counterclaim alleging that the plaintiffs had violated the antitrust laws with respect to their patents. While some matters which might be material to the antitrust issue were presented during the trial of the patent issue, the trial court, in denying the motion, ruled that it did not try the antitrust issue. Furthermore, a counterclaim for treble damages under the antitrust laws is permissive in nature so that the failure by a defendant to plead it in a prior patent suit does not bar a subsequent independent suit by the defendant under the antitrust laws.

See Private Enforcement and Procedure, Vol. 2, ¶ 9046.70.

For the appellants: Robert B. Russell (with whom Porter, Chittick & Russell was on brief), Boston, Mass.

For the appellees: Hector M. Holmes (with whom A. Donham Owen, San Francisco, Cal.; W. R. Hulbert, Boston, Mass.; and Fish, Richardson & Neave, Boston, Mass., were on brief), Boston, Mass.

Before Magruder, Chief Judge, and Woodbury and Hartigan, Circuit Judges.

Opinion of the Court

[*Patent-Validity*]

Hartigan, Circuit Judge [*In full text except for omissions indicated by asterisks*]: This is an appeal from a judgment of the United States District Court for the District of Massachusetts, entered on January 22, 1957, holding plaintiffs' Letters Patent No. 2,667,653 valid and infringed.

* * *

Due to our conclusion that LeFebvre's patent is invalid we need not discuss the findings below as to defendants' infringement of the patent in suit.

[*Antitrust Counterclaim*]

However, there remains one further question presented by the defendants on appeal.[2] On December 21, 1956, approximately two months after the trial had ended, defendants filed a motion under Fed. R. Civ. P. 15(b) to amend the pleadings to conform to the evidence. This proposed amendment to the pleadings set forth an affirmative defense and counterclaim for damages, alleging, among other things, that plaintiffs had violated the anti-trust laws by cross-licensing with another company on separate patents, including the patent in suit, and simultaneously agreeing not to compete with each other on sales of this mop in the same markets. The district court, after a hearing, denied the motion, stating, "I did not try an anti-trust case. I was sure of that."

[*Separate Action Permitted*]

It has been stated that "[i]t is ordinarily within the sound discretion of the trial court to permit an amendment to conform to the proof where evidence has been introduced without objection as to facts not presented, or insufficiently presented, by the pleadings." *Simms v. Andrews,* 118 F. 2d 803, 807 (10 Cir. 1941). Without undertaking a detailed discussion of this point, we believe that here the trial court did not abuse its discretion in denying defendants' motion to amend the pleadings, notwithstanding that in the course of the trial there were presented some items which might be considered material to the anti-trust issue. Certainly the defendants are not prejudiced by our holding since the Supreme Court has clearly stated that a counterclaim for treble damages is permissive in nature so that failure by a defendant to plead it in a prior patent suit does not bar a subsequent independent suit by him under the anti-trust laws. *Mercoid Corp. v. Mid-Continent Co.* [1944-1945 TRADE CASES ¶ 57,201], 320 U. S. 661 (1944).

A judgment will be entered reversing the judgment of the district court and remanding the case to that court for further proceedings consistent with this opinion.

[¶ 68,754] Jantzen Inc. v. S. Klein Department Stores, Inc.

In the United States District Court for the Southern District of New York. Civ. 120-394. Filed June 27, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Sales Which May Be Excepted from Price Restrictions—Damaged or Deteriorated Merchandise—Notice to Public.—A manufacturer of fair traded bathing suits was entitled to a temporary injunction restraining a retailer (a nonsigner) from violating the New York Fair Trade Act where it was found that the retailer advertised that the bathing suits were purchased at auction from a company which obtained them as the result of a fire damage claim and that the bathing suits would pass any first quality test, that the retailer offered for sale and sold the bathing suits at less than the manufacturer's fair trade prices, that the bathing suits were not damaged or deteriorated in quality, and that no notice to the public that they were damaged or deteriorated in quality had been given.

See Fair Trade, Vol. 1, ¶ 3224.34.

For the plaintiff: Rogers, Hoge and Hills, New York, N. Y.

For the defendant: Joseph Walker, New York, N. Y.

Memorandum

[*Preliminary Injunction—Motion*]

ARCHIE O. DAWSON, District Judge [*In full text*]: This is a motion for a preliminary injunction to restrain the defendant, its agents, servants and employees from advertising, offering for sale or selling at retail, merchandise bearing the plaintiff's trade-

* * *

[2] Although in their answer defendants, alleging that plaintiffs had interfered with their business by threats of infringement, counterclaim for an injunction and other relief, they do not pursue this question on appeal and accordingly we do not consider it.

marks for less than the minimum fair trade prices stipulated in plaintiff's Fair Trade contracts and supplements thereto.

[*Findings of Court*]

The Court finds the following facts:

1. Subsequent to the enactment of the New York Fair Trade Act (General Business Law § 369 (1940)), plaintiff entered into Fair Trade contracts with retailers of sportswear and swim suits in the State of New York. Thereafter such Fair Trade contracts have been maintained with retailers in the State of New York.

2. The defendant has been advised by the plaintiff and knows that the plaintiff is "fair trading" its bathing suits in the State of New York.

3. On or about May 20, 1957, defendant advertised in various newspapers in the City of New York. A representative advertisement bore the catchline "Bought at Auction! Save 40% to 63%!" and offered bathing suits bearing the trade-marks of various well-known manufacturers with plaintiff's leading the list. As part of the copy, the statement appears that these swim suits were "purchased at auction from the Underwriters Salvage Company, who obtained them as the result of a fire damage claim. We inspected every garment thoroughly and we guarantee that they will pass any first quality test."

4. Thereafter defendant offered for sale and sold certain bathing suits bearing the name and trade-mark of plaintiff at less than fair trade prices; the bathing suits so sold were not damaged or deteriorated in quality, nor was any notice given to the public that they were damaged or deteriorated in quality, but rather, they were advertised to the public as being able to "pass any first quality test."

5. Even after this action was started defendant continued to sell bathing suits bearing plaintiff's name and trade-mark at less than fair trade prices.

[*Fair Trade Violation*]

The Court concludes that the defendant has, in the State of New York, knowingly advertised, offered for sale and sold certain bathing suits bearing the name and trademark of plaintiff at less than the prices stipulated in the contract or contracts entered into with other retailers pursuant to the provisions of § 369(a) of the General Business Law of the State of New York, and that defendant, therefore, has engaged in unfair competition as defined in § 369(b) of said statute; that defendant continued to practice such unfair competition even after commencement of this action and there is reason to believe that it will continue to do so unless restrained by the Court, and that plaintiff has no adequate remedy at law.

[*Injunction To Be Issued*]

The Court therefore directs that the injunction as prayed for herein shall be issued and that the stay granted in the order to show cause shall be continued until such injunction is issued.

Settle temporary injunction on notice. The bond shall continue at $5,000.

[¶ 68,755] United States v. Aluminum Company of America, et al.

In the United States District Court for the Southern District of New York. Equity No. 85-73. Filed June 28, 1957.

Case No. 423 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Injunctive Decrees—Modification—Extension of Period Within Which To Apply for Further Relief.—Where an aluminum company was found to have unlawfully monopolized the aluminum ingot market, the court required certain stockholders of the company to divest themselves of certain stocks, denied the Government's application for divestiture, but granted the Government the right to renew its application for divestiture or to apply for further relief within a five-year period. A subsequent Government application to extend, for an additional five years, the period within which it could apply for divestiture or other relief was denied on the ground that almost every relevant occurrence during the

five-year period militated against a determination that the Government was entitled to further relief in the form of an extension of the five-year period. Jurisdiction was assumed under the five-year relief provision rather than under the standard retention of jurisdiction provision. The court ruled that relief other than divestiture could be sought under the five-year relief provision, that the retained jurisdiction of the court was defined by the terms of the judgment and the nature of the relief sought, and that the Government had the burden of proof. The Government had contended that the five years provided for in the relief provision were not typical years, that the company still maintained its superior competitive position, that the industry was still pre-empted, and that the stock disposal relief had proven ineffective.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.325, 8233.475, 8233.717.

For the plaintiff: Max Freeman, Attorney, Department of Justice, Washington, D. C.

For the defendant: Leon E. Hickman, General Counsel, Aluminum Co. of America, Pittsburgh, Pa.; William K. Unverzagt, Assistant General Counsel, Aluminum Co. of America, Pittsburgh, Pa.; William Watson Smith (Smith, Buchanan, Ingersoll, Rodewald & Eckert), Pittsburgh, Pa.; and L. Homer Surbeck (Hughes, Hubbard, Blair & Reed), New York, N. Y.

Denying an application for modification of a decree entered pursuant to a decision of the U. S. District Court, Southern District of New York, 1950-1951 Trade Cases ¶ 62,646; for other rulings, see 1954 Trade Cases ¶ 67,745; 1953 Trade Cases ¶ 67,542; 1948-1949 Trade Cases ¶ 62,336 and 62,256; 1946-1947 Trade Cases ¶ 57,642 and 57,572; 1944-1945 Trade Cases ¶ 57,342; and 1940-1943 Trade Cases ¶ 56,200.

Opinion

[*Government Motion*]

CASHIN, JOHN M., District Judge [*In full text except for omissions indicated by asterisks*]: This is an application by the United States under Section X of the Final Judgment of July 6, 1950 for an order modifying Section VIII of that Final Judgment so as to extend the jurisdiction of this Court an additional five years within which period, if conditions so warrant, the United States may petition this Court for further remedial relief.

[*Final Judgment*]

Section X of the Final Judgment of July 6, 1950 entered by Judge Knox of this Court provides:

> "Jurisdiction of this cause is retained for the purpose of enabling the plaintiff or Alcoa to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or complete execution of this judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of any violations thereof".

Section VIII of the Final Judgment of July 6, 1950 provides:—

> "The divestiture of plants and properties of Alcoa, for which the plaintiff has petitioned, is presently denied; however, jurisdiction of this cause is retained for five years from the date of adoption by the Court of a plan, pursuant to paragraph V of this judgment, for the disposal of stock interests, within which period, if conditions so warrant, plaintiff may petition this Court for further and more complete relief."

Brief History of Case

This anti-trust action has been actively litigated for over twenty years. Numerous ancillary proceedings have been held and determined. Fortunately, the purposes of this Opinion will be served by a brief summary of the main course of events in its litigated history.

This case was commenced by the United States against the Aluminum Company of America (hereafter called "Alcoa") and numerous other defendants, on April 23, 1937. The United States charged Alcoa with numerous violations of Sections 1 and 2 of the Sherman Act and after twenty-six months of trial this Court, through Judge Caffey, dismissed the Government's case on July 23, 1942.

The Government appealed and, in the absence of a qualified quorum of the Supreme Court, the appeal by Special Act of

Congress, 58 Stat. 272, Act June 9, 1944, 15 U. S. C. A. § 29, was heard and determined by the United States Circuit Court of Appeals for the Second Circuit sitting as the court of final appellate jurisdiction. On November 12, 1945 the Circuit Court of Appeals, through Judge Learned Hand, affirmed in part and reversed in part the trial court's determination.

Insofar as is material here, the basis of the Circuit Court's reversal was that it found that Alcoa had unlawfully monopolized the aluminum ingot (primary aluminum) market in violation of Section 2 of the Sherman Act. The Circuit Court found that Alcoa's market control in aluminum ingots exceeded 90%. However, the Circuit Court directed that determination of what remedial relief was to be afforded the Government was to be held in abeyance pending the results and effects on competition of the Government's disposal of the huge aluminum manufacturing facilities constructed by it during World War II.

In 1947 Alcoa applied to this Court for a determination that it no longer had a monopoly and that competitive conditions had been restored in the aluminum industry. In 1948 the Government filed a petition for divestiture and other relief, contending that competitive conditions in the aluminum industry had not been established. Issue having been so joined Judge Knox of this Court, after extensive hearings and in an exhaustive and learned Opinion granted the Government's application for relief—insofar as is material here—only to the extent of requiring that certain stockholders of Alcoa divest themselves of either their Alcoa stock or Aluminum Limited stock. The Government's application for divestiture was denied, as was Alcoa's petition for a determination that it no longer had a monopoly and that competitive conditions had been restored in the aluminum industry.

In denying the Government's application for divestiture Judge Knox stated ([1950-1951 Trade Cases ¶ 62,646] 91 F. Supp. 333, 419):

> "Nevertheless, the Government, for a period of five years, if conditions so warrant, may petition the Court for further and more complete relief".

No appeal was taken by either party from Judge Knox's decision. The Government on this application, made within the five year period, seeks no further or more complete relief other than an extension of the five year period to make such an application.

Judge Knox in his Opinion made an exhaustive study and comprehensive analysis of the entire aluminum industry as it then existed. He correlated that analysis of the aluminum industry with a most learned exposition of the antitrust law especially with respect to the function of a court in relief proceedings.

For the purposes of this motion the parties have stipulated and agreed to certain facts and tables substantially within the framework of those factors considered by Judge Knox and which for the most part merely bring up to date those factors considered in 1950. The Tables so stipulated to are included in the Appendix of this Opinion [not reproduced]. The facts are as follows:

* * * [Stipulated Facts—1-34 not reproduced.]

Jurisdiction

The Government in its moving papers affirmatively disavows that it is seeking further relief in accordance with Section VIII of the Final Judgment, stating:

> "Despite the fact that the experience of the past five years has not provided a well-founded assurance that, in future years, competitive conditions of an effective and lawful nature will be certain to prevail in the aluminum industry, a prayer *for further relief in accordance with Section VIII of the Final Judgment of July 6, 1950,* is not made at this time since such a request would be premature." (Government's motion papers paragraph 21).

The Government's application is made pursuant to the provisions of Section X of the Final Judgment of 1950. Section X is the standard anti-trust retention of jurisdiction provision which sets forth the perpetual jurisdiction possessed by any court of equity over the enforcement of its judgments. Indeed, a court of equity has such jurisdiction even in the absence of any provision in its Final Judgment. *United States v. Swift & Co.* [1932-1939 Trade Cases ¶ 55,005], 286 U. S. 106, 114.

Alcoa challenges the jurisdiction of the Court and points out under the Government's interpretation of the powers reserved in Section X the present application could be made at any time since Section X

has no time limitation. The defendant argues that such an interpretation carried to its logical conclusion renders all the provisions of Section VIII mere surplusage.

However, in resolving the question of jurisdiction we do not think it is necessary to rely on either the semantics of the terminology used in Section X or the broad scope of retained jurisdiction in anti-trust cases under provisions similar to those in Section X. It suffices to state that in each case the retained jurisdiction of the Court is always defined by the terms of the judgment and the nature of the relief sought. *United States v. United States Gypsum Co.* [1954 Trade Cases ¶ 67,813], 124 F. Supp. 573, 581, 582.

Here, Judge Knox's Opinion and the resultant Final Judgment specifically provided for an application by the Government for further relief and set down a five year time limit within which such an application was to be made. We do not agree with Alcoa's contentions that the only relief available to the Government under Section VIII is divestiture. The words "further and more complete relief" can fairly be considered as including an application for an extension of the time limit imposed.

The Government in its brief correctly points out that, despite the position assumed in its moving papers, its application does in fact meet all the preliminary prerequisites of an application under Section VIII. The application was made within the five year period and the claim is made that conditions warrant the relief sought. Jurisdiction is, therefore, assumed under the provisions of Section VIII for the purposes of determining whether or not the conditions relief on by the Government warrant the further relief requested. (Rule 53(b) Federal Rules of Civil Procedure).

The issue is a narrow one and, in this Court's opinion, almost every relevant occurrence of the last five years militates against a determination that the Government is entitled to further relief in the form of an extension of the five year period.

Judge Knox's Opinion

Judge Knox's Opinion, besides being a most learned and authoritative treatise on anti-trust remedial proceedings, is the law of this case. The completeness and clarity of his Opinion greatly simplifies this Court's task.

Judge Knox, in denying the Government's application for divestiture, found that the Government disposal of its aluminum manufacturing facilities, pending which the Circuit Court had stayed remedial proceedings, had, in fact, resulted in the creation of two substantial and completely integrated aluminum manufacturers in vigorous competition with Alcoa.

He stated:

> "The Reynolds and Kaiser organizations are operating successfully and profitably, and there is little or no reason to think that either of them will be unable, under existing trade circumstances, to continue to thrive, and even to prosper. The Government disposal program has launched them with excellent properties, low investments, and safeguards for their future stability." ([1950-1951 Trade Cases ¶ 62,646] 91 F. Supp. 333, 418).

He also stated:

> "The relative market positions for the period under review do not show prima facie monopoly power in Alcoa. But Alcoa's two major competitors—Reynolds and Kaiser—together have secured only 35% of a market in which Alcoa enjoys 50%. Nevertheless, Reynolds and Kaiser have consistently enlarged their shares." ([1950-1951 Trade Cases ¶ 62,646] 91 F. Supp. 333, 364).

Alcoa in the proceeding before Judge Knox had affirmatively moved for a determination that competition existed in the aluminum industry. He refused to give Alcoa such a positive determination, in that he found that the evidence presented was insufficient to give him a well-founded assurance that, in future years, competitive conditions would be certain to prevail. ([1950-1951 Trade Cases ¶ 62,646] 91 F. Supp. 333, 416).

As we read Judge Knox's Opinion his only concern about the future competitive conditions of the alumnium industry was the continued success of Alcoa's two competitors, Reynolds and Kaiser. He saw

> "* * * no likelihood of domestic competition arising in the aluminum industry, as now constituted, to challenge the present three producers." ([1950-1951 Trade Cases ¶ 62,646] 91 F. Supp. 333, 401).

Judge Knox's immediate concern was the obvious opportunity for common control of Alcoa and Aluminum Limited of Canada, the largest aluminum producer in the world, to the detriment of Kaiser and Reynolds

by virtue of a few persons' ownership of controlling interests in both companies. He expressed this fear as follows:

"The effective future competitive efforts of these two companies will be greatly enhanced if the shadow that now hangs over them in Alcoa's potential control of Aluminum Limited be removed.

"It is inevitable that investments are deterred, expansion retarded, and stability impaired by the power in Alcoa's controlling stockholders, if they choose to exercise it, to overwhelm, and put to naught, the best efforts of both Reynolds and Kaiser. Such power, whether or not exercised, and whether or not likely of execution, is omnipresent." ([1950-1951 TRADE CASES ¶ 62,646] 91 F. Supp. 333, 418).

He ordered these persons to dispose of either their Limited or Alcoa stock interests.

Judge Knox also expressed the hope that such a stock disposal would create another competitor in the domestic aluminum market, as follows:

"Moreover, if the common control of Alcoa and Limited be eliminated, it is fairly possible, and even probable, that there will be introduced into the domestic market, a rival that is fully worthy of Alcoa's steel. The competitive potential of Limited could not be duplicated in this country by the organization of an additional producer, except at the risk of serious danger and disruption to the present effectiveness of the industry. Today, the United States provides a natural and ample market for part of the huge surplus of metal produced in Canada. The activities of Limited can furnish a supplement to present competitive efforts in offering stimulants to efficiency and lowered prices, from which the general public will gain, and this, of course, is one purpose of the anti-trust laws." ([1950-1951 TRADE CASES ¶ 62,646] 91 F. Supp. 333, 418).

Having provided a remedy for this immediate threat to Kaiser's and Reyonlds' future, Judge Knox proceeded to set forth the reasons for and purposes of his retention of jurisdiction for five years, as follows:

"These possibilities (that Limited's competition might impair the domestic competitive situation or Limited might not compete because of high tariffs), plus the fact that there has been such a short time over which the operation of Reynolds and Kaiser are open to appraisal, require that, for another five years, jurisdiction of this case shall be retained by the Court. Within that period, note can be taken of the progress—or otherwise—of Reynolds and Kaiser. If, for any reason, it should appear that their competition with Alcoa is feeble, uncertain and ineffective, appropriate action, in addition to that now about to be accorded the Government, will be in order." ([1950-1951 TRADE CASES ¶ 62,646] 91 F. Supp. 333, 418). (Parentheses added).

ISSUE

As we have stated, the Government on this application seeks no additional relief other than a five year extension of the period set down by Judge Knox. The Government does not claim that Kaiser's and Reyonlds' competition with Alcoa is "feeble, uncertain and ineffective" but rather it takes the position that the developments of the five year period have been such as not to remove the doubts Judge Knox expressed in 1950 and therefore this Court should extend its jurisdiction for another five years.

We have found such an application to be within the contemplation of Section VIII of the Final Judgment of 1950. However, contrary to the Government's position, we are also of the opinion that under the law of this case the Government assumes the burden of showing either that the competitive future of Reynolds and Kaiser is, at least to some degree, more doubtful today than it was in 1950, or that, for some reason unforeseen in 1950, the five year period has proven an inadequate test period. It is our opinion that the finality of the Judgment of 1950, and the mere passage of the five year period, fixed Alcoa's rights at least to that extent.

The Government, although disavowing any burden of proof, advances as one of its main arguments in support of its application, that the five years provided for in the 1950 Judgment were "atypical" years. The Government's other reasons are Alcoa's continued economic superiority, that the primary aluminum industry is still pre-empted and the relief by that stock disposal, provided for in the 1950 Judgment, has proven ineffective.

We shall briefly examine the Government's position in conjunction with the Stipulated Facts above.

Atypical Years

The Government points to the Korean conflict (Stipulated Fact 1); Government Control (Stipulated Fact 2); a seller's market (Stipulated Fact 3); and governmental incentitives [sic] to expansion in the aluminum industry (Stipulated Fact 4) all as unforeseen events in 1950 which so altered market conditions during the five year period as to render those years of no value for the purpose Judge Knox intended.

The main purpose of retaining jurisdiction, we think, is clear. It was to see if Kaiser and Reynolds would thrive and prosper. We agree that the particular events, with the execption of Government controls, relied upon by the Government, were probably not foreseen in 1950 but we think the effect of such events was not only foreseeable but was actually foreseen. All the events relied upon, with the exception of Government controls, had one ultimate effect on the aluminum industry—expansion.

Kaiser's and Reynolds' future in an expanding aluminum industry was exactly what Judge Knox was doubtful about in 1950, and he so expressed himself—

> "In concluding this subject (Financial Resources), it is sufficient to say that the financial data before me show Reynolds and Kaiser to be capable of carrying on their operations with fair success under market conditions reasonably foreseeable. Nevertheless, Alcoa's financial strength is of a high order of superiority, and to the extent that the aluminum industry is considered an expanding one, the potentialities for Alcoa's growth out-distances any expectations which may be held for the other two companies." ([1950-1951 Trade Cases ¶ 62,646] 91 F. Supp. 333, 386). (Parentheses added).

The realities are that Kaiser and Reynolds more than maintain their competitive position in the phenomenal expansion of the industry. (Stipulated Facts 5-22).

We have stated that the particular events relied on by the Government were not foreseeable but certainly events of their general nature were and would necessarily be considered as possible at the present time during any future five-year period. A court would be naive, indeed, not to foresee as possible, Government controls, Government incentives, war (cold or hot), and a seller's market within the next five years.

All of the events relied upon by the Government operated with equal effect on Alcoa as well as on Kaiser and Reynolds. In view of Kaiser's and Reynolds' progress and development, it is our opinion that, only if the Government could show that the conditions of the last five years were such as to have created a form of "economic hothouse" within which Reynolds and Kaiser alone thrived, could the Court at this stage of these proceedings be justified in discounting the results of the five year period provided for in the Final Judgment. None of the events relied on by the Government, or any combination of them, came even close to effecting such a result.

Alcoa's Superior Competitive Position

It is the Government's position that its application should be granted because Alcoa still maintains its superior competitive position. Here, again, we feel the Government relies on a fact that has no significance of and in itself. Once the fact is put within its proper frame of reference for the purposes of this application—Judge Knox's Opinion—it completely fails to support the Government's position.

The purpose of the five year period was to observe Kaiser's and Reynolds' progress or lack of it. Alcoa's competitive position is significant only insofar as it may have increased at the expense of Reynolds and Kaiser. The facts are that Alcoa's relative share of the aluminum market has declined; Kaiser's has increased substantially; and Reynolds' has remained about the same.

The following excerpts from the Stipulated Tables (See Appendix [not reproduced]) speak for themselves:

MARKET POSITION—PRODUCTION AND PURCHASES OF PRIMARY AND SECONDARY ALUMINUM IN THE UNITED STATES

	ALCOA		REYNOLDS		KAISER		Total for Three Companies	
1949	Thousands of Pounds	%	Thousands of Pounds	%	Thousands of Pounds	%	Thousands of Pounds	%
Production	582,783	48.3	364,955	30.2	259,984	21.5	1,207,722	100.0
Purchased Primary (1)	112,137	87.9	9,875	7.7	5,542	4.4	127,554	100.0
Purchased Secondary (2)	18,854	63.6	8,061	27.2	2,713	9.2	29,628	100.0
Total	713,774	52.3	382,891	28.0	268,239	19.7	1,364,904	100.0
1956 (First Nine Months)								
Production	1,110,953	46.6	620,555	26.1	649,853	27.3	2,381,361	100.0
Purchased Primary (1)	130,467	66.7	16,418	8.4	48,654	24.9	195,539	100.0
Purchased Secondary (2)	4,729	44.5	3,997	37.6	1,901	17.9	10,627	100.0
Total	1,246,149	48.2	640,970	24.7	700,408	27.1	2,587,527	100.0

MARKET POSITION—SALES (ALL STAGES OF PRODUCTION)

	ALCOA		REYNOLDS		KAISER		Total for Three Companies	
1949	Thousands of Pounds	%	Thousands of Pounds	%	Thousands of Pounds	%	Thousands of Pounds	%
Pig and Ingot (3)	132,279	68.2	45,367	23.4	16,344	8.4	193,990	100.0
Sheet	241,941	38.3	205,258	32.5	184,574	29.2	631,773	100.0
Other Fabrications	314,136	74.3	98,615	23.3	9,888	2.4	422,639	100.0
Total	688,356	55.1	349,240	28.0	210,806	16.9	1,248,402	100.0
1956 (First Nine Months)								
Pig and Ingot (3)	288,697	39.2	191,523	26.0	256,477	34.8	736,697	100.0
Sheet	393,670	41.8	272,470	29.0	275,092	29.2	941,232	100.0
Other Fabrications	412,375	58.2	173,836	24.5	122,767	17.3	708,978	100.0
Total	1,094,742	45.9	637,829	26.7	654,336	27.4	2,386,907	100.0

NET WORTH

	ALCOA		REYNOLDS		KAISER		Total for Three Companies	
	Thousands of Dollars	%	Thousands of Dollars	%	Thousands of Dollars	%	Thousands of Dollars	%
December 31, 1949	306,407	76.7	55,103	13.8	37,725	9.5	399,235	100.0
September 30, 1956	605,079	57.2	220,370	20.9	231,522	21.9	1,056,971	100.0

EARNINGS

	1949—First 9 Mos.		1955—First 9 Mos.		1956—First 9 Mos.	
	Thousands of Dollars	%	Thousands of Dollars	%	Thousands of Dollars	%
Earnings Before Taxes						
Alcoa	38,826	70.8	**136,959	57.0	138,457	52.1
Reynolds	5,969	10.9	51,950	21.6	63,092	23.7
Kaiser	10,009	18.3	51,552	21.4	64,486	24.2
Earnings After Taxes						
Alcoa	22,744	69.9	** 68,280	56.6	67,160	50.7
Reynolds	3,371	10.4	25,904	21.5	31,456	23.8
Kaiser	6,421	19.7	26,346	21.9	33,701	25.5
Earnings After Taxes and Cash Dividends						
Alcoa	13,552	71.0	** 51,170	54.4	46,829	48.9
Reynolds	2,237	11.7	23,643	25.1	26,305	27.4
Kaiser	3,301	17.3	19,232	20.5	22,701	23.7

** [Footnote was not reproduced by the Court in its Opinion. CCH.]

The inescapable conclusion from the facts reflected in these Tables and in those contained in the Stipulated Facts 5 to 16 is that Kaiser and Reynolds have not only thrived and prospered but they have removed all reasonable doubts as to their capacity to effectively compete with Alcoa in the future.

Preemption of Primary Aluminum Industry

Failure of Stock Disposal Remedy

The Government argues that the primary aluminum industry remains closed to prospective producers unless they are the beneficiaries of Government assistance.

It is difficult to perceive how this contention in and of itself can in any way aid the Government's position within the boundaries of Judge Knox's Opinion. We have already noted that a basic premise of the remedial relief afforded was that the existing producers of primary aluminum had preempted the field and in all probability no other domestic producers of primary aluminum would come into being. Time has proven that premise to have been erroneous. Other producers have entered, or are about to enter, the field. (Stipulated Facts 5, 6 and 7). That the Government itself, through Supply Contracts and Rapid Tax Amortization privileges, has been the cause to some degree may be laudatory but we think immaterial to the issue raised by this application.

The material fact is that there is no indication that the existence or contemplated existence of these new producers has in any way lessened the competitive status of the primary aluminum market or benefited Alcoa. At the present time there is no reason to believe these new producers will not increase competition in the primary aluminum market at Alcoa's expense as much as Reynolds' or Kaiser's.

In this same vein the Government also argues that the stock disposal ordered in the Final Judgment has not been effective in that Aluminum Limited has not become a competitor of Alcoa.

The main purpose of the stock disposal was clearly expressed to be the elimination of the possibility of or the effects of even the fear of the possibility that Alcoa and Limited would "gang up" on Kaiser and Reynolds. There is not a scintilla of evidence before this Court that Alcoa and Limited have acted in unison to the detriment of Reynolds or Kaiser. On the basis of the facts before us it must be presumed that the stock disposal remedy completely achieved its main purpose.

While it is true that Judge Knox expressed the hope that by virtue of the stock disposal plan Limited would become a more active competitor with Alcoa in the domestic market, it is clear that this purpose was secondary and of necessity based on the belief that Limited was the only possible new competitor. In addition, the facts show that Limited has increased its competition with Alcoa in the domestic market since 1950. In the last nine months of 1949 Alcoa received 78.3% of the primary aluminum sold by Limited in the domestic market. In the last nine months of 1956 Alcoa received 36.2% of the total primary aluminum sold by Limited in United States. The total quantity of primary aluminum sold in the domestic market by Limited increased from 90,774 thousand pounds in the first nine months of 1949 to 348,465 for the same period in 1956. (Stipulated Table X).

Nor has Limited's increased competition in the domestic market during the five year period in any way reduced Reynolds' and Kaiser's market position, which possibly was one of the reason for retaining jurisdiction. Nor did any domestic producer effect an increase of tariff and so keep Limited out of the domestic market, which was another reason for retaining jurisdiction. The fact is that the tariff on primary aluminum was lowered.

Conclusion

As we have stated, Judge Knox's Opinion, and the resultant Final Judgment of 1950, is the law of this case. The facts here do not sustain this application for they fail to reveal any basis for retaining jurisdiction within the framework of that Opinion.

Motion denied.

[¶ 68,756] **United States v. The Greyhound Corporation.**

In the United States District Court for the Northern District of Illinois, Eastern Division. Civil Action No. 57 C 1107. Filed June 27, 1957.

Case No. 1347 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Monopolies—Consent Decree—Practices Enjoined—Restrictions on Sales and Services, Allocation of Territories, Representation on Rate Bureau, and Development Contracts —Intercity Bus Transportation.—A corporation engaged in the operation of a nationwide intercity bus transportation system was prohibited by a consent decree from entering into any understanding having the effect of (a) preventing or restricting any person from selling buses, (b) allocating territories with any other bus operator, or (c) limiting or denying the services or facilities of any terminal not owned or controlled in whole or in part by the corporation.

Also, the corporation was prohibited from (a) selling any bus upon any condition which restricts or limits the use or resale of the bus, (b) having its directors, officers, or agents comprise more than one-third of the board of directors or executive committee of a national bus rate association, (c) conditioning the use, by a bus operator, of any terminal owned or controlled by the corporation upon an agreement to refrain from competing with the corporation, (d) evicting a bus operator from any terminal owned or controlled by the corporation, (e) entering into any contract for the development of buses with a specified bus manufacturer for a specified period of time, or (f) purchasing any commodity from any person known to the corporation to be the owner of more than three per cent of the capital stock of the corporation.

See Monopolies, Vol. 1, ¶ 2610.

Monopolies—Consent Decree—Practices Enjoined—Discriminatory Practices.—A corporation engaged in the operation of a nationwide intercity bus transportation system was prohibited by a consent decree from seeking or knowingly receiving from any person terms, prices, services, facilities, or credit arrangements in connection with the purchase of buses or fuel for buses which are not available to other bus operators. Also, the corporation was prohibited from discriminating against any bus operator using a terminal owned or controlled by the corporation.

See Monopolies, Vol. 1, ¶ 2610.280.

Monopolies—Consent Decree—Practices Enjoined—Requirement and Supply Contracts.—A corporation engaged in the operation of a nationwide intercity bus transportation system was prohibited by a consent decree from entering into any contract or understanding having the effect of requiring or obligating itself to buy all or any specified percentage of its requirements of buses from any designated source.

See Monopolies, Vol. 1, ¶ 2610.760.

Monopolies—Consent Decree—Practices Enjoined—Interlocking Directorates.—A corporation engaged in the operation of a nationwide intercity bus transportation system was prohibited by a consent decree from having as an officer, director, or employee any person who is also an officer, director, or employee of any domestic manufacturer of buses not a wholly-owned subsidiary of the corporation.

See Monopolies, Vol. 1, ¶ 2610.420.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief —New Source of Supply—Contingent Provision.—A corporation engaged in the operation of a nationwide intercity bus transportation system was directed to use its best efforts to obtain one or more suitable sources of supply for its new buses in addition to a specific bus manufacturer, pending the entry of a final judgment in an action against the bus manufacturer. If, after the entry of a final judgment in favor of the Government in the action against the bus manufacturer, the corporation has not obtained a suitable supply source,

the corporation was required to so notify the court and the court could grant additional relief in favor of the Government.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.60, 8341, 8421.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Dedication of Patents.—A corporation engaged in the operation of a nationwide intercity bus transportation system was required to dedicate to the public all of its United States patents relating to the design and/or manufacture of buses.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.30.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions.—A consent decree entered against a corporation engaged in the operation of a nationwide intercity bus transportation system did not prohibit the corporation from: (1) exercising any legal rights it may acquire growing out of its ownership of patents or engineering data, (2) utilizing the services of any employee of a manufacturer of buses on a temporary basis not to exceed 90 days in any one year, (3) receiving differentials which make only due allowance for differences in costs, (4) protecting a lien incident to a deferred payment sale of its buses where the effect is not to limit competition between the purchaser and the corporation, (5) requiring tenants to execute written agreements or requiring compliance with reasonable tenancy rules established for the operation of any terminal owned or controlled by the corporation, or (6) entering into any agreement which is subject to the approval of the Interstate Commerce Commission or taking any action which has been approved by the Commission.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.48.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; and W. D. Kilgore, Jr., Victor H. Kramer, Earl A. Jinkinson, Albert Parker, Charles F. B. McAleer, George D. Reycraft, and William F. Costigan, Attorneys, Department of Justice.

For the defendant: Edward K. Wheeler, Robert G. Seaks, Robert Driscoll, and George W. Rauch.

Final Judgment

JOHN P. BARNES, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on June 27, 1957; the defendant having appeared and filed its answer to such complaint denying the substantive allegations thereof; and the parties hereto, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without any admission by any party hereto with respect to any such issue;

Now, therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein and upon the consent of the parties hereto, it is hereby

Ordered, Adjudged and Decreed, as follows:

I

[*Sherman Act*]

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a claim for relief against the defendant under Section 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, entitled "An Act to protect trade and commerce from unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Defendant" means defendant The Greyhound Corporation, a Delaware corporation, which has its principal office and place of business at Chicago, Illinois, and each and all of its subsidiaries, all of which, including The Greyhound Corporation, collectively, shall for the purposes of this judgment be deemed to be one person;

(B) "Person" means any individual, partnership, firm, corporation, association or other business or legal entity;

(C) "Subsidiary" means any domestic corporation which is a bus operator, a terminal company, manufacturer or distributor of buses, and a majority of whose voting capital stock is owned or controlled by the defendant;

(D) "Bus operator" means any person who engages as a common carrier in the transportation of passengers under a certificate issued by the Interstate Commerce Commission;

(E) "Bus" means any motor vehicle used or intended for use by a bus operator in the transportation of passengers under a certificate issued by the Interstate Commerce Commission, and shall include accessories, tires and parts used or intended for use therewith;

(F) "Terminal" means any facility used by any bus operator for the arrival and departure of buses and for the selling of tickets;

(G) "Development contract" means any contract or agreement for the development of buses between Greyhound and any bus manufacturer giving, directly or indirectly, to Greyhound the exclusive or preferential right to any type or model of bus.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment shall apply to the defendant and to its successors, assigns, officers, directors, servants, employees, and agents, and to all persons in active concert or participation with the defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Concerted Action Enjoined*]

Defendant is enjoined and restrained from entering into, maintaining, adhering to, or claiming any rights under, any contract, agreement or understanding having the effect of:

(A) Requiring or otherwise obligating defendant to buy all or any specified percentage of its requirements of buses from any designated source;

(B) Preventing, limiting or restricting any person from selling buses to any third person: *Provided, however,* that nothing in this subsection (B) shall prevent defendant from exercising any legal rights it may hereafter acquire growing out of its ownership of patents or engineering data, drawings, blueprints, plans, specifications, tools, dies, jigs, fixtures, patterns or similar items used or capable of use in the manufacture of buses and not in existence on the date of entry of this Final Judgment;

(C) Allocating, dividing, assigning or reserving territories with any other bus operator;

(D) Limiting, restricting or denying the services or facilities of, or otherwise excluding any bus operator from, any terminal not owned or controlled in whole or in part by defendant.

V

[*Individual Action Enjoined*]

Defendant is enjoined and restrained from:

(A) Purchasing any commodity (including but not limited to buses and fuel) from any person known to defendant to be the owner of more than three per cent of the capital stock of defendant;

(B) Having as an officer, director or employee or permitting any person so to continue who is also an officer, director or employee of any domestic manufacturer of buses not a wholly owned subsidiary of defendant; *Provided, however,* that nothing in this subsection (B) shall prevent defendant from utilizing the services of any employee of a manufacturer of buses on a temporary basis not to exceed ninety days in any one year;

(C) Seeking or knowingly receiving from any person (other than a lending institution not controlled by a manufacturer of buses or by a vendor of fuel for buses) terms, prices, services, facilities or credit arrangements in connection with the purchase of buses or fuel for buses which are not available to other bus operators; *Provided, however,* that nothing herein contained shall prevent defendant from obtaining or receiving differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are sold or delivered to defendant;

(D) Selling any bus upon any term, condition or understanding which restricts or limits the use to which such bus may be put or the persons to whom or the time within which such bus may be resold; nothing in this subsection shall prohibit restrictions, the sole purpose of which, is the protection of a lien incident to a deferred payment sale, and the effect of which is not to limit competition between the purchaser and defendant;

(E) Having its directors, officers, employees or agents comprise more than one-third (⅓) of the board of directors or ex-

ecutive committee of National Bus Traffic Association, Inc.;

(F) Conditioning the use by a bus operator, of any terminal owned or controlled by defendant, upon an agreement to refrain from competing with defendant;

(G) Discriminating against a bus operator, using a terminal owned or controlled by defendant in the provision of usual terminal services and facilities (other than loading docks where adequate loading docks of equal desirability are not available), including, but not limited to, the sale and issue of tickets, the routing of passengers, and the dissemination of travel information;

(H) Evicting a bus operator from any terminal, owned or controlled by defendant; *Provided, however,* that paragraphs (G) and (H) shall not be so construed as to prevent defendant from requiring tenants to execute written tenancy agreements or requiring compliance with reasonable tenancy agreements and terms and rules established for the operation of any terminal owned or controlled by it.

VI

[*Dedication of Patents*]

Defendant Greyhound is ordered and directed within thirty days from the date of entry of this Final Judgment to dedicate to the public all United States Letters Patent owned or controlled by it on said date of entry relating to the design and/or manufacture of buses.

VII

[*Additional Supply Source*]

Pending entry of a Final Judgment in *United States v. General Motors Corporation,* Civil No. 15816 (E. D. Mich.), defendant is directed to use, and to continue to use, its best efforts to obtain, one or more suitable sources of supply for its new buses in addition to General Motors Corporation. If, after the entry of a Final Judgment, not subject to appeal, in favor of plaintiff in *United States v. General Motors Corporation,* defendant shall not have obtained such a suitable source of supply, defendant shall so notify the Court, on notice to the Attorney General, and the Court may grant such additional relief, in favor of the plaintiff, as may be required in the circumstances.

VIII

[*Development Contracts*]

Defendant is enjoined and restrained from entering into any development contract, as defined herein, with General Motors Corporation until after the expiration of a period of four years from the date of entry of this Final Judgment or until the entry of a Final Judgment in *United States v. General Motors Corporation,* Civ. No. 15816, (E. D. Mich.), whichever occurs sooner.

IX

[*ICC Approval*]

Nothing contained in this judgment shall be deemed to restrain or prevent defendant from entering into any agreement which under the provisions of any United States statute is at the time subject to the approval of the Interstate Commerce Commission, or from taking any action, which shall have been approved by the Interstate Commerce Commission.

X

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Access, during office hours of defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of defendant relating to any matters contained in this Final Judgment;

(B) Subject to the reasonable convenience of defendant and without restraint or interference from defendant, to interview officers or employees of defendant, who may have counsel present, regarding any such matters.

Upon such written request, defendant shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means permitted in this Section X shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department

of Justice except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XI

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

[¶ 68,757] **Chain Institute, Inc.; American Chain & Cable Company, Inc.; The McKay Company; Hodell Chain Company; St. Pierre Chain Corporation; S. G. Taylor Chain Company; Columbus McKinnon Chain Corporation; Campbell Chain Company; Nixdorff-Krein Manufacturing Company; Peerless Chain Company; The John M. Russell Manufacturing Company, Inc.; Turner & Seymour Manufacturing Company; Western Chain Products Company; Dennis A. Merriman; William D. Kirkpatrick; and George J. Campbell, Jr. v. Federal Trade Commission.**

In the United States Court of Appeals for the Eighth Circuit. No. 14,821. Dated July 3, 1957.

Petitions to Review Order of Federal Trade Commission.

Federal Trade Commission Act

Unfair Practices—Combining or Conspiring To Fix Prices—Delivered Pricing Systems—Validity of Federal Trade Commission Order Prohibiting Individual Use of Systems.—A Federal Trade Commission order prohibiting manufacturers of chain and chain products from individually using three delivered pricing systems for the purpose or with the effect of systematically matching delivered prices of competitors was not too broad where the Commission found that the manufacturers had conspired to use such pricing systems. The order of the Commission could not be said to be purely arbitrary because it lacked adequate evidentiary support or because it was clearly beyond the powers of the Commission; therefore, it could not be set aside on review. The order did not prohibit *per se* the individual use of the pricing systems. The order would be violated only if there were identical prices resulting from single basing point, freight equalization, or zone delivered pricing. Therefore, the order did not require f.o.b. mill selling. Furthermore, if conditions changed and the prohibition was no longer needed to restore competition, the order could be modified.

See Unfair Practices, Vol. 2, ¶ 5035.11, 5035.56; FTC Enforcement and Procedure, Vol. 2, ¶ 8621.

Unfair Practices—Combining or Conspiring To Fix Prices—Delivered Pricing Systems (Basing Point, Freight Equalization, and Zone Systems)—Evidence of Conspiracy.—A Federal Trade Commission order prohibiting manufacturers of chain and chain products, the trade association of which they were members, and certain officers of the association from conspiring to quote or sell such products at prices determined pursuant to a single basing point delivered price system, a freight equalization delivered price system, or a zone delivered price system was affirmed and enforced. There was sufficient evidentiary basis for an inference by the Commission that the substantial uniformity and virtual identity of prices which existed in the industry resulted from concerted conscious action, amounting to conspiracy, and that the delivered pricing systems used in connection with and in furtherance of cooperative and collusive efforts to fix prices were necessarily an inherent and indispensable part of the conspiracy. The contention that the order was invalid because an agreement to use the delivered pricing systems was not shown was rejected.

See Unfair Practices, Vol. 2, ¶ 5035.11, 5035.41, 5035.56, 5201.525; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.74.

Unfair Practices—Combining or Conspiring To Fix Prices—Delivered Pricing Systems—Evidence of Participation in Conspiracy To Fix Prices—Member of Trade Association.—There was sufficient evidence from which the Federal Trade Commission could find that a manufacturer of chain participated in a conspiracy among other chain manufacturers and a trade association to fix prices by adopting certain delivered pricing systems. The manufacturer was an active member of the association from its inception and followed the delivered pricing systems of the other manufacturers with respect to the types of chain it manufactured. The Commission reasonably could infer that the manufacturer, as a member of the association, knew or was charged with knowledge of the collusive efforts of other members to stabilize prices by suppressing competitive pricing and was therefore a party to the conspiracy.

See Unfair Practices, Vol. 2, ¶ 5035.

For the petitioners: Sumner S. Kittelle (Cann, Lamb, Long & Kittelle; Frazer F. Hilder; Stephen H. Beach; Wilkie, Owen, Farr, Gallagher & Walton; Beekman & Bogue; Reed, Smith, Shaw & McClay; McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett; Sidley, Austin, Burgess & Smith; Marsh, Day & Calhoun; Lawrence, Goldberg, Lawrence & Lewin; Finck & Huber; Halfpenny & Hahn; Frederick B. Gerber; and Charles Fay were with him on the briefs).

For the respondent: J. B. Truly, Attorney, Federal Trade Commission (Earl W. Kintner, General Counsel, and Robert B. Dawkins, Assistant General Counsel, Federal Trade Commission, were with him on the briefs).

Affirming and enforcing a Federal Trade Commission cease and desist order in Dkt. 4878.

Before SANBORN, JOHNSEN, and VOGEL, Circuit Judges.

[*FTC Complaint and Findings*]

SANBORN, Circuit Judge [*In full text*]: This case comes to this Court upon petitions to review a cease and desist order of the Federal Trade Commission[1] which is based upon its determination that the petitioners had conspired to bring about uniformity in prices for chain and chain products, in violation of Section 5 of the Federal Trade Commission Act.[2]

The petitioners are: the principal manufacturers of chain and chain products in the United States; the trade association of which they are members; and certain of the officers of the association. The Commission on December 22, 1942, issued a complaint charging them with having conspired to fix and maintain identical delivered prices for such products. Delivered prices are those charged by a seller for his goods when and where delivered. On October 9, 1945, the Commission issued an amended complaint which contained two counts. The first count charged the petitioners with conspiring, in violation of § 5 of the Federal Trade Commission Act, to fix identical delivered prices for their respective products by the use of the same delivered pricing methods, which are referred to as (1) a basing point system, (2) a freight equalization system, and (3) a zone system; and thereby preventing the forces of competition from making and determining price quotations. The second count of the amended complaint charged the petitioners with price discrimination, in violation of § 2(a) of the Clayton Act, as amended.[3] That count was ultimately dismissed by the Commission. The petitioners denied all of the material allegations of the amended complaint. Evidence was heard by a Trial Examiner designated by the Commission. The hearings commenced in April of 1946 and continued through 1947 and into 1948. The record evidence was closed July 7, 1948. The Trial Examiner filed his recommended decision on September 23, 1948. It was later amended in some particulars. The case was argued before the Commission, on exceptions to the Trial Examiner's report, on April 7, 1949; was reargued September 22, 1950; and was finally decided by the Commission adversely to petitioners on the first count February 16, 1953, by a vote of 3 to 1, Commissioner Mason dissenting and Commissioner Car-

[1] The proceeding before the Commission is entitled, *In the Matter of Chain Institute, Inc., et al.*, Docket No. 4878. 49 F. T. C. 1041.

[2] 38 Stat. 719, as amended, 52 Stat. 111; 15 U. S. C. § 45.

[3] 38 Stat. 730, 49 Stat. 1526; 15 U. S. C. § 13.

retta not participating. The cease and desist order under review was entered on the same date. In addition to the dismissal of the second count, the amended complaint was also dismissed as to several individuals who had been joined as parties. The record evidence necessarily reflects conditions in the chain industry as they existed prior to July 1948.

The petitioners on April 20, 1953, filed their "Joint and Several Petition to Review" the order of the Commission. The John M. Russell Manufacturing Company, Inc., and Turner & Seymour Manufacturing Company, who were parties to the joint petition, filed a supplemental petition to review the order, asserting, in effect, that there was no adequate evidentiary basis for a finding that they had participated in a conspiracy to fix prices. They asked that the relief prayed for in the joint petition be granted. The petitioners originally all sought a complete review and reversal of the Commission's findings and order. On June 17, 1954, they (with the exception of the two petitioners who had filed the supplemental petition and the Columbus McKinnon Chain Corporation) moved this Court for leave to withdraw their challenge to the Commission's findings and order with respect to the price fixing conspiracy charge, except as such findings and order bore upon the use of the delivered pricing methods.

[*Cease and Desist Order*]

The cease and desist order of the Commission prohibited broadly a continuation of the price fixing conspiracy which the Commission had found to exist. Included in this part of the order was a subparagraph numbered (6) requiring the petitioners who make or deal in chain to cease and desist from entering into or continuing any common course of action, agreement or conspiracy to

> "Quote or sell chain or chain products at prices calculated or determined pursuant to or in accordance with the single basing point delivered-price system, the freight equalization delivered-price system, or the zone delivered-price system; or quote or sell chain or chain products at prices calculated or determined pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for chain or chain products at points of quotation or sale or to particular purchasers by any two or more sellers of chain or chain products using such plan or system or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller."

In addition, the Commission included in the order a third ordering paragraph. That paragraph required each of the corporate petitioners to

> "cease and desist from quoting or selling chain or chain products at prices calculated or determined pursuant to or in accordance with a single basing point delivered-price system, a freight equalization delivered-price system, or a zone delivered-price system, for the purpose or with the effect of systematically matching the delivered-price quotations or the delivered prices of other sellers of chain or chain products and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another."

The validity of both of these paragraphs of the order is challenged as being without adequate evidentiary support and exceeding the powers of the Commission.

[*National Lead Case*]

The case was argued and submitted to this Court at its March Session 1956. The Court of Appeals for the Seventh Circuit had just decided the case of *National Lead Co. v. Federal Trade Commission* [1955 TRADE CASES ¶ 68,211], 227 F. 2d 825, which also involved an alleged conspiracy to fix prices. The Commission in its cease and desist order in that case had included a paragraph similar to the third ordering paragraph in this case, forbidding the respondents there involved "from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." 227 F. 2d, at page 840. The Seventh Circuit ruled that that paragraph of the order was invalid. See pages 840-844 of 227 F. 2d. In his argument, in the instant case, counsel for the Commission conceded that if that ruling was correct, the corresponding paragraph in the order under review here could not be sustained.

Moreover, Commissioner Mason, who had dissented in both the *National Lead Co.* case and this case, had said in his dissenting opinion, with respect to the order now under review: "The order in this case, like the order in Docket 5253, *National Lead Company, et al.,* goes further than to suppress practices found to be unlawful." We therefore deferred decision pending final disposition of the *National Lead Co.* case, in which the Supreme Court granted certiorari. That Court on February 25, 1957, in *Federal Trade Commission v. National Lead Co.* [1957 TRADE CASES ¶ 68,629], 352 U. S. 419, ruled that it was within the power of the Commission, under the evidence in that case, to include the paragraph corresponding to the third ordering paragraph in the instant case.

After the decision of the *National Lead Co.* case by the Supreme Court, the parties here, at our invitation, filed supplemental briefs relative to the effect, if any, of that decision upon the questions which we are called upon to decide, and specifying what those questions are.

The petitioners in their supplemental brief say that the Supreme Court merely decided in the *National Lead Co.* case that the Commission had basic statutory authority to include in its order a paragraph of the type there in question, forbidding the use of a single delivered pricing system, and that, as narrowly interpreted, the paragraph in that case was not an inappropriate remedy under the peculiar facts.

[*Issues*]

In our opinion, there are three questions requiring determination: (1) The validity of the prohibition contained in subparagraph (6) of the first ordering paragraph, prohibiting the continued use, pursuant to conspiracy, of the three delivered pricing systems. (2) The validity of the third ordering paragraph, prohibiting the individual independent use of any of the three delivered pricing systems "for the purpose or with the effect of systematically matching" delivered prices of competitors, with the effect of eliminating competition. (3) Whether there was an adequate evidentiary basis for the finding of the Commission that Columbus McKinnon Chain Corporation was a participant in the alleged conspiracy to fix prices.

[*Evidence of Conspiracy*]

The petitioners in their supplemental brief say that Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company, Inc., as well as Columbus McKinnon Chain Corporation, have challenged the entire findings, conclusions and order. The latter company has filed a brief. Neither of the other two has briefed or argued its assertions of error. As was said in *Kimball Laundry Co. v. United States,* 8 Cir., 166 F. 2d 856, 859, "An unargued assertion of error is no more helpful to an appellate court than is an unsupported allegation of fact to a trial court. The burden of demonstrating error is upon an appellant, and errors assigned, but not argued in his brief, are waived." See, also, *Turner County, S. D., v. Miller,* 8 Cir., 170 F. 2d 820, 828.

Since the petitioners do not challenge the adequacy of the evidence to sustain the Commission's determination of the existence of concerted action by the petitioners, amounting to conspiracy, to fix the prices for chain and chain products, it is unnecessary to attempt to state the evidence in detail. What the petitioners contend is that there was no evidence that the delivered pricing methods used in the sale of the chain or chain products resulted from any conspiracy, understanding, agreement or concerted action on the part of the petitioners.

There is no doubt of the power of the Commission to declare that conduct which tends to restrain trade by fixing prices is an unfair method of competition. *Federal Trade Commission v. Cement Institute* [1948-1949 TRADE CASES ¶ 62,237], 333 U. S. 683, 693. Within broad limits, it is for the Commission to prescribe the remedy for the prevention of such conduct, which may include depriving those who have engaged in it of the weapons which they used in making it effective. *Federal Trade Commission v. National Lead Co., supra,* pages 428-430 of 352 U. S. See, also, *Federal Trade Commission v. Ruberoid Co.* [1952 TRADE CASES ¶ 67,279], 343 U. S. 470, 473.

The instant case strongly resembles the *Cement Institute* case, 7 Cir. [1946-1947 TRADE CASES ¶ 57,490], 157 F. 2d 533, reversed in [1948-1949 TRADE CASES ¶ 62,237] 333 U. S. 683; the *National Lead Co.* case [1955 TRADE CASES ¶ 68,211], 227 F. 2d 825, reversed in part [1957 TRADE CASES ¶ 68,629] 352 U. S. 419; and the case of *Triangle Conduit & Cable Co., Inc., v. Federal Trade*

Commission, 7 Cir. [1948-1949 Trade Cases ¶ 62,254], 168 F. 2d 175, affirmed by an equally divided Supreme Court under the title, *Clayton Mark & Co. v. Federal Trade Commission* [1948-1949 Trade Cases ¶ 62,409], 336 U. S. 956. The only important distinction between the instant case and those cases, it seems to us, is that here three delivered pricing systems are involved, and in each of the other cases only one was involved.

The record shows that the three delivered pricing systems or methods were used in selling chain. Welded chain (heavy-duty chain such as anchor chain, logging chain and the like) was sold under the old "Pittsburgh plus" method of delivered pricing, which called for the f.o.b. mill or factory price plus freight based on Pittsburgh. The method is described in the *Cement Institute* case at pages 697-698 of 333 U. S.

Weldless chain (which is lighter than welded chain and is made by bending and knotting wire into links or by cutting links from flat metal) was sold under the freight equalization method of computing delivered pricing. Under this system the buyer pays the seller's mill or factory price plus an amount equal to the rail freight applicable to the shipment from the factory, in which such chain is made, nearest freightwise to the point of delivery.

Tire chain (which consists of two welded line or side chains with cross links and is used on the wheels of motor vehicles to prevent skidding on or in snow, ice or mud) was sold f.o.b. factory with freight allowed or absorbed by the seller to all destinations in the United States. This the Commission calls a zone delivered price system, the entire United States being the zone. The petitioners prefer to call the system "the universal delivered price method." All that this means is that tire chains, like chewing gum, cigarettes, and many other products, are sold everywhere at the same delivered prices, regardless of point of origin.

The Commission, in substance, found that the petitioners entered into agreements and understandings concerning current and future prices; that they cooperatively compiled schedules of common pricing factors used in selling welded chain; that they adopted and used, by agreement, the prices and discounts published by the American Chain & Cable Company, Inc., the largest manufacturer of chain in the United States; that they exchanged information as to prices at which their products were offered for sale generally and as to prices made particular customers; and that they promoted adherence to prices agreed upon through the Chain Institute and otherwise.

The Commission further found that

> "Each of the * * * manufacturers has quoted and sold chain and chain products at prices calculated pursuant to and in accordance with the particular method or system of computing delivered prices applicable to the products it sold, with the knowledge that all the other * * * manufacturers selling the same products were simultaneously doing likewise. In entering into and engaging in the cooperative and collective actions described hereinabove, there was necessarily an understanding and agreement between all of the respondents [before the Commission] that each of the * * * manufacturers would continue to use the particular method or system applicable to the type or types of chain each sold."

The Commission also found:

> "* * * All users of each of the three methods or systems of computing delivered prices have thus been enabled to present to a prospective purchaser a condition of matched prices in which such purchaser was isolated and deprived of any choice on the basis of price. The delivered costs to purchasers have not reflected any of the differences in cost of raw materials, other items, or freight delivery from the places of manufacture to the purchaser's delivery points. The principles and forces of competition have been prevented from making and determining the prices of each of the * * * manufacturers."

One not learned in unfair trade practices and unfair methods of competition might, from the record in this case, get the impression that the Commission's findings presented a somewhat overdrawn and unduly sinister picture of the situation out of which this controversy arose. We think, however, that there was a sufficient evidentiary basis for an inference by the Commission that the substantial uniformity and virtual identity of prices which existed in the chain industry resulted from concerted conscious action on the part of petitioners, amounting to conspiracy, and that the delivered pricing methods used by petitioners in connection with and in furtherance of their cooperative and collusive efforts to fix

or stabilize prices for chain were necessarily an inherent and indispensable part of the conspiracy.

In the *Cement Institute* case it was asserted, as it is here, that the Commission failed to find, and that the evidence failed to show, any agreement to use the delivered price system involved in that case. See page 709 of 333 U. S. This contention was rejected by the Supreme Court.

[*Concerted Action*]

The contention of petitioners that subparagraph (6) of the first ordering paragraph is invalid and unjustified by the evidence, cannot be sustained. The Supreme Court held in the *Cement Institute* case that a similar paragraph was valid. The Court said (page 729 of 333 U. S.): "The paragraph is merely designed to forbid respondents from acting in harmony to bring about national uniformity in whatever fashion they may seek by collective action to achieve that result."

[*Independent Action*]

It is evident that it is the third ordering paragraph by which the petitioners are most aggrieved and which they seem to construe as totally and permanently disabling each of them from selling its chain products at delivered prices, and leaving them no alternative but to sell at prices f. o. b. their respective factories. They say this will prevent them from engaging in country-wide competition and confine each of them to its own local trade territory. If this paragraph of the order of the Commission were to be given the effect of depriving each of the petitioners of every lawful and practical method of independently and honestly selling its products at delivered prices, and thus preventing it from engaging in nationwide competition, we would consider the paragraph invalid.

The only distinction between the third ordering paragraph in this case and the corresponding paragraph in the *National Lead Co.* case is that there the order proscribed the use of the zone delivered price system, which was the only delivered price system in question in that case, while in this case the Commission was dealing with three delivered price systems, each of which was used in computing the price of a single type of chain. In its supplemental brief, the Commission says:

"While the use of each system was limited in the past to a particular type of chain, each has been equally effective in restraining trade and eliminating competition. The order, we think, properly guarded against the use of the simple device of interchanging the systems used as among the three types of chain, and thus perpetuating the restraints of trade at which the order is directed. The Commission has frequently issued orders which have consistently been upheld by the Courts, prohibiting unfair methods and practices as to all products sold in cases where the methods and practices had been used in the past only in connection with the sale of one of the products."

It is possible that the Commission has made its order too broad in undertaking to proscribe the qualified independent use by each of the petitioners of the only practical systems of delivered pricing for its chain products. If in the *National Lead Co.* case the Commission had prohibited not only the individual use of the single delivered price system there involved, but had also conditionally prohibited the use of all other practical delivered price systems, the Supreme Court might have refused to sustain so broad a prohibition.

[*Court Review*]

In *Federal Trade Commission v. Ruberoid Co., supra*, page 473 of 343 U. S., the Supreme Court, in sustaining an order of the Commission, said:

"* * * Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. Moreover, 'the Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices' disclosed. *Jacob Siegel Co. v. Federal Trade Comm'n*, 327 U. S. 608, 611 (1946). Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a

special competence in formulating remedies to deal with problems in the general sphere of competitive practices. Therefore we have said that 'the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.' *Id.*, at 613."

We gather from this and the other recent Supreme Court decisions to which reference has been made, that, unless an order of the Commission can be said to be purely arbitrary because without adequate evidentiary support or because clearly beyond the Commission's powers, it may not be set aside. The question of the adequacy of the evidentiary basis for the third ordering paragraph as applied to all types of chains and to every petitioner, whether it had used all of the three delivered price systems or not, is, to say the least, debatable. But if the Commission honestly and justifiably believed that competition in the chain industry had been virtually destroyed by the conduct of petitioners and that the third ordering paragraph was necessary to restore competitive prices, we cannot say that the Commission's determination in that regard was purely arbitrary. The Commission, in cases such as this, is the trier of the facts, the appraiser of the credibility of witnesses, the weigher of evidence, the drawer of inferences, and, within broad limits, the prescriber of remedies for trade practices found by it to be unfair. Its determination as to the facts is as invulnerable to attack as is a jury verdict in a case triable by and properly submitted to a jury. It seems apparent that, unless a reviewing court can demonstrate that the Commission's order is legally or factually baseless, it may not be set aside.

[*Scope of Order*]

The scope of the third ordering paragraph in the instant case is, of course, the same as was the scope of the corresponding paragraph in the *National Lead Co.* case, with respect to which the Supreme Court said, page 431 of 352 U. S.:

> "* * * It is our conclusion that the order was not intended to and does not prohibit or interfere with independent delivered zone pricing *per se*. Nor does it prohibit the practice of the absorption of actual freight as such in order to foster competition. Furthermore, as we have said there is read into the order the provision of § 2(b) of the Clayton Act as to the right of a seller in good faith to meet the lower price of a competitor. This is not to say that a seller may plead this section in defense of the use of an entire pricing system. The section is designed to protect competitors in individual transactions."

Moreover, the Commission does not place the same construction on the paragraph as do the petitioners. In its supplemental brief the Commission says:

> "The order here does not require f. o. b. mill selling. As the Supreme Court pointed out in *National Lead*, 'delivered zone pricing violates the order only when two conditions are present: (1) identical prices with competitors (2) resulting from zone delivered pricing' (1 L. ed. 2d at 443). So, here, the order will be violated only if there are identical prices resulting from single basing point, freight equalization or zone delivered pricing. As we pointed out in our main brief, the order does not prohibit *per se* the use of any delivered price-system and can be fully complied with by competition in base prices, no matter what system of delivered pricing is used. If there is competition in base prices there cannot possibly be any 'systematic matching' of delivered prices."

Furthermore, if conditions have changed and the third ordering paragraph is no longer needed to restore competition to the chain industry, it seems fair to assume that the Commission will, upon application reopen the proceeding under Section 5(b) of the Federal Trade Commission Act as amended, and modify its order. See *American Chain & Cable Co., Inc., v. Federal Trade Commission*, 4 Cir. [1944-1945 TRADE CASES ¶ 57,251], 142 F. 2d 909, 911-912.

[*Participation in Conspiracy*]

Columbus McKinnon Chain Corporation in its brief asserts that an adequate evidentiary basis for the Commission's finding that the company was involved in the conspiracy is lacking. The company points to the fact that it made no weldless chain, although it at times purchased small amounts of such chain for resale as an accommodation to its customers; that such resales were usually priced f. o. b. its factory at Tonawanda, New York, and rarely, when shipped with other chain, f. o. b. Pittsburgh; that about 95% of the tire chain sold by the company was its own patented "claw chain," the published price of which differed from the prices of tire chain of other petitioners;

that, while in selling its patented tire chain it independently adopted the universal delivered price method, the use of that method did not result in "any regular identity of price with" the tire chain of other petitioners; that when the company entered the tire chain business it adopted the pricing practices of established manufacturers; and that the only way to compete for tire chain sales was by the universal price method, "Because of the homogeneity of the product and the peculiarly sporadic geography of the tire chain market."

Columbus McKinnon asserts that the Commission's inference of its complicity is based on: (1) its membership in the Chain Institute, and (2) the similarity of its prices on welded chain to those of competing manufacturers. It contends that, considered in proper perspective, those facts do not justify the inference, and that mere membership in a trade association, without more, is not enough to establish participation in a conspiracy. It cites, in that connection, *Phelps Dodge Refining Corp. v. Federal Trade Commission*, 2 Cir. [1940-1943 TRADE CASES ¶ 56,297], 139 F. 2d 393, 396. We note that in that case the court went on to say:

> "* * * Thus the issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to dissociate himself from them is a ratification of what they are doing. He becomes one of the principals in the enterprise and cannot disclaim joint responsibility for the illegal uses to which the association is put. While the culpable role of petitioner Cyanamid is less clearly established than that of the three petitioners already considered, it nevertheless sustains the Commission's findings."

The record shows that the Columbus McKinnon Chain Corporation was an active member of the Chain Institute from its inception, and followed the delivered pricing methods of other petitioners at least with respect to unpatented tire chain and welded chain.

The Commission, we think, reasonably could infer that Columbus McKinnon Chain Corporation, as a member of the Chain Institute, knew or was charged with knowledge of the collusive efforts of other members to stabilize prices for chain and chain products by suppressing competitive pricing, and was therefore a party to the conspiracy. Compare, *Federal Trade Commission v. Cement Institute, supra*, pages 717-720 of 333 U. S.

[*Order Affirmed*]

The order under review is affirmed, and an order of enforcement may be entered.

[¶ 68,758] United States v. A M I Incorporated.

In the United States District Court for the Western District of Michigan, Southern Division. Civil Action No. 3238. Filed June 28, 1957.

Case No. 1350 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Allocation of Markets—Refusal To Deal—Coin Operated Phonographs.—A manufacturer-distributor of coin operated phonographs was prohibited by a consent decree from (1) limiting or restricting the persons to whom or the territory within which any distributor or operator may sell such phonographs, (2) requiring any distributor to advise it of the name or address of any purchaser of phonographs or the serial number of such phonograph, or (3) limiting or restricting the right of any purchaser from any distributor to resell such phonographs after they have been paid for in full. Also, the manufacturer-distributor was prohibited from refusing to enter into or canceling any contract with a distributor because of such distributor's refusal to do any of the above acts and from maintaining any index or record of the names or addresses of any purchasers from distributors of such phonographs or the serial numbers of such phonographs.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.468, 2005.785.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Obtaining Names of Purchasers—Right To Select Customers.—A consent decree did not prohibit a manufacturer-distributor of coin operated phonographs from requiring any distributor to advise it of the name or address of any purchaser of such phonographs from the distributor or the serial number of such phonographs where such name, address, and serial number are necessary (1) to fill an order for repair parts, for service, or for possible attendance at service schools, or (2) to resolve a complaint or inquiry involving loss or the fulfillment or breach of a conditional sales agreement or other credit or collateral agreement. The decree also provided that the manufacturer-distributor could exercise its right to select its distributors and customers and to designate geographical areas in which distributors shall be primarily responsible for promoting the sale of its coin operated phonographs.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321, 8421.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Notice of Judgment.—A manufacturer-distributor of coin operated phonographs was required by a consent decree to serve upon each of its distributors a conformed copy of the decree.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.60.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; Wendell A. Miles, United States Attorney, Western District of Michigan; and W. D. Kilgore, Jr., Earl A. Jinkinson, Harold E. Baily, and James E. Mann, Attorneys, Department of Justice.

For the defendant: Thomas L. Marshall of Bell, Boyd, Marshall & Lloyd, Chicago, Ill.; and Marshall M. Uhl of Uhl, Bryant, Slawson & Wheeler, Grand Rapids, Mich.

Final Judgment

S. Wallace Kent, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on June 28, 1957, the defendant having filed its answer denying the substantive allegations thereof, and the United States of America and the defendant, A M I Incorporated, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or an admission by any party signatory hereto with respect to any such issue;

Now, Therefore, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties signatory hereto, It is hereby ordered, adjudged and decreed as follows:

I

[*Sherman Act*]

This Court has jurisdiction of the subject matter of this action and of the parties signatory hereto. The complaint states claims for relief against the defendant under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce from unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Person" shall mean an individual, partnership, firm, corporation, or any other legal entity;

(B) "Distributor" shall mean any person engaged in the purchase from defendant, for resale, of coin-operated phonographs manufactured by it;

(C) "Operator" shall mean any person who owns coin-operated phonographs and leases said machines to location owners;

(D) "Location owner" shall mean any person owning or operating a restaurant, tavern or other place of business in the Continental United States where coin-operated phonographs are placed for use by the public;

(E) "Coin-operated phonographs" shall mean new and used coin-operated phonographs manufactured originally by defendant.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment shall apply to defendant and to its succes-

sors, assigns, officers, directors, servants, employees and agents, and to any corporation subsidiaries of defendant, and to all persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

This Final Judgment is not to be construed as relating to commerce outside the United States.

IV

[*Practices Enjoined*]

Defendant is enjoined and restrained from directly or indirectly:

(A) (1) Limiting or restricting, the persons to whom or the territory within which any distributor or operator may sell coin-operated phonographs;

(2) Requiring any distributor to advise defendant of the name or address of any purchaser from such distributor of any coin-operated phonographs or the serial number or numbers of such phonographs, except where such name, address and serial number or numbers are necessary to fill an order for repair or maintenance parts, or for service, or for possible attendance at service schools, for maintenance or replacement of parts or components, or to resolve a complaint or inquiry involving loss or theft or the fulfillment or breach of a conditional sales agreement or other credit or collateral agreement;

(3) Limiting or restricting the right of any purchaser from any distributor of coin-operated phonographs to resell such phonograph or phonographs after they have been paid for in full.

(B) Entering into, adhering to or enforcing any contract, agreement, or understanding with any distributor, directly or indirectly:

(1) Limiting or restricting the persons to whom or the territory within which any distributor or operator may sell a coin-operated phonograph or phonographs;

(2) Limiting or restricting the right of any purchaser from any distributor of coin-operated phonographs to resell such phonograph or phonographs after they have been paid for in full.

(C) Refusing to enter into or cancelling any contract with a distributor for the distribution of coin-operated phonographs because of such distributor's refusal to do any of the following acts:

(1) Limit or restrict, directly or indirectly, the persons to whom or the territory within which he sells coin-operated phonographs;

(2) Advise defendant of the name or address of any purchaser from such distributor of any coin-operated phonographs or the serial number or numbers of such phonographs, except where such name, address and serial number or numbers are necessary to fill an order for repair or maintenance parts, or for service or for possible attendance at service schools, for maintenance or replacement of parts or components, or to resolve a complaint or inquiry involving loss or theft, or the fulfillment or breach of a conditional sales agreement or other credit or collateral agreement held by the defendant.

(3) Limit or restrict, directly or indirectly, the right of any purchaser of coin-operated phonographs to resell such phonographs after the defendant shall have been paid in full therefor.

(D) (1) Maintaining any index, catalog or record of the names or addresses of any purchasers from distributors of coin-operated phonographs or the serial numbers of such phonographs; provided, however, that any distributor may advise defendant and defendant may keep a record of the names or addresses of any such purchasers of such phonographs and the serial numbers thereof in connection with an order for repair or maintenance parts, or for service or for possible attendance at service schools, or for advertising, or in connection with a complaint or inquiry involving loss or theft or fulfillment or breach of a conditional sales agreement or other credit or collateral agreement involving such phonographs; and provided further that defendant shall not be required to discontinue obtaining post cards upon forms prescribed from any owner of its coin-operated phonographs as a means of determining the time at which its warranty begins to operate and identification of its then warranty promisee, but these exceptions and provisions shall not be used directly or indirectly to accomplish, or to attempt to accomplish, action or results enjoined by any provision of this decree.

(2) Using any file or record of defendant for any purpose contrary to any of the provisions of this Final Judgment.

(E) Subject to the above subsections of this Section IV, defendant may exercise its

right from time to time to choose and select its distributors and customers, and to designate geographical areas in which such distributors shall respectively be primarily responsible for promoting the sale and distribution of coin-operated phonographs manufactured by defendant.

V

[*Notice of Judgment*]

Defendant is directed, within sixty (60) days after the entry of this Final Judgment, to serve by mail upon each of its distributors a conformed copy thereof.

VI

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant, made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Access, during regular office hours, to those parts of the books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the defendant which relate to any matters contained in this Final Judgment;

(B) Subject to the reasonable convenience of the defendant, and without restraint or interference from it, to interview its officers or employees, who may have counsel present, regarding any such matters.

Upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the defendant shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means permitted in this Section VI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VII

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

VIII

[*Effective Date*]

This Final Judgment shall become effective ninety (90) days after entry herein.

[¶ 68,759] United States v. International Boxing Club of New York, Inc., et al.

In the United States District Court for the Southern District of New York. Civ. No. 74-81. Dated June 24, 1957.

Case No. 1122 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Dissolution and Divestiture.—Two individuals who controlled corporations engaged in the promotion of professional championship boxing contests in Illinois and New York and controlled corporate boxing stadia located in the same states were ordered to transfer all of their stockholdings in the New York stadium corporation to a trustee and to divest themselves of all of their stockholdings in such corporation within a period of five years. In the event that the individuals failed to dispose of such stockholdings, the trustee was empowered to effect a sale of the stock. Also, the dissolution of the corporations engaged in the promotion of boxing contests in Illinois and New York was ordered.

It had been found that the individuals, the boxing clubs, and the New York stadium corporation (1) engaged in a conspiracy to restrain and to monopolize the promotion of professional championship boxing contests and (2) monopolized the promotion of such boxing contests. Severance of the interlocking ownership of the individuals in the New York stadium was necessary because the defendants through ownership and control of the stadium were in a position to exclude other promoters from using it to promote boxing contests. The boxing clubs were the promotional arms of the individuals, and they were used to monopolize the promotion of such contests.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.700.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief.—Injunctive Decrees—Compulsory Leasing.—Two individuals who controlled corporations engaged in the promotion of professional championship boxing contests and two corporate stadia where boxing contests were held were directed to lease the stadia on a reasonable rental basis as long as they owned or controlled them. This was a necessary remedy because the individuals, through their ownership and control of the stadia, were in a position to exclude other promoters from using them to promote boxing contests.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.800.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Injunctive Decrees—Interference with Competitors.—Two individuals who controlled corporations engaged in the business of promoting professional championship boxing contests and stadia where such contests were held were prohibited from interfering with an independent promoter's disposition of radio or television rights to any championship boxing contest promoted by such promoter and from interfering with the negotiations of sponsors or networks with independent promotors concerning the televising or broadcasting of any championship boxing contest. Also, the individuals and one of the stadia were prohibited for a period of five years from promoting more than two championship boxing contests in each calendar year. It had been found that the defendants (1) engaged in a conspiracy to restrain and to monopolize the promotion of professional championship boxing contests and (2) monopolized the promotion of such boxing contests.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Injunctive Decrees—Termination of Exclusive Agreements.—Where two individuals, two boxing clubs, and an operator of a boxing stadium were found to have engaged in a conspiracy to restrain and to monopolize the promotion of professional championship boxing contests and to have monopolized the promotion of such boxing contests, the court declared illegal and void all exclusive service contracts for championship boxers or contenders and all exclusive leases with stadia for the staging of boxing contests. By such contracts, the defendants preempted the championship field by requiring all championship contenders to sign with them for future contests and preempted the field of places where championship boxing contests could be staged.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.625.

For the plaintiff: Herbert Brownell, Jr., Attorney General; Victor R. Hansen, Assistant Attorney General; and Victor H. Kramer, Richard B. O'Donnell, John D. Swartz, William J. Elkins, Lawrence Gochberg, Frank D. Curtis, and Edward F. Corcoran, Attorneys, Department of Justice.

For the defendants: Simpson, Thacher & Bartlett (Whitney North Seymour, Benjamin C. Milner, Armand F. Macmanus, and Newell G. Alford, Jr., of counsel) for Madison Square Garden Corporation and International Boxing Club of New York, Inc.; and Reid & Priest, and Peabody, Westbrook, Watson & Stephenson (Charles H. Watson and Ralph M. McDermid, of counsel), for International Boxing Club, Inc., James D. Norris, and Arthur M. Wirtz.

For a prior opinion of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,649; for a prior opinion of the U. S. Supreme Court, see 1955 Trade Cases ¶ 67,941; and for a prior opinion of the U. S. District Court, see 1954 Trade Cases ¶ 67,758.

Opinion

[*Findings*]

THE COURT [SYLVESTER J. RYAN, District Judge, *In full text*]: We heretofore have found from the evidence presented at trial and concluded that the defendants engaged in a combination and conspiracy in unreasonable restraint of trade the promotion of professional championship boxing contests in violation of Section I of the Sherman Act. We further have found that the defendants have conspired to monopolize trade and commerce in the same field, thus violating Section II of the Act. Defendants also were found to have actually monopolized commerce in the professional championship boxing field which was a further violation of Section II.

[*Objectives of Decree*]

We now, after full hearing of all parties and upon consideration of the evidence submitted, turn to the formulation of an appropriate decree to remedy the wrongs which were committed. The decree in a monopolization case should have three objectives:

> "One, it puts an end to the combination or conspiracy when that is itself the violation.
>
> "Two, it deprives the antitrust defendants of the benefit of their conspiracy.
>
> "Three, it is designed to break up or render impotent a monopoly power which violates the Act." (*Schine Chain Theatres v. U. S.* [1948-1949 TRADE CASES ¶ 62,245], 334 U. S. at 128-9.)

[*Dissolution of Combination*]

The conspiracy which we found to have existed was made effective by the concert of action of the defendants. Thus, by stock ownership and control of stock voting power, defendants dictated the election and functioning of interlocking directors and officers and of management between the Chicago and Mid-Western boxing interests —defendants Wirtz and Norris—and the New York interests—Madison Square Garden.

The illegal conspiracy and monopolization was a direct and immediate purpose of this combination. There must be a dissolution of the combination which will permit the reestablishment of the competitive positions of the defendants and the entry of others into the market.

The combination still exists and continues to function in only slightly altered form. Its purposes and objectives remain unchanged. The stock ownership of IBC-NY has been transferred to Madison Square Garden Corporation. IBC-Illinois has now Chicago Stadium Corporation as its sole stockholder. Wirtz and Norris and interests allied to them still have controlling interest in Madison Square Garden and it stands undisputed that Wirtz and Norris control and direct the management of Madison Square Garden and dictate its policies and boxing activities. Wirtz and Norris are the sole stockholders of Chicago Stadium Corporation. Norris is the president and a director of IBC-New York, of IBC-Illinois, of Madison Square Garden Corporation and of Chicago Stadium Corporation.

Wirtz is a director of all four corporations, and in addition, vice-president of the Board and treasurer of Madison Square Garden Corporation. Although the stock ownership of IBC-New York and IBC-Illinois has been changed, they still share the profits of championship contests as of old.

[*Television and Radio Rights*]

With respect to the control of television and radio rights, a mere corporate structure change has taken place. A new corporation has been formed, Teleradio Promotions, Inc., and its entire issued capital stock is owned by Chicago Stadium Corporation. To Teleradio has been given the right to sell television and radio rights in connection with the Wednesday night television series. Thus, Wirtz and Norris control Teleradio and IBC-Illinois through Chicago Stadium Corporation, and with it the Wednesday night television series, and through IBC-New York and Madison Square Garden these same combinations control the Friday night series. Truman Gibson is still found as one of the liaison between New York and Chicago. He is still an employee and secretary of IBC-NY and IBC-Illinois, and is now, in addition, an employee and secretary of Teleradio Promotions, Inc.

[*Control of Contests*]

The unlawful combination of the defendants still possesses and exercises its monopolistic control in the field of championship contests. It appears that since May 15, 1953 there have been held in the United States 37 championship contests, excluding one

bantamweight contest. The defendants admit that they had promotional control over 24 of the 37 championship contests which were held, or of 65 per cent of the market, but we find that the defendants were not financial strangers to the other 13 championship contests which were held in cities other than New York and Chicago. Because the defendants are licensed by state authorities to promote only in New York and Illinois, they could not be the persons actually designated as the promoter of the 13 championship contests, but all five of the championship contests which originated in cities other than Chicago or New York on Friday nights were televised on IBC's New York Friday night television series.

We find, too, that all of the 37 championship contests in this period from May 15, 1953, save only the five outdoor contests, were televised on either the defendants' Wednesday or Friday night television series, and that the profits of the sale of the telecasting rights inured to the benefit of the defendants.

[*Stock Divestiture*]

The combination of the defendants is still in operation in violation of the law as we have heretofore found. The dissolution of the combination can only be accomplished by an immediate and complete severance of the interlocking ownership of Norris and Wirtz in Madison Square Garden. This means there must be a complete divestiture of the stockholdings of Norris and Wirtz in the Garden. The Government has established Norris and Wirtz control the Garden Corporation.

The decree will direct Norris and Wirtz to divest themselves of all of their stockholdings in the Garden. This includes all stock which they own individually or actually control through other entities.

In order not to unduly affect the market for stock or innocent stockholders the divestiture will be accomplished in the following manner:

One, Norris and Wirtz within 30 days after the entry of final judgment will resign as officers and directors of the Garden Corporation.

Two, Norris and Wirtz will be enjoined thereafter from holding any office or directorship in the Garden Corporation.

Three, Norris and Wirtz will be enjoined from voting by proxy or otherwise any stock at any meeting of the Garden Corporation stockholders, either for the election of officers or directors or for determination of any business policy of the corporation.

Four, Norris and Wirtz will be ordered to transfer all of their Garden stockholdings direct and indirect to a trustee to be named by the Court, who will be empowered and authorized to vote the stock and exercise all other incidence of ownership.

Five, Norris and Wirtz are to effect a sale or other divestiture of their ownership of Garden stock within five years from the date of the decree, which divestiture shall be subject to the approval of this Court. Upon their failure to effect such sale or divestiture within the fixed time limit, the trustee will be authorized and empowered to effect a suitable sale of the stock within the next two years after the expiration of Norris's and Wirtz's time limit.

The Court's purpose here is to bring about the complete divestiture within seven years of the date of the final judgment and decree and in the meanwhile the defendants may receive and collect any dividends declared and paid on this stock.

The foregoing will effect a major step toward undoing the illegal combination found by the Court to exist. Competition for championship contests will then be possible between Madison Square Garden in New York, on the one hand, and the Chicago Stadium, Detroit Olympia and St. Louis Arena, all still owned or controlled by Wirtz and Norris or by interests allied to or associated with them on the other hand.

[*Promotional Activities—Limitations*]

This, however, will not afford the full measure of relief required in this suit. The illegal monopoly of championship boxing contests was made possible by defendants because of their control of the promotion of championship fights together with their control of the principal stadia for the staging of the fights. In other words, combination between promotion and arena operation was a means by which the objects of the illegal conspiracy were accomplished.

Accordingly, there must be a limitation placed on the promotional activities of these defendants with respect to championship contests. The decree will enjoin the Garden

for a period of five years from promoting more than two championship boxing contests in each calendar year. Likewise, the decree will enjoin for a period of five years Wirtz and Norris from promoting more than two championship contests in each calendar year.

[*Radio and Television Restrictions*]

The Court will accept provisions in the decree with respect to this substantially as proposed by the defendants. Such provisions shall, however, incorporate and include restraints upon the defendants from hereafter interfering in any way with an independent promoter's disposition of television or radio rights to any championship contest which may be promoted by such independent promoter or from hereafter interfering in any manner with a sponsor or television network from negotiating directly with such independent promoter of championship contests to present and include them in any television or radio broadcasting series, or to the television or radio broadcasting of such contests independently of such series.

[*Necessity of Divorcement*]

Divorcement is found to be a necessary remedy in this suit because defendants through ownership and control of the principal stadia for staging championship bouts are in a position to exclude other promoters from using these stadia to promote a championship fight.

The Court determines that it is necessary to separate and limit promotion of championship boxing contests from the operation of the arenas where those contests are staged.

[*Rental of Stadiums*]

In connection with this limited divorcement which we have directed, the Court will direct the compulsory leasing of Madison Square Garden and of Chicago Stadium as long as they are owned or controlled by the defendants or any of them on a reasonable rental basis to be judicially determined upon application after refusal to fix a reasonable rental. Jurisdiction will be reversed by the Court to pass upon the reasonable rental fee should agreement not be reached on reasonable rental. The Court will incorporate in its decree to accomplish this [sic] provisions substantially as proposed by the defendants.

[*Dissolution of Boxing Clubs*]

The divorcement to be effected must be complete and irrevocable. Defendants brought the International Boxing Club of New York, Inc. and the International Boxing Club-Illinois into existence as the instrumentalities by which the illegal conspiracy was carried out. The stock of IBC-New York is wholly-owned by Madison Square Garden Corporation. The stock of IBC-Illinois is owned by the Chicago Stadium Corporation. These corporations are the promotional arms of the defendants, conceived and used to enable defendants to restrain and monopolize promotion of championship boxing contests. Their assets are of but nominal value except for the goodwill attaching to their names by virtue of the conspiracy.

Both IBC corporations must be dissolved. The decree will enjoin both corporations until dissolved from functioning in the promotion of boxing contests, will declare illegal and void all existing and unexecuted contracts of either corporation for the exclusive services of any boxer and for the promotion of more than two contests in any one calendar year within the period of five years and will require dissolution of each.

[*Exclusive Service Contracts*]

The final major provision of the decree must declare illegal and void all exclusive service contracts for championship boxers or contenders as well as all exclusive leases with stadia for the staging of boxing contests. By these exclusive contracts defendants preempted the championship field by requiring all championship contenders to sign up with defendants for future bouts. Likewise the exclusive leases with arenas and stadia other than those owned or controlled by the defendants permitted them to preempt the field of places for the staging of championship contests.

The relief here must be broader than the championship field because the evil to be remedied is broader. By terminating all exclusive contracts and leases and enjoining them in the future, the way will be open for those who wish and have the financial ability and otherwise meet local and state requirements to enter into the promotion of championship boxing contests. The Court will accept generally the language of the injunction against exclusive contracts as

submitted by the Government in its proposed decree.

[*Purpose of Relief*]

The Court desires to note that the relief to be afforded is required by the facts of this suit. Championship boxing was regarded by defendants as a business, engaged in solely for profit. For these profits defendants were bent upon a plan of monopolization to exclude all competition and leave them free to reap financial gain. The extent of defendants' activities in this illegal conspiracy requires drastic affirmative action by this Court.

The relief outlined herein is designed to put an end to the conspiracy; to deprive defendants of their present position in the market, which was attained through the conspiracy, and to destroy the monopoly which they created and seek to perpetuate. Professional championship boxing contests will be opened with television and radio broadcasting to legitimate and healthy competition.

[*Retention of Jurisdiction*]

Jurisdiction of this cause and of the parties hereto is retained by the Court for the purposes of enabling any of the parties to this judgment or any other person, firm or corporation that may hereafter become bound thereby, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate for the construction or carrying-out of the final judgment and for the enforcement of compliance therewith.

[*Other Provisions of Decree*]

Judgment is to be entered herein against all defendants for all costs to be taxed in this suit. The usual provisions against extra-territorial operation of the decree permitting reasonable inspection of defendants' records by the Attorney General are to be incorporated in the decree substantially as proposed by the defendants. The decree will be settled accordingly within one week from this date.

[¶ 68,760] United States v. Gold Filled Manufacturers Association, Inc., et al.

In the United States District Court for the District of Massachusetts. Civil Action No. 56-295 W. Filed July 1, 1957.

Case No. 1278 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Price Fixing.—Manufacturers of gold filled plate materials and their trade association were prohibited by a consent decree from (a) suggesting to any other such manufacturer the prices or terms of sale for gold filled or rolled gold plate, (b) entering into any understanding with any other such manufacturer or any association to fix prices, discounts, or terms of sale, (c) exchanging price lists with any other such manufacturer in advance of the publication of such lists to customers of the defendant manufacturers, (d) circulating price lists which have been established by agreement, or (e) participating in any of the activities of any association with knowledge that the association's activities are in violation of the decree. Also, the association was prohibited from circulating cost information, prices, or formulae for computing costs or prices.

See Combinations and Conspiracies, Vol. 1, ¶ 20011.218, 2017.121, 2017.168, 2017.208.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Prices.—Manufacturers of gold filled plate materials were each directed to determine prices for gold filled and rolled gold plate based on their own manufacturing costs and to put such independently determined prices into effect in place of their prevailing prices.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.45, 8421.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Sales Negotiations.—A consent decree entered against manufacturers of gold filled plate materials did not prohibit bona fide negotiations between such manufacturers concerning sales to one another.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.48.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; and Richard B. O'Donnell, W. D. Kilgore, Jr., Harry N. Burgess, John J. Galgay, Philip Bloom, Joseph T. Maioriello, and Alan L. Lewis, Attorneys.

For the defendants: John M. Hall for Gold Filled Manufacturers Assn., Inc., J. L. Anthony & Co., The Improved Seamless Wire Co., and Standard Metals Corp.; Matthew W. Goring for Cook-Dunbar-Smith Co. and Metals & Controls Corp.; Ralph J. Gutman for Edward N. Cook Plate Co., Inc., I. Stern & Co. Inc., and The H. A. Wilson Co.; John W. McIntyre for Horton Angell Co.; Ronald B. Smith for A. Holt and Co., Inc. and Leach & Garner Co.; Samuel M. Lane for Union Plate & Wire Co.; Francis J. Kiernan for Vennerbeck and Clase Co.; and Westcote H. Chesebrough for A. T. Wall Co.

Final Judgment

CHARLES E. WYZANSKI, JR., District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on April 5, 1956, and each of the defendants having appeared herein and the plaintiff and said defendants, by their respective attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or admission by any such defendant in respect of any such issue;

Now, therefore, before any testimony or evidence has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon the consent of all the parties hereto, it is hereby ordered, adjudged, and decreed as follows:

I

[*Sherman Act*]

The Court has jurisdiction of the subject matter herein and all the parties hereto. The complaint states a claim upon which relief may be granted against the defendants and each of them under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Person" means any individual, partnership, firm, association, corporation, or other legal entity; for the purposes of this Judgment Edward N. Cook Plate Company, Inc. and I. Stern & Co., Inc. shall be deemed to be one person and one defendant;

(B) "Gold filled manufacturer" means a person engaged in the business of manufacturing gold filled and rolled gold plate sheet, wire or tubing, hereinafter referred to as "gold filled and rolled gold plate";

(C) "Defendant Association" means Gold Filled Manufacturers Association, Inc.

III

[*Applicability of Decree*]

The provisions of this Final Judgment applicable to any defendant shall apply to each such defendant and to its officers, agents, servants, employees, subsidiaries, successors and assigns, and to all persons in active concert or participation with any defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

[*Cost Information*]

The defendant Association is enjoined and restrained from collecting from or circulating, reporting, or recommending to any gold filled manufacturer any costs or averaged costs of manufacture or sale of gold filled or rolled gold plate, any prices or terms of sale of gold filled or rolled gold plate or any formulae for computing such costs or prices.

V

[*Pricing Practices*]

The defendants are jointly and severally enjoined and restrained from:

(A) Urging, influencing or suggesting, or attempting to urge, influence or suggest, to any other gold filled manufacturer the price or prices, or other terms or conditions for the sale of gold filled or rolled gold plate;

(B) Entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any other manufacturer of gold filled or rolled gold plate or any association or central agency of or for

such manufacturers to fix, determine, establish or maintain prices, pricing methods, discounts or other terms of sale of gold filled or rolled gold plate;

(C) Circulating or exchanging any price lists or price quotations applicable to gold filled or rolled gold plate with any other gold filled manufacturers in advance of the publication, circulation or communication of such price lists or price quotations to the customers of such defendants;

(D) Circulating, exchanging or using, in any manner, any price list or purported price list containing or purporting to contain any prices or terms or conditions for the sale of gold filled or rolled gold plate which have been agreed upon or established by agreement between two or more gold filled manufacturers; and

(E) Being a member of, contributing anything of value to, or participating in any of the activities of, any trade association or central agency for gold filled manufacturers with knowledge that the activities thereof are in violation of any of the provisions of this Final Judgment.

VI

[*Determination of New Prices*]

Each of the defendants, other than the defendant Association, is ordered and directed, not later than sixty (60) days following the date of the entry of this Final Judgment, individually and independently (1) to review its then prevailing prices for gold filled and rolled gold plate, (2) to determine prices for gold filled and rolled gold plate based on its own manufacturing and overhead costs, the margin of profit individually desired and other lawful considerations, and (3) in place of its then prevailing prices, to establish the prices determined under (2) above, which prices shall become effective not later than one hundred and fifty (150) days following the date of the entry of this Final Judgment. The provisions of this section shall not apply to any defendant which since November 1, 1955 has individually and independently established its own prices in a manner consistent with the procedures set forth in this section.

VII

[*Scope of Prohibitions*]

The provisions of Sections V and VI above shall not be deemed to invalidate, prohibit, or restrain bona fide negotiations between gold filled manufacturers concerning sales to one another.

VIII

[*Notice of Judgment*]

The defendant Association is ordered and directed, within ten (10) days after the date of its entry, to furnish to each of its present members a conformed copy of this Final Judgment and to file with this Court, and with the plaintiff herein, a report setting forth the fact and manner of its compliance with this Section VIII, together with the names and addresses of each person to whom a copy of this Final Judgment shall have been furnished in compliance herewith.

IX

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Anti-Trust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally-recognized privilege, (a) reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Final Judgment, and (b) subject to the reasonable convenience of such defendant, and without restraint or interference, to interview officers and employees of such defendant who may have counsel present, regarding such matters. For the purpose of securing compliance with this Final Judgment, the defendants, upon the written request of the Attorney General, or the Assistant Attorney General in charge of the Anti-Trust Division, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment. No information obtained by the means permitted in this Section IX shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department except in the course of legal

proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

X

[*Jurisdiction Retained*]

Jurisdiction of this Court is retained for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement or compliance therewith, and punishment of violations thereof.

[¶ 68,761] United States v. North American Van Lines, Inc.; ABC Bonded Warehouses; Aero-Mayflower Transit Company; Allied Van Lines, Inc.; American Red Ball Transit Company, Inc.; Atlas Van Service, Inc.; Bekins Van & Storage Company, Inc.; Bekins Van Lines Company; Benton Van & Storage, Inc.; Dalton Van & Storage Company, Inc.; Ford Van Lines, Inc.; Kings Van & Storage, Inc.; Lyon Van Lines, Inc.; National Van Lines, Inc.; Southwest Moving & Storage Company; United Van Lines, Inc.; George H. Buergi; Pines Dunn; Carlos Hogue; George R. Kilgore; J. Clell Miller; J. Lawrence Milne.

In the United States District Court for the District of New Mexico. Cr. No. 19207 Dated June 20, 1957.

Case No. 1322 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Price Fixing—Transportation Rates of Motor Carriers—Regulation of Rates by Interstate Commerce Commission.—Motor carriers were granted a judgment of acquittal in a Government action which charged that they conspired, in violation of the Sherman Act, to fix the rates for transporting household goods of military personnel from United States installations in New Mexico. The court ruled that there was no evidence of a conspiracy to file identical rates; that there was sufficient divergence in the rates to vitiate the charge; that there was no evidence of any injury to the public, even if the alleged conspiracy existed; and that there was no unreasonable restraint of trade because the motor carriers' rates, which were less than those charged civilians, were approved by the Interstate Commerce Commission.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.181, 2039.

For the plaintiff: Willard R. Memler, Antitrust Division, Department of Justice, Washington, D. C.; Robert S. Burk and Joseph Gallagher, Department of Justice, Washington, D. C.; Paul F. Larrazolo, U. S. Attorney, and James A. Borland, Asst. U. S. Attorney, Albuquerque, N. M.

For the defendants: Pope & Ballard, by Melville C. Williams, Chicago, Ill. for Bekins Van & Storage Co., Inc., Bekins Van Lines Co., and Pines Dunn. Rodey, Dickason, Sloan, Akin & Robb, by Wm. A. Sloan, Albuquerque, N. M. for North American Van Lines, Inc., Southwest Moving & Storage Co., Kings Van & Storage, Inc., Atlas Van Service, Inc., Dalton Transfer & Storage Co., Inc., and J. Lawrence Milne. Rodey, Dickason, Sloan, Akin & Robb, by John P. Eastham, Albuquerque, N. M. for Benton & Van Storage, Inc., George H. Buergi, ABC Bonded Warehouses, American Red Ball Transit Co., Inc., and Geo. R. Kilgore. Gambrell, Harlan, Russell, Moye & Richardson, by Charles A. Moye, Jr., Atlanta, Ga. for Aero Mayflower Transit Co., Inc. Quincy D. Adams, Albuquerque, N. M. for Allied Van Lines, Inc. Jack Devoe, Lincoln, Neb. for Ford Van Lines, Inc. Stewart Rose, III, Albuquerque, N. M. for Ford Van Lines, Inc., and J. Clell Miller. Grantham, Spann & Sanchez, by Everett Grantham and Charles Spann, Albuquerque, N. M. for Lyon Van Lines, Inc. Gilbert, White & Gilbert, by Carl H. Gilbert, Santa Fe, N. M. for National Van Lines, Inc. Botts & Botts, by Robert W. Botts, Albuquerque, N. M. for United Van Lines, Inc., and Carlos Hogue.

Judgment of the Court

The Court [WALDO H. ROGERS, District Judge, *In full text*]: Members of the jury, since about 10:30 this morning, until a few minutes ago, with the exception of an interval for lunch, a good many legal issues have been presented to me, in the form of Motions for a Directed Verdict, or for a Judgment of Acquittal, to be more precise.

This case, as you know, has a most interesting background. It has been carefully investigated, carefully prepared, carefully tried. We have had a number of past proceedings in the case. Motions filed and argued, an extensive Pre-Trial Conference between all of the counsel—they came in from all points of America—and I have had under advisement, some legal points.

I didn't want to precipitously rule on the face of an indictment. I determined to hear the evidence, and to choose as fine a jury as I could have, to listen to it, and I am sure I got that form of a jury.

Sometimes, hearing evidence makes plainer, makes more relevant, makes clearer certain rules of law that are presented to you, and in view of the intricacies of the case, in view of the many days you have spent, and the interest that you have shown, I am going to go into some detail, at least, as to my rulings.

[*Conspiracy*]

As the case was presented to this Court, I rule, as a matter of law, which means you folks don't have to rule, because I will rule —I take the responsibility—first, that there is no evidence of a conspiracy or agreement or any action under it, to file identical rates. I believe there is a sufficient divergence in the rates, and at least in the rates eventually filed with the transportation officers of Sandia Base and Kirtland Air Force Base, to vitiate that charge.

[*Restraint of Trade*]

Secondly, I find there is no evidence of a restraint of trade, or a burden on Interstate Commerce by any alleged agreements, whatever it was having been made.

[*Injury to Public*]

Third, I am lining up with my Court of Appeals of my own Circuit, who I work with day in and day out—and I hope have another quarter of a century of association —I stay with them. I don't overrule them, I don't overrule those fine gentlemen—as pastly constituted, as now constituted, or as constituted in the future. I am sticking close, I am riveted to them, so I claim you have to have an injury to the public as a whole, and I hold there is no evidence, at all, of any injury to the public, even if there was the alleged agreement between these nine agents of the corporations.

[*Unreasonable Restraint of Trade*]

There is another point that I am not constrained to pass on, that is the linking up of the National carriers. If there was any agreement, it was, of course, formulated by the nine local agents. I have an abhorrence toward releasing the people who might have been the ultimate large beneficiaries, and feeding the so-called small men to the wolves, but I don't have to, in here, because the main basis of my decision, here, along with the rest of the foregoing three grounds, [is that] there is no evidence of unreasonable restraint of trade.

I emphasize, "unreasonable". Here, these tariffs that have been mentioned, are tariffs that are filed in the regulated industry, warehousing is a regulated industry. You ladies and gentlemen know what I mean by that, public utilities are regulated, and railroads are regulated.

As to charges, these van lines are regulated. You saw, I saw you looking at them, these various tariffs, which bear motor vehicles numbers of that division of the Interstate Commerce Commission. They had to be filed there. They had to be examined, open for examination by the public, and they received, at least the passive or tacit approval of another branch of our National government. If the ICC and the Department of Justice aren't able to agree, that is just too bad, I don't care, but anyway, I hold that there is no unreasonable restraint of trade, because they used a tariff that is approved, the rates of which are less than that charged the civilians.

[*Judgment of Acquittal*]

This is a case of first impressions. I might feel like an old hen that hatched out a fancy duck, or something, but that is it. They gave it to me, so, as I understand it, with a judgment of acquittal you don't have a regular directed verdict form, there.

Mr. Sloan: That is correct, yes, Rule 29.

The Court: Is that correct? Rule 29?

Mr. Sloan: Yes, sir, Motions for Directed Verdict are abolished, and Motions—(Interrupted)

The Court: Ah, that is all I need to know. Yes. Fine. In civil cases, I still direct them. I don't usually dismiss a criminal case, but it is my responsibility, and I have had it on my mind a lot, read lots of citations and texts, this was admirably prepared, as I said, and presented by both the government and the defendants.

[*Return of Documents*]

Mr. Sloan: May I make a Motion, first, Your Honor? I would like to make a Motion that the government would be required to return to each of the defendants, the documents that have been taken from them.

The Court: Well, let's see, it is hard to get down—the jury may leave. Have you any objection to that, Mr. Memler?

Mr. Sloan: Documents and all copies of documents.

The Court: Sure, do that, that is double jeopardy.

[¶ 68,762] Aircoach Transport Association, Inc., etc., et al. v. Atchison, Topeka and Santa Fe Railway Co., etc., et al.

In the United States District Court for the District of Columbia. Civil Action No. 875-57. Dated July 5, 1957.

Sherman Antitrust Act

Combinations and Conspiracies—Price Fixing—Concerted Transportation Rate Quotations to Military Establishments—Regulation of Rates by Interstate Commerce Commission—Primary Jurisdiction.—In an action for treble damages and injunctive relief where supplemental air carriers charged that railroads violated the Sherman Act by making concerted quotations, to military establishments, of special transportation rates (varying to as low as 50 per cent below the railroads' regularly filed tariffs), the court granted the air carriers' motion for summary judgment except as to damages. The court ruled that the antitrust immunity conferred by Section 5a of the Interstate Commerce Act did not apply to concerted quotations made to the Government under Section 22 of the Interstate Commerce Act (providing for reduced rates to the Government); that the Interstate Commerce Commission had never immunized the railroads' concerted Section 22 quotations; that the Interstate Commerce Commission did not have primary jurisdiction over the subject matter of the air carriers' suit; and that the concerted Section 22 quotations of the railroads were illegal *per se* under the antitrust laws.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.355, 2039.70.

For the plaintiffs: Gerhard P. Van Arkel and Henry Kaiser, Washington, D. C.

For the defendants: Douglas F. Smith, Stuart S. Ball, Howard J. Trienens, Richard J. Flynn (Sidley, Austin, Burgess & Smith); Joseph H. Hays, Amos M. Mathews, Joseph D. Feeney, Jr.; John Bodner, Jr.; Hugh B. Cox, Paul F. McArdle (Covington & Burling); Edward K. Wheeler (Wheeler & Wheeler); William E. Miller, Stephen Ailes, Richard A. Whiting (Steptoe & Johnson); Newell A. Clapp (Morison, Murphy, Clapp & Abrams); Arthur Littleton, Benjamin M. Quigg (Morgan, Lewis & Bockius); and J. David Mann, Jr.

Memorandum

[*Alleged Antitrust Violations*]

JOSEPH C. MCGARRAGHY, District Judge [*In full text*]: Since October 1, 1956, the defendant railroads have been transporting military personnel on official business under a reduced rate agreement known as the Joint Military Passenger Agreement providing that the railroads would charge the military establishment a standard or uniform discount of 10% below their filed commercial tariffs. Commencing in 1953, the defendants began the practice of making concerted quotations to the military establishment of special rates varying to as low as 50% below the defendants' regularly filed tariffs.

The plaintiffs who are supplemental air carriers have brought this action to enjoin said concerted special rates and for treble damages, alleging violation of the Sherman Act and of the Clayton Act. With the filing

of the complaint, the plaintiffs moved for a preliminary injunction. Prior to hearing on that motion, certain of the defendants moved to dismiss or in the alternative for summary judgment and certain other defendants filed motions for summary judgment. The plaintiffs also filed a motion for summary judgment.

[*Defenses*]

The defendants claim that the bids which are attacked by the complaint as being in violation of the anti-trust laws have been made pursuant to and in conformity with agreements approved by the Interstate Commerce Commission and, therefore, that they are expressly relieved from the operation of the anti-trust laws with respect to the practices complained of by Section 5a of the Interstate Commerce Act. Further, the defendants say that the subject matter of this suit is within the exclusive primary jurisdiction of the Interstate Commerce Commission and that this Court is without jurisdiction to grant relief to the plaintiffs.

[*Rulings*]

With reference to the points of law raised by the several motions which have been argued fully and briefed exhaustively, the Court is of the opinion as follows:

1. The anti-trust immunity conferred by Section 5a of the Interstate Commerce Act does not apply to concerted Section 22 quotations made to the United States Government.

2. The Interstate Commerce Commission has never immunized defendants' concerted Section 22 quotations.

3. The Interstate Commerce Commission does not have primary jurisdiction over the subject matter of this suit.

4. The concerted Section 22 quotations of defendants are illegal *per se* under the anti-trust laws.

5. The defenses raised by the defendants are insufficient as a matter of law and there is no genuine issue as to any material fact.

Accordingly, the plaintiffs' motion for summary judgment except as to damages will be granted and the defendants will be enjoined in accordance with the prayers of the complaint.

Counsel for plaintiffs will submit an order in conformity with this memorandum.

[¶ 68,763] In the Matter of the Grand Jury Subpoena *Duces Tecum* dated February 15, 1957 and Addressed to Siemens & Halske A. G., Berlin, Germany.

In the United States District Court for the Southern District of New York. No. M11-188. Filed June 28, 1957.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Grand Jury Proceedings—Production of Records of Affiliated Foreign Company.—A motion to quash a subpoena *duces tecum,* which was addressed to a German corporation in connection with a grand jury investigation as to possible violations of the antitrust laws and which was served upon the assistant treasurer of a partly owned subsidiary of the German corporation located in New York, was denied. Even if its corporate affiliation were disregarded, the subsidiary located in New York was an agent of the German corporation, and the parent's activities through this agent were sufficient to sustain service of process in New York. Furthermore, the intercorporate history established that the subsidiary located in New York was no more than an alter ego for the German corporation. Under the circumstances, it was the duty of the court to pierce the corporate veil.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8021.600.

Memorandum

[*Motion to Quash Subpoena*]

WALSH, District Judge [*In full text*]: Siemens & Halske A. G., a German corporation, moves to quash a subpoena addressed to it in connection with a grand jury investigation as to possible violations of the anti-trust laws through alleged cartel activities of persons in the radio and television

industry. The subpoena was served upon the assistant treasurer of Siemens New York Incorporated, a subsidiary of Siemens & Halske A. G.

Siemens & Halske A. G. is a large German producer of electrical and electronic equipment. It is, in turn, a subsidiary of Siemens-Schuckertwerke A. G.

[*Subsidiary an Agent*]

In 1954 the two German Siemens corporations established a jointly owned subsidiary, a Delaware corporation, upon which the subpoena in question was served. Siemens (N. Y.) acts as representative of the German organizations in this country. It assists in the negotiation of contracts, servicing contracts and advising potential customers. It also advises and assists Siemens with respect to patents and patent licenses and it furnishes general technical, economic and financial information from this country. To a minor extent it sells products of the Siemens enterprise and purchases a small amount of American products for Siemens in Germany. It devotes itself exclusively to the business of Siemens. For these services it receives a flat allowance of $17,500 per month, plus a 5% price differential with respect to sales made for Siemens or purchases made on Siemens' account.

Even if its corporate affiliation be disregarded, the New York company is clearly an agent of the German parent. The parent's activities through this agent are sufficient to sustain the service of process within this district. See *Applewhaite v. Saguenay Terminals, Ltd.,* — F. Supp. —, mandamus denied — F. 2d —; *Allegue v. Gulf and South American S. S. Co., Inc.,* S. D. N. Y., 103 F. Supp. 34, 35; *Nugey v. Paul-Lewis Laboratories,* 132 F. Supp. 448; *McClendon v. The Curtis Bay Towing Co.,* S. D. N. Y., 130 F. Supp. 455.

[*Intercompany History*]

In addition, however, the intercorporate history shows that the New York organization is no more than an alter ego for the German parents. The two German affiliates hold its entire stock. The chairman of its board of directors is a director and member of the board of management of one German parent, and also its head of international operations. Its president, who is also a member of the board, is an engineer formerly employed by one of the German organizations who came to this country to take charge of the American corporation. Two other members of the five member board are also officers or members of the boards of the German parent corporations. The American corporation has no business except the services it performs for its German parents. Although its officers have appreciable freedom of day to day action, they obviously are dependent to a substantial extent upon instructions from the parent corporation with respect to the items upon which they are to work. They are further restricted by the amount of the fee paid by the German parent. Any expenditure which will raise their budget above that amount must be approved in advance by the parent abroad.

The business of S. & H. which is serviced through the American corporation, is substantial and continuous. It includes contracts totaling over $11 million in two years. These contracts were all concluded directly by the German parent, but the American corporation aided in locating and securing the customers, in servicing them, by furnishing engineering advice and answering other inquiries.

[*Corporate Veil Pierced*]

Notwithstanding *Cannon Mfg. Co. v. Cudahy Co.,* 267 U. S. 333; *People's Tobacco Co. v. Am. Tobacco Co.,* 246 U. S. 79, and the dictum in *Eastman Co. v. Southern Photo Co.,* 273 U. S. 359, it is my opinion that at least for the purpose of sustaining process in aid of an investigation into crime, particularly a violation of the anti-trust laws, it is the duty of this Court to pierce the corporate veil with respect to a wholly owned subsidiary, such as here presented. *In the Matter of Grand Jury Duces Tecum (Electric & Musical Industries, Ltd.),* M. 18-304, Opinion dated June 27, 1957. While not overruling these cases, *United States v. Scophony Corp.,* [1948-1949 TRADE CASES ¶ 62,238], 333 U. S. 795, narrowly restricted them to other cases presenting identical facts and to controversies of a private nature which are not within Congressional policy manifested by the liberalization of the venue provision of Section 12 of the Clayton Act (15 U. S. C. § 22). See 333 U. S. at pp. 816-18.

The motion is denied. It is so ordered.

[¶ 68,764] Stokely-Van Camp, Inc., et al.[1] v. Federal Trade Commission.

In the United States Court of Appeals for the Seventh Circuit. September Term, 1956—April Session, 1957. No. 11863. Dated July 17, 1957.

Petition for review of order of the Federal Trade Commission.

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Unfair Practices—Discontinuance of Unlawful Practices—Necessity for Cease and Desist Order—Public Interest.— A Federal Trade Commission order prohibiting canners from entering into a conspiracy to refuse to negotiate or deal with a tomato growers' cooperative marketing association or to refuse to recognize such association as the bargaining agent for its member growers was set aside on the ground that the facts did not support the Commission's ruling that the issuance of the order was in the public interest. Evidence established that the practices complained of had been discontinued before the issuance of the complaint, that such practices had not been committed for over four years, that the association had acquired a strong position in the industry, and that the canners, with the exception of one, had freely negotiated with the association. The fact that the canners insisted that their course of conduct was not unlawful and the fact that no affidavits appeared in the record indicating a clear intention to refrain from the complained of practices could not support the issuance of the order. While the Commission has broad discretion to determine whether or not a cease and desist order is needed to prevent the resumption of unlawful practices, such discretion must be confined within the bounds of reasonableness.

See Unfair Practices, Vol. 2, ¶ 5031.40, 5043.15, 5201, 5201.171; FTC Enforcement and Procedure, Vol. 2, ¶ 8621.620.

For the petitioners: Thomas M. Scanlon.

For the respondent: Robert B. Dawkins and John W. Carter, Jr.

Setting aside a Federal Trade Commission cease and desist order in Dkt. 5994.

Before LINDLEY and SCHNACKENBERG, Circuit Judges, and BRIGGLE, District Judge.

[*Review of FTC Order*]

SCHNACKENBERG, Circuit Judge [*In full text*]: On the petition of *Stokely-Van Camp, Inc., et al.,* we review an order of the Federal Trade Commission directing petitioners to cease and desist from engaging in certain acts and practices found to constitute unfair methods of competition and unfair acts or practices in commerce, within the meaning of section 5 of the Federal Trade Commission Act, as amended.[2] The hearing examiner and the Commission found that petitioners, in purchasing raw tomatoes in 1951 for canning purposes, had violated the Act by entering into a common understanding and agreement to refuse to negotiate or deal with Cannery Growers, Inc., a tomato growers co-operative marketing association (referred to herein as "co-op"), or to recognize it as the bargaining agent for its grower members.

The Commission's complaint was issued on May 21, 1952. Petitioners' answers denied that they had violated the Act.

[*Initial Decisions*]

The hearing examiner issued two initial decisions in this case. The first was rendered on February 3, 1954, at the conclusion of the introduction of evidence in support of the complaint.[3]

[1] H. J. Heinz Company, Campbell Soup Company, Joseph Campbell Company, Bauer Cannery, Inc., Foster Canning, Inc., Hirzel Canning Company, Lake Erie Canning Co. of Sandusky, J. Weller Company, and Winorr Canning Company.

[2] The pertinent provisions of the Act are as follows:

"Sec. 5. (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. * * *

"(6). The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 66 Stat. 632, 15 U. S. C. A. § 45(a)(1)(6).

[3] Upon motion of respondents, the examiner dismissed the complaint as to certain respondents for failure of proof, and dismissed as to all respondents the allegations of the complaint relating to price fixing and preventing competing purchasers from dealing with the co-op. An appeal was taken to the Commission only with respect to the dismissal of the price fixing charges, and the hearing examiner's decision was affirmed.

The second initial decision, rendered on August 8, 1955, at the close of the entire case, dismissed all the allegations of the complaint charging petitioners herein with inducing the grower members to breach their contract with the co-op. As to petitioners and Hunt Foods of Ohio, Inc., the hearing examiner made findings of fact, and concluded, that their acts and practices, beginning in the spring of 1951 and continuing through the remainder of the tomato contracting and harvesting season of that year, were performed pursuant to a common undestanding and planned common course of action (a) to refuse to negotiate or deal with the co-op as a bargaining agent for its grower members, and (b) to refuse to grant recognition of, or to negotiate with, the co-op by deducting the dues check-off for grower members of that organization, which constitutes an unreasonable restraint of trade and an unfair method of competition under the Act. However, he dismissed the complaint without prejudice, saying, that "it is believed that the Commission would be justified in assuming from the facts disclosed that the respondents will not again attempt to engage in these acts and practices in this industry and therefore it would not be in the public interest for the Commission to issue an order to cease and desist at this time."

[*FTC Decision*]

The Commission, on appeal from the second initial decision, held that the record fully supported the hearing examiner's findings as to the existence in 1951 of an agreement to boycott the co-op. But it held that it would not be justified in assuming that the boycott would not be renewed, and that the public interest required the prevention of such renewal by issuing an order. On June 29, 1956, such an order was issued, directing that petitioners cease and desist from entering into, continuing, co-operating in, or carrying out any planned course of action, understanding, agreement, combination or conspiracy, to do or perform any of the following acts or things:

(a) Refusing to grant recognition of or to negotiate or deal with Cannery Growers, Inc., an association of tomato growers, as a bargaining agent for its grower members;

(b) Refusing to purchase or to contract to purchase tomatoes from growers who are members of Cannery Growers, Inc.[4]

[*Contentions*]

1. Briefly, petitioners state their position as follows: There was no direct evidence of a conspiracy, and hence this is an inference case. In 1951, the co-op arbitrarily asserted that a refusal to agree to its demands constituted a refusal to negotiate and a refusal to grant a dues check-off constituted a refusal to recognize. The attitude of the various petitioners toward the co-op varied; two for independent business reasons did not negotiate; some negotiated briefly but gave up because of the unreasonable demands of the co-op; others continued to negotiate and came close to agreement. The only similarity of conduct among petitioners was inability to reach agreement with the co-op. This evidence cannot support a finding of a common course of conduct to refuse to negotiate. They further contend that the Commission ignored the obvious fact that the conduct of petitioners toward the co-op was reasonable and the exercise of good business judgment, and that the co-op injected itself into a well-established economic relationship and attempted to effect drastic changes in price and other terms, all within the short space of the few weeks of the tomato contracting season. They point out that the co-op had never negotiated before, lacked confidence in its own position, wrote threatening letters and took extravagant positions in negotiation from which it did not retreat until the end of the tomato contracting season when it was too late to get tomato plants into the ground. It demanded a price increase of 65%, elimination of quality controls, a check-off of dues to it and by bulletins to its members engaged in a campaign of abuse. Petitioners did not know how many growers belonged to the

[4] The position of the petitioners in this court, in reference to clause (b) is not clear. Moreover this clause is practically ignored in the Commission's brief and is not involved in the contested issue stated in petitioners' brief, except that they allege that a charge that petitioners engaged in a common course of action to boycott grower members of the co-op was among eight dismissed charges. On the other hand respondent, while denying that this charge was dismissed, cites no finding of fact incorporated in the Commission's order under review either expressly or by reference to the initial decision, upon which clause (b) may be based.

co-op, questioned its responsibility, had no permission from its growers to grant the check-off and could not economically pay the 65% increase in price demanded by the co-op. Petitioners and the co-op failed to agree upon a contract during the relatively short tomato contracting season because of these economic and psychological reasons, leaving no legal basis for the inference that such failure was the result of conspiracy.

On the other hand, respondent's contentions may be summarized as follows: The meetings between the parties do not in themselves constitute negotiations, and petitioners in reality were attempting to obtain approval of their standard forms of contract without negotiation, and at the same time were refusing to recognize the co-op as the bargaining agent of its members. Respondent asserts that the co-op made no adamant demands on the processors and petitioners' alleged business reasons for not negotiating or dealing with the co-op do not render lawful a conspiracy to boycott the co-op.

In their brief petitioners concede that a common agreement to refuse to negotiate with or recognize the co-op would obviously have constituted illegal conduct under the Act.

[*Sufficiency of Evidence*]

The record before us is massive. It contains 4463 pages of proceedings and 282 pages of exhibits. There is substantial evidence in the whole record to support the Commission's findings of fact, and showing the existence of such an agreement. Those findings are therefore conclusive. *Allied Paper Mills v. Federal Trade Commission* [1948-1949 TRADE CASES ¶ 62,263], 168 F. 2d 600, 605, cert. den. 336 U. S. 918. This is also true as to inferences which reasonably can be drawn from the proven facts. *Federal Trade Commission v. Pacific States Paper Trade Association,* 273 U. S. 52, at 61; *Triangle Conduit & Cable Co. v. Federal Trade Commission* [1948-1949 TRADE CASES ¶ 62,254], 168 F. 2d 175, 180, aff'd *sub nom. Clayton Mark & Co. v. Federal Trade Commission* [1948-1949 TRADE CASES ¶ 62,409], 336 U. S. 956, and *National Lead Company v. Federal Trade Commission* [1955 TRADE CASES ¶ 68,211], 227 F. 2d 825, 833, reversed on other grounds [1957 TRADE CASES ¶ 68,629], 352 U. S. 419. We hold that on the record as a whole there is substantial evidence to support the Commission's findings. *Universal Camera Corp. v. National Labor Relations Board,* 340 U. S. 474, 488.

[*Necessity of Order*]

2. With the complaint issued by the Commission, respondents named therein (including petitioners here) were given notice that they had a right to appear and show cause why an order should not be entered requiring them to cease and desist from the violations of law charged in the complaint. Such is the character of the order from which the present appeal has been taken.

The Commission contends that, in the exercise of its discretion, it properly concluded that the public interest required an order to cease and desist. On the other hand, petitioners claim that the purpose of a cease and desist order is not to punish for past practices, but rather to insure that in the future the public will be protected, and that the public interest in the issuance of such an order requires that there be some reasonable expectation that the violations will be repeated. They cite our language in *National Lead Co. v. Federal Trade Commission, supra,* at 839,

> "* * * While the Commission is vested with a broad discretion to determine whether an order is needed to prevent the resumption of unlawful acts which have been discontinued, this 'discretion must be confined * * * within the bounds of reasonableness.' [citing *Marlene's Inc. v. F. T. C.,* 216 F. 2d 556, at page 559].
>
> "This rule of reasonableness requires something more than a mere guess or suspicion contrary to the evidence and to the finding of the trial examiner that a resumption of discontinued practices may not reasonably be anticipated. * * *"

They also quote the following from *United States v. W. T. Grant Co. et al.* [1953 TRADE CASES ¶ 67,493], 345 U. S. 629, 633:

> "But the moving party [Commission] must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. * * *"

They refer to *Eugene Dietzgen Co. v. Federal Trade Commission* [1944-1945 TRADE CASES ¶ 57,216], 142 F. 2d 321, 331, where we said:

"The object of the proceeding to to *stop* the unfair practice. If the practice has been surely stopped and by the act of the party offending, the object of the proceedings having been attained, no order is necessary, nor should one be entered. * * *"

They also cite *Federal Trade Commission v. Civil Service Training Bureau, Inc.* [1932-1939 TRADE CASES ¶ 55,079], 79 F. 2d 113, involving a cease and desist order against misleading advertising practices, where at 116, the court said:

"The commission is not authorized to issue a cease and desist order as to practices long discontinued, and as to which there is no reason to apprehend renewal."

Petitioners point to their conduct, both before and after the filing of the complaint herein, which, they say, clearly indicates that there is no reasonable expectation that they or any of them will, in the future, resort to any planned common course of action to boycott or refuse to recognize the co-op or negotiate with it.

[*Summary of Argument*]

Their argument we now summarize.

Whatever petitioners did with relation to the co-op in 1951 was born of the economic conflict which resulted from the appearance of a new and revolutionary force in the tomato industry in Ohio. In late 1950 and early 1951 the co-op claimed representation of a large number of growers in the Ohio tomato market. The co-op proceeded, in a militant fashion, to make demands upon the Ohio processors. The record shows that the petitioners considered these demands unreasonable and as posing a serious threat to the economy of the entire industry. Despite this, the co-op remained firm in its demands throughout the normal tomato contracting season of 1951. The stalemate which resulted was purely temporary. By the latter part of May 1951 the co-op had negotiated a contract with Hunt, had actively negotiated with petitioner Stokely, and had discussed contract terms with most of the other petitioners. By the end of May it was too late in the season for any of the petitioners to do anything about advance contracting for the 1951 crop. If the period during which a compromise could have been achieved between the co-op and the processors had not been limited to the contracting season, other contracts with the co-op might well have resulted. In any event, the alleged conspiracy had terminated and the petitioners and other processors had come to recognize the co-op's position in the industry months prior to the issuance of the complaint on May 21, 1952. The hearing examiner concluded that the battle had ended and that the practices proscribed by the Act would not be resumed.

[*Hearing Examiner's Ruling*]

The hearing examiner held:

"* * * that the Commission would be justified in assuming from the facts disclosed that the respondents will not again attempt to engage in these acts and practices in this industry and therefore it would not be in the public interest for the Commission to issue an order to cease and desist at this time".

He mentioned several specific facts supporting his conclusion:

"(1) The acts and practices complained of had been definitely discontinued by respondents before the complaint in the case was issued.

"(2) The acts and practices complained of had not been committed for over four years.

"(3) The Co-op had acquired and now occupies a strong position in the industry as a bargaining agent for its member growers.

"(4) Early in 1952, all the respondent processors with the exception of Campbell freely negotiated with the Co-op, had their contracts approved and allowed the 1% check-off which had been the principal stumbling block to negotiations the previous year.

"(5) Commission counsel had not only conceded these facts in their proposed findings but, at the oral argument, also conceded that the alleged illegal practices would probably not recur."

[*Adopted Findings*]

Commission counsel proposed findings of fact to the hearing examiner, as follows:

"L. *The Situation Since 1951.*

"166. In 1952, the concerted, planned common course of action between and among the respondents was abandoned and many of them encountered no difficulty in recognizing and dealing with the Cooperative. The respondents, who adopted this more reasonable and whole-

some approach included Heinz, Stokely, Hunt-Ohio, Bauer, Sharp, and Winorr, all of whom conferred with officials of the Cooperative, engaged in discussions concerning approval of their contracts, had their contracts approved, and deducted the check-off for the Cooperative.

"167. In 1952 many of the tomato processors had a more friendly attitude toward the Cooperative and were agreeable to granting audiences to its officials. Respondent Everitt E. Richard of respondent Heinz conferred and negotiated with officials of the Cooperative early in March 1952, two weeks before the Heinz contract prices were announced. Then when the Heinz prices were announced on March 14, 1952, the Cooperative approved such prices and the Heinz contract. Thereafter Mr. Richard wrote a letter to the President of the Cooperative, enclosed a copy of the Heinz contract, and advised that Heinz would deduct the check-off and remit the same to the Cooperative for grower-members who authorized such deductions. Respondent A. A. Ehrman of respondent Stokely engaged in an earnest effort to negotiate and did negotiate with the Cooperative in 1952. Respondent Hunt-Ohio did likewise. Respondents Stokely and Hunt-Ohio also sent letters to the Cooperative in 1952, similar to the one sent by Heinz, confirming the results of the negotiations.

"168. Beginning in 1952 certain of the respondents realized the Cooperative was here to stay, that the growers had agreed to it and were agreeable to the check-off, and that the processors would have to conform with the growers' wishes. The respondents who started dealing with the Cooperative in 1952 have continued to do so, and have continued to deal and contract directly with their growers as they always did. Since 1951 there have been no difficulties, and contracts of many of the respondent processors have been approved and relations between them and the Cooperative have been amicable." [5]

These findings were adopted by the hearing examiner, who stated:

"In view of the definite discontinuance of the foregoing acts and practices by the respondent processors before the complaint in this case was issued, and the fact that they have not been committed for more than four years since, and the strong position that the Co-op now occupies in the industry as a bargaining agent for its member tomato growers in the Ohio area, it is believed that the Commission would be justified in assuming from the facts disclosed that the respondents will not again attempt to engage in these acts and practices in this industry and therefore it would not be in the public interest for the Commission to issue an order to cease and desist at this time. * * *."

[*Commission's Ruling*]

The Commission adopted *in toto* the hearing examiner's findings. The only announced basis for its reversal of his conclusion that a cease and desist order would not be in the public interest is contained in a single paragraph. It follows:

"In the present case, it is clear that respondents did cease the practices complained of prior to the issuance of the complaint and have not renewed them. Nevertheless, they have at all times insisted that their course of conduct did not violate the law. No affidavits or statements appear in the record indicating a clear intention to refrain from the practices found to exist. The fact that the Co-op now occupies a strong position in the industry as a bargaining agent is a circumstance to be considered, but we do not consider it sufficient. No criticism is to be made against respondents for vigorously defending the position they had taken. This, of course, they had a right to do. Our conclusion simply is that the facts in this particular case do not warrant a dismissal without prejudice; on the other hand, we think an order based on the findings should be issued."

The Commission contends that its action was proper. It relies upon what we said in *Marlene's Inc. v. Federal Trade Commission* [1954 Trade Cases ¶ 67,882], 216 F. 2d 556, 559:

"That discontinuance of an unlawful practice, of itself does not necessarily preclude the issuance of a cease and desist order is so well settled as to preclude further argument."

and

"* * * 'the Commission had broad discretion to determine whether such an order is needed to prevent resumption' of the unlawful practice."

We added the following language not quoted by the Commission:

[5] The above excerpt omits references to the numbers of record pages and exhibits.

"* * * This discretion must be confined, however, within the bounds of reasonableness."

[*Court Review*]

Whether or not the discretion granted to the Commission is broad enough to sustain the cease and desist order in this case requires us to consider not only the facts appearing in the record, upon which the hearing examiner based his conclusion that the entry of a cease and desist order would not be in the public interest, but the facts stated by the Commission which it considered sufficient to justify such order.

If we consider only the hearing examiner's statement of the facts upon which his conclusion rested, and the actual findings of fact 166, 167 and 168, *supra,* which were adopted by the Commission, we see no reason for the issuance of a cease and desist order.

[*Commission's Reasoning*]

We must, however, consider the reasons given by the Commission for ruling otherwise. It alludes to only four *facts.* Incidentally, none of those facts is disputed in this case. They are (1) respondents did cease the practices complained of prior to the issuance of the complaint and have not renewed them, (2) they have at all times insisted that their course of conduct did not violate the law, (3) no affidavits or statements appear in the record indicating a clear intention to refrain from the practices found to exist, and (4) the co-op now occupies a strong position in the industry as a bargaining agent.

We are unable to see how fact (1) calls for a cease and desist order. Unless persuasive reasons to the contrary appear, this fact calls for a rejection of such an order.

Fact (2) is irrelevant. Its irrelevancy is emphasized by the Commission's apologetic statement that no criticism is to be made against respondents (petitioners here) for vigorously defending the position they had taken, which, of course they had a right to do. It does not follow, however, that one who defends charges before the Commission is, on that account, to be subjected in the future to a cease and desist order because his defense there proves unsuccessful. That would be a policy abhorrent to our sense of justice.

As to fact (3), it may be admitted *arguendo* that no affidavits or statements appear in this record showing a clear intention by petitioners to refrain from the practices found to exist. However, there are no affidavits or statements to the contrary. The actual absence of such practices by petitioners, during a period of four years between the termination of the conspiracy in 1951 and the entry of the cease and desist order in 1956, weighs heavily in support of a conclusion that, after the tomato growing season of 1951 ended, there has been no intention on the part of petitioners to again engage in those practices.

As to fact (4), while recognizing the strong position of the co-op as a bargaining agent in the industry, the Commission lightly brushes that fact aside because it does "not consider it sufficient." Why, it does not explain. That statement, without any indication of facts to support it, expresses no adequate basis for a proper exercise of discretion. Dogmatically, the Commission then abruptly states that its conclusion "simply is that the facts in this particular case do not warrant a dismissal without prejudice; on the other hand, we think that an order based on the findings should be issued." Its language boils down to this: "It is so simple because we say it is so."

[*Order Set Aside*]

We think that the hearing examiner was right and that the Commission was wrong, in entering the cease and desist order. It should have dismissed the complaint, without prejudice.

For the reasons above set forth, the order of the Commission is set aside and the case is remanded to the Commission with instructions to dismiss the complaint, without prejudice.

Order Set Aside and Case Remanded with Instructions.

[¶ 68,765] Sunbeam Corporation v. J. Eis & Sons, Appliances, Inc. and Jacob Eis, Samuel Eis, Aaron Eis and Philip Eis, copartners doing business under the firm name and style of J. Eis & Sons.

In the United States District Court for the Southern District of New York. Civil 90-203. Filed July 10, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Violation of Injunction—Contempt —Refusal to Pay Costs—Commitment.—Defendants in a fair trade enforcement action had been found guilty of wilfully violating a permanent injunction restraining fair trade price violations, and the court ordered the defendants to pay the fair trader the sum of $600 to cover the expenses of the contempt proceeding. Upon the defendants' failure to pay the $600, the court increased the amount to $700 and ordered that a commitment be issued against the defendants if the $700 was not paid within a specified time.

See Fair Trade, Vol. 1, ¶ 3380.34.

For the plaintiff: Rogers, Hoge & Hills, New York, N. Y.

For the defendants: Detsky, Hecht & Easton, New York, N. Y.

For a prior decision of the U. S. District Court, Southern District of New York, see 1956 Trade Cases ¶ 68,393.

[*Prior Contempt*]

LEVET, District Judge [*In full text*]: By a consent decree dated August 18, 1955, and entered as a judgment of this court on August 19, 1955, the above-named defendants, J. Eis & Sons, Appliances, Inc. and Jacob Eis, Samuel Eis, Aaron Eis and Philip Eis, individually and as copartners doing business under the firm name and style of J. Eis & Sons, were permanently enjoined from certain acts prohibited by the Fair Trade Act of the State of New York. Jacob Eis has since died.

On August 16, 1956, the defendants other than the said decedent were held guilty of wilful contempt of the said order on judgment of this court of August 19, 1955 and were ordered to pay to the plaintiff the sum of $600.00, within 15 days after the entry of said order of August 16, 1956.

[*Commitment*]

It now appears by the present motion that said sum of $600.00 has not been paid. The plaintiff seeks commitment of the individual defendants unless paid. This motion is granted. Submit order pursuant to Rule 12 of the Civil Rules of this Court. An allowance of $100.00 is made to the plaintiff for reasonable counsel fees for the bringing on of this motion, etc. The order shall permit payment of the total amount of $700.00 to plaintiff within 10 days of the entry and service of the order. Otherwise commitment shall issue.

Settle order on notice.

[¶ 68,766] In re: Dolcin Corporation and Victor van der Linde, George Shimmerlik and Albert T. Wantz, individually and as officers of Dolcin Corporation.

In the United States Court of Appeals for the District of Columbia Circuit. Misc. No. 648. Decided June 27, 1957.

On Petition by George Shimmerlik and Albert T. Wantz for Reconsideration and Rehearing.

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Cease and Desist Order—Court Review—Violation of Decree of Court—Criminal Contempt.—A United States Court of Appeals refused to vacate its finding that two individuals were guilty of criminal contempt for violating the Court's decree enforcing a Federal Trade Commission order

prohibiting the individuals and the corporation of which they were officers from falsely advertising a product of the corporation; however, in imposing fines of $1,000 and $750 on the individuals, the Court took into consideration the individuals' assertions that they did not have knowledge of a letter by the corporation's counsel expressing the need for immediate compliance with the Court's decree, and that their contemptuous conduct was a result of inertia rather than of active participation in the advertising practices which violated the decree. The individuals had knowledge of the decree, and the Court imposed an affirmative obligation upon them to take all reasonable steps to effect compliance with the decree.

See Unfair Practices, Vol. 2, ¶ 5087.63; FTC Enforcement and Procedure, Vol. 2, ¶ 8621.150.

For the respondents: Paul C. Warnke for George Shimmerlik and Albert T. Wantz.

For the Federal Trade Commission: Robert B. Dawkins, Assistant General Counsel, Federal Trade Commission, appointed by the Court to prosecute the respondents for criminal contempt.

Denying a petition for reconsideration and rehearing of a decision of the U. S. Court of Appeals, District of Columbia Circuit, in FTC Dkt. 5692, 1956 Trade Cases ¶ 68,570; for prior opinions of the Court, see 1954 Trade Cases ¶ 67,791 and 1955 Trade Cases ¶ 67,951.

Before BAZELON, FAHY and WASHINGTON, Circuit Judges.

[*Contempt*]

WASHINGTON, Circuit Judge [*In full text*]: This proceeding is before us on a petition for reconsideration of our finding that the respondents Shimmerlik and Wantz, individually and as officers of Dolcin Corporation, were guilty of criminal contempt. See *In re Dolcin Corporation* [1956 TRADE CASES ¶ 68,570], — U. S. App. D. C. —, — F. 2d — (1956), cert. denied, — U. S. — (1957).[1]

[*Orders of FTC and Court*]

Shimmerlik and Wantz are respectively treasurer and secretary of Dolcin Corporation. Each was a named respondent—individually and as an officer of Dolcin—in the proceeding before the Federal Trade Commission. Each admitted and acquiesced in the following finding made by the Hearing Examiner and adopted by the Commission:

> "Paragraph One: . . . Respondents . . . George Shimmerlik, and Albert T. Wantz, individuals, are now and at all times mentioned herein have been directors of said corporate respondent, and respectively, the . . . treasurer, and secretary thereof . . . and are now, and at all times mentioned herein have been, in control of the management, policies, and operation of the said corporate respondent, including the acts, practices and methods herein found." Record in No. 11,700, *Dolcin Corp. v. Federal Trade Commission, supra* n. 1.

Shimmerlik and Wantz did not challenge that finding in this court when they sought review of the Commission's cease and desist order.

The order entered by the Commission expressly named—and ran against—Shimmerlik and Wantz. And this court's decree, effective April 8, 1955, enforcing that cease and desist order, as modified and affirmed, likewise ran against them. It directed each of them—individually and as officers of Dolcin—to cease and desist from certain specified advertising practices.

[*Knowledge*]

Shimmerlik and Wantz press two grounds for reconsideration of our finding of guilt: (1) They say they did not know of the letter from the corporation's counsel to the corporation's president dated May 17, 1955, which stated:

> ". . . there is nothing to settle because the courts have settled the matter for us. Therefore, we are in no position to bargain.
>
> "The F. T. C. order, as modified by the Court speaks for itself. There is

[1] This was a contempt proceeding growing out of violations of our decree enforcing a cease and desist order. *Dolcin Corp. v. Federal Trade Commission* [1954 TRADE CASES ¶ 67,791], 94 U. S. App. D. C. 247, 219 F. 2d 742 (1954), *rehearing en banc denied* [1955 TRADE CASES ¶ 67,951], 94 U. S. App. D. C. 256, 219 F. 2d 751 (1955), *cert. denied*, 348 U. S. 981 (1955).

nothing further to be done now except comply with its provisions until such time when it is amended by the Commission. . . ."

Since Shimmerlik and Wantz had not been alerted by the corporation's counsel to the need for immediate compliance, they say they could not have been expected to make any effort to effect a change in Dolcin's advertising policy.

In seeking reconsideration, Shimmerlik and Wantz do not claim that they did not know of our decree against them. They say, however, that there was a "general uncertainty" as to the effective date of that decree. In our opinion of December 18, 1956, we rejected this argument:

> ". . . We think the terms of our decree did make it clear that they were to [comply with our decree without awaiting further action by the Commission], especially when read in the light of our opinion of July 1, 1954, and the opinion of Judges Edgerton, Prettyman, Bazelon, Fahy and Washington of February 3, 1955, in support of the order denying respondent's petition for rehearing *en banc.* In the latter opinion it is made explicit that respondents were to comply with our decree from and after its date, that is, that they were required, notwithstanding an interim between our decision and possible subsequent modification of its order by the Commission, to comply immediately with the terms of the order of the Commission, as modified, affirmed and enforced by our decree."

We adhere to our former statement and add this comment: It is clear from the above quotation that we considered Shimmerlik and Wantz guilty from and after the effective date of our decree. We chose, however, as a matter of grace, to date our finding of guilt from May 17, and to dismiss the charges as to conduct between April 8 and May 17. The evidence in the case other than the May 17 letter provided a sufficient basis for holding Shimmerlik and Wantz guilty of contempt.

[*Failure To Act*]

(2) Shimmerlik and Wantz say they had no reason to know that their inaction would result in violation of this court's order by the corporation. Dolcin's advertising policy was—they say—completely controlled by Victor van der Linde, and was handled by him through his advertising agency. The petition for rehearing states:

> "If there were any indication in the record that Shimmerlik and Wantz knew, or had reason to believe, that unless they personally took measures the Dolcin Corporation would violate this Court's order, they might conceivably be found to have failed in their duty to this Court. Without such a finding, a requirement that they insulate themselves from criminal liability by essentially meaningless articulations to van der Linde of the obvious—that they expected and wished the corporation to take all necessary and proper steps toward compliance—would be a travesty."

Shimmerlik and Wantz acknowledge that after April 8, 1955, they did nothing to comply with our decree. Indeed, they claim that they neither could have nor should have done anything to bring both themselves and their corporation into compliance. In essence, their claim is that this whole proceeding, insofar as it affected them, was wasted effort.

But this court did not impose an obligation on Shimmerlik and Wantz that they could discharge by remaining inert. We imposed an affirmative obligation upon them, individually and as officers of Dolcin, to take all reasonable steps to effect compliance with this court's order. Those steps included, at least, that they become currently informed of the advertising conduct of Dolcin. That their "articulations" to van der Linde might have been unavailing does not relieve them of the responsibility to make those articulations. And we are not prepared to predict that such efforts, had they been made, would have been "meaningless." Whatever the order of this court directed Shimmerlik and Wantz to do, it did not permit them to stand idly by while the Dolcin Corporation—their corporation—continued to flout our order. As the Supreme Court has said:

> "When one accepts an office of joint responsibility, whether on a board of directors of a corporation, the governing board of a municipality, or any other position in which compliance with lawful orders requires joint action by a responsible body of which he is a member, he necessarily assumes an individual responsibility to act, within the limits of his power to do so, to bring about compliance with the order. It may be that the efforts of one member of the board will avail nothing. If he does all he can, he will not be punished because of the recalcitrance of others." *United States v.*

Fleischman, 339 U. S. 349, 356-57 (1950). See also *Wilson v. United States,* 221 U. S. 361, 376-77 (1911).

Were we to take the opposite view, we would be putting a premium on ignorance and offering a sanctuary for those remiss in performing their duties as corporate officers. See *Fleischman, supra* at 364. Shimmerlik and Wantz should not be permitted to use their own inertia as a shield against the force of this court's decree.

We thus will not vacate our finding that petitioners are guilty of criminal contempt. They have committed a serious offense against the law and the court's authority. At the same time, in view of all the circumstances here, we should not be understood as implying that they have been convicted of a "crime" in the ordinary sense of that term. See *Myers v. United States,* 264 U. S. 95, 103-105 (1924); *Ex parte Grossman,* 267 U. S. 87, 117 (1925); *Cf. Nye v. United States,* 313 U. S. 33, 43-44 (1941). Furthermore, in fixing the punishment to be imposed we have taken into account their assertions that they did not know of the May 17, 1955, letter of the corporation's counsel and that their contemptuous conduct was a result of inertia rather than of active participation in the advertising practices which violated our decree. *Cf. In re Door,* 90 U. S. App. D. C. 190, 194, 195 F. 2d 766, 770 (1952).

[*Fine*]

We fix the punishment as a fine of $1,000.00 on petitioner Shimmerlik and a fine of $750.00 on petitioner Wantz, and "shall enter an order to that effect, which will state the time, place and means of payment." *In re Door, loc. cit. supra.*

The petition for reconsideration and rehearing is denied.

[Dissenting Opinion]

FAHY, Circuit Judge, *dissenting:* I would grant the petition of George Shimmerlik and Albert T. Wantz for reconsideration and rehearing.

[¶ 68,767] The Parker Pen Company v. Charles Appliances Incorporated.

In the United States District Court for the Southern District of New York. Civil 120-375. Filed July 11, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Nonsigner—Defenses—Refusal To Sell and Enforcement Activity.—A pen company was granted a preliminary fair trade injunction against a retailer (nonsigner) who allegedly sold the company's pens for less than their minimum fair trade price in violation of the New York Fair Trade Act. The court ruled that the alleged conduct of the retailer was a clear violation of the Act; that such conduct unless restrained, pending trial, would result in irreparable injury to the pen company and its fair trade structure and good will; that the pen company's refusal to sell to the retailer did not bar injunctive relief; that the enforcement of the pen company's rights had been adequate and that reasonable steps had been taken to secure compliance; and that the New York Act was enforceable against a nonsigner of a fair trade contract.

See Fair Trade, Vol. 1, ¶ 3258.34, 3440.34, 3460.

For the plaintiff: Rogers, Hoge & Hills (George M. Chapman and Francis P. Kelly, of counsel), New York, N. Y.

For the defendant: Isidor Edward Leinwand, New York, N. Y.

Opinion

[*Injunction Sought*]

LEVET, District Judge [*In full text*]: This is an application for a preliminary injunction against defendant's sale of plaintiff's trademarked products for less than the minimum fair trade price. Jurisdiction here is based upon diversity of citizenship.

[*Fair Trader*]

Plaintiff has manufactured and sold fountain pens since 1890. In 1891, it adopted and began to use the notation "Parker" as

a trademark on its fountain pens and has since continuously used this mark. Plaintiff presently possesses numerous trademarks for its products. In 1939, a certain new model fountain pen, mechanical pencil and desk set were manufactured and called "51." Parker "51" was employed as a trademark commencing in the same year. Another trademark used is "21," a lower priced pen. In 1955, plaintiff placed on the market a pencil called "Liquid Lead." Each Parker product is separately boxed and packaged and the trademark appears on the outside. The trade marks are also prominent in plaintiff's advertising, both nationally and in New York, for which advertising the company spends large amounts of money. Such advertising and identifying marks have created certain good-will, which appears to be a valuable property right. The Parker products are sold to more than 30,000 retailers located in the principal distribution centers of the country.

The writing instruments manufactured by the plaintiff are in direct competition with a number of nationally advertised brands, such as Schaeffer, Waterman and Eversharp. It has been plaintiff's policy to protect its valuable good-will and reputation especially when faced with price-cutting by vendors who compete with the retail dealers handling plaintiff's products. Plaintiff appears to have been reasonably active in taking steps to insure protection against such price-cutting. In this connection it has since 1937 entered into fair trade contracts with a large number of retail dealers throughout the State of New York.

[*Defendant*]

The defendant, Charles Appliances Incorporated, executed a fair trade contract with plaintiff on August 13, 1956, which the defendant cancelled in October, 1956. Thereafter, it appears, and it is not disputed, that the defendant engaged in price-cutting plaintiff's products. Parker "51" pens which listed at $16.50 were sold by the defendant at $9.90.

[*New York Act*]

Plaintiff's contracts with its retailers calling for minimum retail fair trade prices were entered into pursuant to the General Business Law of the State of New York (c. 19, § 369-a), which reads:

"Price fixing of certain commodities permitted

"1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of New York by reason of any of the following provisions which may be contained in such contracts:

"(a) That the buyer will not resell such commodity except at the price stipulated by the vendor; * * *"

[*Miller-Tydings Act*]

The Miller-Tydings Amendment (50 Stat. 693 (1937)) to the Sherman Anti-Trust Act (15 U. S. C. A. § 1 *et seq*), in specifically removing minimum resale price arrangements from the purview of the federal antitrust statutes, supports the contracts entered into under the New York Fair Trade Law.

[*Nonsigner Provision*]

Section 369-b of the New York statute brands the refusal to observe such a commitment as here involved "unfair competition." It reads:

Unfair competition defined and made actionable

"Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

The "non-signer loophole" created by the decision of the Supreme Court in *Schwegmann Bros. v. Calvert Distillers* [1950-1951 Trade Cases ¶ 62,823], 341 U. S. 384 (1951) was eliminated by 66 Stat. 632, an amendment to the Federal Trade Commission Act (15 U. S. C. A. § 45). The 1952 amendment, familiarly known as the "Maguire Act," was construed and upheld by the United States Court of Appeals for the Fifth Circuit in the case of *Schwegmann v. Eli Lilly*, 1953 [1953 Trade Cases ¶ 67,516], 205 F. 2d 788. The United States Supreme Court denied certiorari, 346 U. S. 856. Similarly, the court refused to review a decision of the New York Court of Appeals sustaining the Fair Trade Act of this state against

attack. *General Electric Company v. Masters, Inc.* [1954 TRADE CASES ¶ 67,776], 307 N. Y. 229 (1954). The Supreme Court in [1954 TRADE CASES ¶ 67,907] 348 U. S. 892 gave as its reason for dismissing the appeal "want of substantial Federal question."

The New York Court of Appeals in the *General Electric* case, *supra,* in referring to the New York Fair Trade Act, declared:

> "* * * As to marked goods, it merely permits a manufacturer, whose trade-mark or brand name may represent a large advertising investment and a carefully nurtured good will, to prevent retailers, over whom he would otherwise have little control, from seriously impairing the value of that trade-mark and good will by reselling his identified products at unreasonably low prices. * * *" (pp. 238-239)

[*Refusal to Sell—Injury*]

There appears to be no substantial reason why plaintiff's motion for a preliminary injunction should not be granted. Plaintiff's refusal to sell to the defendant does not bar the injunctive relief sought here. See *Dorothy Gray, Ltd. v. Johnson Wholesale Perfume Co., Inc.,* D. C. Conn., 1941, 45 F. Supp. 744, 746. The defendant's acts are in clear violation of Section 369-b of the General Business Law of the State of New York. Unless these acts are restrained, their continuance pending trial will result in irreparable injury to plaintiff and may lead to the destruction of its fair trade structure and the impairment of its good-will. See *Sunbeam Corporation v. Max Marcus d/b/a Westchester Appliance Center and White Plains Discount House,* D. C. S. D. N. Y., 1952 [1952 TRADE CASES ¶ 67,288], 105 F. Supp. 39, 42.

[*Conclusions*]

I, therefore, conclude that (1) the proof is sufficient to determine that the enforcement of the rights of plaintiff have been adequate and that reasonable steps have been taken to secure compliance; (2) the plaintiff here is entitled to relief under the New York Fair Trade Law upon establishment at the trial of the allegations contained in the complaint; (3) relief sought against the defendant is for the sole purpose of enforcement of plaintiff's Fair Trade Law right; (4) there is no reason why preliminary injunction should not be granted; (5) plaintiff has established its right to a preliminary injunction since the defendant's acts are in clear violation of Section 369-b of the General Business Law of the State of New York and, unless restrained pending trial, such conduct will result in irreparable injury to the plaintiff and may lead to the destruction of its fair trade structure and the impairment of its good-will.

[*Order*]

Settle order on notice which shall recite the facts as found herein and which shall provide that said order shall be conditioned upon plaintiff's furnishing a bond to the satisfaction of the court in the amount of $5,000.

[¶ 68,768] United States v. Ekco Products Company, National Glaco Chemical Corporation, Glaco Central Company, Glaco Company of Pittsburgh, Glaco New Jersey Company, Glaco Northwest Company, Glaco Potomac Company, The Glaco Company, and The Glaco Company of Southern California.

In the United States District Court for the Northern District of California, Southern Division. Civil No. 36584. Filed July 1, 1957.

Case No. 1351 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Monopolies—Consent Decree—Practices Enjoined—Acquisition of Stock or Assets.—Companies engaged in the business of cleaning and glazing bread pans were prohibited by a consent decree from acquiring for a period of 5 years, any of the stock of, assets of, or any financial interest in any person engaged in furnishing pan glazing services. After the expiration of the five-year period, the companies were prohibited from making such acquisitions except upon a showing that any such acquisition would not tend to lessen competition or tend to create a monopoly in the business of furnishing pan glazing services in any area of the United States. Also, the companies were prohibited, for a period of 10 years, from establishing or operating any pan glazing plant not already owned or

operated by them at any location within a radius of 150 miles of any other glazing plant, unless within such radius there is located a glazing plant (1) owned or operated by a person who owns or operates more than 3 such plants or (2) owned or operated by a person other than a specified defendant.

See Monopolies, Vol. 1, ¶ 2610.120.

Monopolies—Consent Decree—Practices Enjoined—Sales Below Cost and Discrimination.—Companies engaged in the business of cleaning and glazing bread pans were each prohibited by a consent decree from making their services available to anyone (1) except in accordance with each of their own published price lists, (2) upon any price, term, or condition or with any serivce which is not regularly made available to all commercial bakeries, or (3) at prices that are below cost or at low prices which have the effect of suppressing competition. Also, the companies were prohibited from entering into any service contract which is discriminatory.

See Monopolies, Vol. 1, ¶ 2610.280, 2610.600, 2610.680.

Monopolies—Consent Decree—Practices Enjoined—Tying Agreements.—Companies engaged in the business of cleaning and glazing bread pans were prohibited by a consent decree from (1) making their pan glazing services available on the condition that a customer will purchase pans from the companies, (2) offering any purchaser of pan glazing services any discount, rebate, or allowance on the purchase of pans on the condition that such purchaser will purchase pan glazing services from the companies, or (3) offering any purchaser of pans any discount, rebate, or allowance for the furnishing of pan glazing services on the condition that such purchaser will purchase pans from the companies.

See Monopolies, Vol. 1, ¶ 2610.850.

Monopolies—Consent Decree—Practices Enjoined—Requirement and Supply Contracts.—Companies engaged in the business of cleaning and glazing bread pans were prohibited by a consent decree from entering into any agreement or understanding for the furnishing of pan glazing services which (1) extends for a period longer than one year or (2) contains an automatic renewable clause unless they show that the effect of such agreements or understandings will not tend to lessen competition or create a monopoly. Also, the companies were prohibited from (1) inducing, persuading or attempting to induce or persuade a specified company to refuse to sell any silicone compounds to any person engaged in furnishing pan glazing services, (2) entering into any agreement or understanding requiring them to purchase from the specified company, or the specified company to sell to them, any silicone compounds on the condition that they will not use any silicone compounds of competitors of the specified company, or (3) requesting, soliciting, or demanding from the specified company any information concerning the plans or operations of any person engaged in furnishing pan glazing services or any person planning or seeking to engage in such business.

See Monopolies, Vol. 1, ¶ 2610.300, 2610.760.

Monopolies—Consent Decree—Practices Enjoined—Contract Not to Compete.—Companies engaged in the business of cleaning and glazing bread pans were prohibited by a consent decree from entering into any agreement (except resasonable covenants not to compete), or doing any act, which limits or prevents any person from engaging in the pan glazing business.

See Monopolies, Vol. 1, ¶ 2610.240.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Prices.—Companies engaged in the business of cleaning and glazing bread pans were required to establish and publish to the trade price lists for each of their pan glazing plants or national price lists for all of their plants.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.45, 8421.

Department of Justice Enforcement and Procedure—Consent Decrees—Enforcement —Burden of Proof of Violation.—A consent decree entered against companies engaged

in the business of cleaning and glazing bread pans provided that, in any proceeding instituted by the Government for alleged violation of a provision of the decree, the burden of proof shall be upon the companies. Also, the decree provided that in any proceeding instituted by the companies under a provision of the decree concerning the acquisition of stock or assets, the Government may introduce evidence of acquisitions of plants and facilities for the furnishing of pan glazing services occurring prior to the date of the entry of the decree.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8401.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Prices.—A consent decree entered against companies engaged in the business of cleaning and glazing bread pans provided that certain provisions of the decree should not prevent the companies from charging different prices at their different pan glazing plants or from charging prices that are equal to or higher than prices charged by competing pan glazing companies.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.48.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Establishment of Plants.—A consent decree entered against companies engaged in the business of cleaning and glazing bread pans provided that the companies may establish new pan glazing plants upon application to the court and a showing that the establishment or operation of such a new plant will not tend to lessen competition or create a monopoly.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.48.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Restrictive Covenants—Exclusive Dealing.—A consent decree entered against companies engaged in the business of cleaning and glazing bread pans did not prohibit them from entering into reasonable covenants not to compete and covenants in employment contracts to protect trade secrets and inventions. Also, the companies were not prohibited from contracting for the manufacture exclusively for them of specific silicone compounds in accordance with formulas and specifications furnished by the companies.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.48.

For the plantiff: Victor R. Hansen, Assistant Attorney General; and William D. Kilgore, Jr., Baddia J. Rashid, Harry N. Burgess, Lyle L. Jones, Jr., Marquis L. Smith, and Arthur H. Tibbits, Attorneys.

For the defendants: Leo F. Tierney; Charles L. Stewart, Jr.; Thomas E. Haven of Pillsbury, Madison & Sutro, San Francisco, Cal.; and Mayer, Friedlich, Spiess, Tierney, Brown & Platt, of counsel.

Final Judgment

Louis Earl Goodman, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on June 29, 1957; the defendants and each of them having appeared by their counsel; and the parties hereto by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without any admission by any party hereto with respect to any such issue;

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein and upon the consent of the parties hereto, it is hereby

Ordered, Adjudged and Decreed, as follows:

I.

[*Sherman Act*]

The Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a claim against the defendants under Section 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

[*Definitions*]

As used in this Final Judgment:

(A) "Defendants" means defendants Ekco Products Company, National Glaco Chem-

ical Corporation, Glaco Central Company, Glaco Company of Pittsburgh, Glaco New Jersey Company, Glaco Northwest Company, Glaco Potomac Company, The Glaco Company and The Glaco Company of Southern California, or any one or more of them acting singly or in concert.

(B) "Pan glazing" means the process of cleaning metallic pans used in baking bread and other bakery products, and applying thereto under extreme heat a silicone compound.

(C) "Pan glazing services" means pan glazing performed for commercial bakeries and others by persons in the pan glazing business.

(D) "Pan glazing plant" means a plant at which pan glazing services are provided.

(E) "Person" means any individual, partnership, corporation, association or any other business or legal entity.

III.

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to any defendant shall apply to each such defendant and to each of its officers, agents, servants, employees, subsidiaries, successors and assigns, and to all other persons in active concert or participation with one or more of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV.

[*Agreements Cancelled*]

The defendants are jointly and severally ordered and directed, within six (6) months from the date of entry of this Final Judgment, to terminate and cancel any provision of any contract, agreement, arrangement or understanding contrary to or inconsistent with any of the provisions of this Final Judgment, and to notify the other party to any such contract, agreement, arrangement or understanding of such termination and cancellation. Defendants are jointly and severally enjoined and restrained from thereafter entering into, maintaining, adhering to or enforcing any contract, agreement, arrangement or understanding contrary to or inconsistent with any of the provisions of this Final Judgment.

V.

[*Prices*]

(A) The defendants are ordered and directed within ninety days after the entry of this Final Judgment to establish and publish to the trade either (1) national price lists for all pan glazing plants owned or controlled by them, or (2) price lists for each pan glazing plant owned or controlled by them, for the furnishing of pan glazing services by each of such pan glazing plants to baking plants, jobbers, and other persons. Such price lists shall specify the prices to be charged for pan glazing services and all other services or terms and conditions of sale;

(B) The defendants are enjoined and restrained from furnishing, offering to furnish, threatening to furnish or making available at any pan glazing plant pan glazing services to any person except in accordance with the price lists used by such plant as provided for in subsection (A) above;

(C) The defendants are enjoined and restrained from furnishing, offering to furnish, threatening to furnish or making available pan glazing services at any pan glazing plant upon any price, term or condition or with any service which is not regularly offered or made available to all commercial bakeries served by such plant; and

(D) The defendants are enjoined and restrained from furnishing, offering to furnish or making available pan glazing services at any plant below cost with, or at low prices which have, the purpose or effect of eliminating a competitor, or destroying, preventing or suppressing competition in pan glazing services in such area.

Nothing in subsections (B) and (C) of this Section, or in subsection (B) of Section VII shall prevent the defendants from (1) offering or charging different prices, terms or conditions for pan glazing services or other services by their different pan glazing plants, or (2) offering or charging to any person, for pan glazing services, or other services, by any of their pan glazing plants, prices, terms or conditions which are equal to or higher than prices, terms or conditions which in fact have been offered or charged for pan glazing services or other services to the same person by a pan glazing plant not owned or operated by the defendants.

In any suit or proceeding instituted by the plaintiff against the defendants, or any of them, alleging violation of this Section V, the burden of proof shall be upon such defendants to prove that the prices, terms or conditions charged have been or were, in fact offered or charged by a pan glazing plant not owned or operated by the defendants.

VI.

[*Service Contracts*]

(A) The defendants are enjoined and restrained from entering into, maintaining or adhering to any contract, agreement or understanding with any person for the furnishing of pan glazing services in any area which:

(1) extends for a period longer than one (1) year; or

(2) contains an automatic renewable clause except upon application to this Court and showing to the satisfaction of this Court that the effect of such contracts, agreements or understandings will not tend to lessen competition or tend to create a monopoly in the business of furnishing pan glazing services in any such area; or

(3) contains any discount, rebate or allowance from its published prices except such discounts, rebates or allowances as are limited to and based upon the number or quantity of pans glazed.

(B) Entering into any contract, agreement, understanding or arrangement with any multi plant commercial bakery to furnish such commercial bakery for any of its plants pan glazing services at lower prices or upon better terms or conditions than those at which pan glazing services are offered or given by the defendant to other commercial bakeries from the same pan glazing plant of the defendants.

VII.

[*Acquisitions*]

(A) The defendants are enjoined and restrained, for a period of five years from the date of entry of this Final Judgment, from acquiring any of the stock or assets of or any financial interest in any person engaged in the business of furnishing pan glazing services. After the expiration of five years from the date of entry of this Final Judgment defendants are enjoined and restrained from acquiring any of the stock or assets of or any financial interest in any person engaged in furnishing pan glazing services except upon application to this Court and showing to the satisfaction of this Court that any such acquisition will not tend to lessen competition or tend to create a monopoly in the business of furnishing pan glazing services in any area of the United States.

(B) Defendants are enjoined and restrained, for a period of ten (10) years from the date of this Final Judgment, from establishing or operating any pan glazing plant not owned or operated by them on the date of this Final Judgment at any location within a radius of 150 miles of any other pan glazing plant unless within such radius there is located a pan glazing plant (1) owned or operated by a person who owns or operates more than 3 such plants or (2) owned or operated by a person, other than defendant Ekco, engaged in the manufacture of pans. Provided, however, the defendants may establish a new pan glazing plant otherwise prohibited by this Section VII upon application to the Court and a showing to the satisfaction of the Court that the establishment or operation thereof will not tend to lessen competition or tend to create a monopoly in the furnishing of pan glazing services in any area of the United States.

Notwithstanding the making and entry of this Final Judgment, in any proceeding instituted by the defendants under this Section VII the plaintiff may introduce evidence of acquisitions of plants and facilities for the furnishing of pan glazing services occurring prior to the date of entry of this Final Judgment.

VIII.

[*Silicone Compounds—Practices*]

The defendants are enjoined and restrained from:

(A) Inducing, persuading or attempting to induce or persuade Dow Corning Corporation to refuse to sell any silicone compounds to any person engaged in furnishing pan glazing services;

(B) Entering into any contract, agreement or understanding requiring defendants to purchase from Dow Corning Corporation, or Dow Corning Corporation to sell to defendants, any silicone compounds

on the condition, agreement or understanding that the defendants will not use any silicone compounds of competitors of Dow Corning Corporation.

(C) Requesting, soliciting or demanding from Dow Corning Corporation any information concerning the plans or operations of any person engaged in furnishing pan glazing services or any person planning or seeking to engage in such business.

(D) Entering into any contract or agreement with any person (except reasonable covenants not to compete and covenants in contracts with employees of defendants to protect trade secrets and inventions) or doing any other act or thing, which hinders, restricts, limits or prevents such person from directly or indirectly engaging in the business of furnishing pan glazing services.

Nothing in this Section VIII shall be deemed to prevent the defendants from contracting for the manufacture exclusively for them of specific silicone compounds in accordance with formulas and specifications furnished by defendants.

IX.

[*Tying Agreements*]

Defendants are enjoined and restrained from:

(A) Offering or making available to any person pan glazing services upon the condition, understanding or agreement that such person will purchase pans from the defendant or any other designated source; or

(B) Giving, offering or making available to any purchaser of pan glazing services any discount, rebate or allowance from established prices on the purchase of pans on the condition, agreement or understanding that such purchaser will purchase pan glazing services from the defendants; or offering, giving or making available to any purchaser of pans any discount, allowance or rebate from established prices for the furnishing of pan glazing services, on the condition, agreement or understanding that such purchaser will purchase pans from the defendants.

X.

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendants, made to their principal offices, be permitted, subject to any legally recognized privilege;

(A) Access, during the office hours of the defendants, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the defendants, relating to any of the matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of the defendants, and without restraint or interference from them to interview officers and employees of the defendants, who may have counsel present, regarding any such matters.

Upon such request the defendants shall submit such reports in writing with respect to any of the matters contained in this Final Judgment as from time to time may be necessary to the enforcement of this Final Judgment. No information obtained by the means permitted in this Section X shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department except in the course of legal proceedings to which the United States is a party, for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XI

[*Jurisdiction Retained*]

Jurisdiction of this cause is retained by the Court for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction, carrying out or modification of this Final Judgment or any of its provisions, or for the enforcement or compliance therewith and for the punishment of violations thereof.

[¶ 68,769] J. Thomas Miley v. John Hancock Mutual Life Insurance Company, et al.

In the United States Court of Appeals for the First Circuit. No. 5211. Dated April 11, 1957.

Appeal from the United States District Court for the District of Massachusetts. FORD, District Judge.

Sherman Antitrust Act

Combinations and Conspiracies—Construction of Sherman Act—Applicability to Insurance Business Under McCarran-Ferguson Act.—The dismissal of an insurance broker's treble damage action (charging that certain Massachusetts insurance companies, members of the Massachusetts employee group insurance commission, and others unlawfully conspired to award an insurance contract to a specified insurance company) on the grounds that the transactions complained of were not subject to the Sherman Act under the McCarran-Ferguson Act, that an injury to business or property was not alleged, and that the Sherman Act did not apply to activities of a state was affirmed on the decision of the trial court, 1957 TRADE CASES ¶ 68,609.

See Combinations and Conspiracies, Vol. 1, ¶ 2263; Private Enforcement and Procedure, Vol. 2, ¶ 9006.70, 9009.275.

For the appellant: John H. Devine, with whom Devine, York & Volpe was on the brief.

For the appellees: Daniel J. Lyne, with whom Edward J. Duggan and Lyne, Woodworth & Evarts were on brief, for John Hancock Mutual Life Insurance Company, Boston Mutual Life Insurance Company, Clarence W. Wyatt, and Edward A. Green. Charles B. Rugg, with whom Levin H. Campbell and Ropes, Gray, Best, Coolidge & Rugg were on brief, for State Mutual Life Assurance Company of Worcester and Alan R. Willson. Lothrop Withington, with whom Claude B. Cross, Charles C. Worth, and Withington, Cross, Park & McCann were on brief, for Columbian National Life Insurance Company, and Loyal Protective Life Insurance Company. Brinley M. Hall, with whom John L. Hall, Rhodes G. Lockwood, Jeptha H. Wade, and Choate, Hall & Stewart were on brief, for Monarch Life Insurance Company, New England Mutual Life Insurance Company, Paul Revere Life Insurance Company, and John Hill. Joseph H. Elcock, Jr., Assistant Attorney General, Massachusetts, with whom George Fingold, Attorney General, Massachusetts, was on brief, for Theodore W. Fabisak, Joseph A. Humphreys, John M. Deely, Horace Gooch, Jr., and Carl A. Sheridan.

Affirming a decision of the U. S. District Court, District of Massachusetts, 1957 Trade Cases ¶ 68,609.

Before MAGRUDER, Chief Judge, and WOODBURY and HARTIGAN, Circuit Judges.

Opinion of the Court

PER CURIAM [*In full text*]: The order of dismissal is affirmed on the memorandum of decision issued by Judge Ford. [1957 TRADE CASES ¶ 68,609.] 148 F. Supp. 299.

[¶ 68,770] United States v. Safeway Stores, Incorporated, Lingan A. Warren, and Earl Cliff.

In the United States District Court for the Northern District of Texas, Fort Worth Division. Criminal Action No. 9584. Filed June 3, 1957.

Case No. 1263 in the Antitrust Division of the Department of Justice.

Sherman and Robinson-Patman Acts

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Defendant's Plea of *Nolo Contendere*.—Defendants' motion for leave to withdraw their pleas of not guilty and to enter pleas of *nolo contendere* in an action charging violations of the

Sherman and Robinson-Patman Acts was granted over the objections of the Government that one of the defendants was a multiple offender of the antitrust laws, and that the acceptance of the pleas would deprive private litigants of the benefits to be derived from a verdict of guilty under Section 5 of the Clayton Act. Prior convictions should have more bearing upon the sentence to be assessed than upon the issue pertaining to the acceptance or rejection of the plea of *nolo contendere,* and Congress did not intend that a plea of *nolo contendere* should be refused in criminal antitrust cases for the purpose of aiding private litigants under the Clayton Act. The acceptance or rejection of such a plea lies within the discretion of the court. The plea has the same effect as a plea of guilty in the proceeding in which it is made, and although it does not create an estoppel in subsequent cases, it constitutes for the purpose of the case an admission of guilt, which is considered to be conclusively established. Also, the court ruled that the benefits to be derived from a long, expensive trial were not sufficient to justify the rejection of the pleas.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.860.

For the plaintiff: Margaret Brass, Washington, D. C.

For the defendants: Clark, Coon, Holt & Reed, Dallas, Tex.; Watson, Ess, Marshall & Enggas, Kansas City, Mo.; and George C. Kemble, Fort Worth, Tex.

[*Nolo Contendere Pleas*]

Estes, District Judge [*In full text*]: The matter for determination is defendants' motion for leave to withdraw their pleas of not guilty, and to enter pleas of *nolo contendere.* Rule 11 of the Federal Rules of Criminal Procedure, Title 18, U. S. C., has provided that a defendant may plead not guilty, guilty, or with the consent of the Court, *nolo contendere.* As the offered plea of *nolo contendere* is only available to the defendants with the consent of the Court it is appropriate that the Court give due consideration to the views of the Government, who urges that the offered plea should not be accepted, as well as those of the defendants who say, in effect, that they do not wish to contest the charges made against them, but desire to submit to the judgment of the Court.

[*Discretion of Court*]

That the acceptance or rejection of this motion lies within the discretion of the Court is undisputed. Proper exercise of this discretion requires careful consideration of the facts and circumstances of this case in the light of the general nature and implications of the plea of *nolo contendere.*

[*Civil and Criminal Suits*]

On November 1, 1955 the United States filed two suits, Criminal Action No. 9584 against Safeway Stores, Incorporated, Lingan A. Warren, then the president of the corporation, and Earl Cliff, manager of Safeway's Dallas Division (hereinafter referred to as Safeway), and Civil Action No. 3173 against Safeway Stores, Incorporated. Both suits charged violations of the Sherman Anti-Trust Act by conspiring and attempting to monopolize interstate commerce in the sale of food and food products at retail in various cities in Texas and New Mexico, and by selling groceries in Safeway's retail stores in a part of the United States at prices lower than those exacted for such groceries by Safeway elsewhere in the United States for the purpose of destroying competition or eliminating competitors in such part of the United States.

Civil Action No. 3173 seeks an adjudication that Safeway has attempted to monopolize interstate commerce in violation of Section 2 of the Sherman Act, and an injunction enjoining and restraining Safeway, its officers, directors and personnel:

> from setting arbitrary quotas or percentages of total available business in retailing groceries to be attained by Safeway, or requiring Safeway personnel to meet such quotas, or
>
> from selling below invoice cost to destroy competition, or
>
> from selling identical items at different prices within the same Safeway district of its retail operations, or
>
> from operating any of its districts below the cost of doing business, for the purpose of destroying competition.

[*Instant Action*]

The criminal information, No. 9584, was substantially the same as an indictment re-

turned against the defendants on July 7, 1955 by the Grand Jury. Upon motion of the Government that indictment was dismissed and this criminal information was substituted, with the consent of the Court by order entered November 1, 1955. This was done in order to avoid the delay and expense of testing the soundness of certain technical legal questions raised by defendants in attacking the validity of the Grand Jury which had returned the indictment. By the Criminal Information No. 9584 the charges in the instant case, misdemeanors, are alleged. The maximum penalty for violations of Section 2 of the Sherman Act before July 7, 1955 was a $5,000.00 fine and/or one year imprisonment. On that date the maximum fine was raised to $50,000.00 by an amendment to the Sherman Act (26 Stat. 209; 15 U. S. C. 1-3). The indictment by the Grand Jury was returned on the same day, July 7, 1955, that the Act increasing the fine was amended.

[*Maximum Fine*]

However, as the Criminal Information charges continuing violations by Safeway after the date of the amendment it is not contended by the defendants that the maximum fine for the Sherman Act violations would be $5,000.00 on each count if their plea of *nolo contendere* is accepted. It has been admitted in open court by the defendants that the maximum fine for the violations of Section 2 of the Sherman Act may be $50,000.00 if their plea of *nolo contendere* is accepted.

[*Counts*]

The information in Criminal Action No. 9584 contains three counts:

Count I charges Safeway, Warren and Cliff with a combination and conspiracy to monopolize interstate trade and commerce in the retail sale of food products in violation of Sec. 2 of the Sherman Act (26 Stat. 209, 15 U. S. C. Sec. 2). Braun and Company of Los Angeles, Cal., a public relations counseling firm, is named as a co-conspirator, but is not made a defendant in the Information.

Count II charges the above named defendants with an attempt to monopolize in the retail sale of groceries in violation of Sec. 2 of the Sherman Act.

Count III charges Safeway and Warren with a violation of Sec. 3 of the Robinson-Patman Act (49 Stat. 1528, 15 U. S. C. Sec. 13a) by selling groceries at lower prices in a part of the United States than elsewhere to destroy competition and eliminate competitors.

The Information further charges that Safeway established arbitrary sales quotas for its stores in Texas and New Mexico, amounting to 25 to 50 percent of the total retail grocery business in the areas, and required that these quotas be attained by Safeway personnel; that Safeway engaged in price wars in these areas for the purpose of destroying competition, and to accomplish this purpose operated stores below the cost of doing business, sold groceries below invoice cost, and sold in some areas at lower prices than in others.

The effects of these activities, it is charged, has [sic] been to restrain competition, exclude, damage and drive competitors out of business.

[*Nature of Plea*]

In view of the facts and charges above stated, what would be the effect of an acceptance of the defendants' plea of *nolo contendere?* To answer this question consideration must be given to the general nature and implications of the plea of *nolo contendere* as such plea has been interpreted by the courts of this country. *U. S. v. Norris*, 281 U. S. 619 (1930) seems to have established beyond question that if the plea of *nolo contendere* is accepted by the Court it is an implied confession of guilt, and for the purposes of the case only, equivalent to a plea of guilty. The plea admits for the purposes of the case all the facts that are well pleaded, 152 A. L. R. 278, and waives all formal defects in the proceedings of which the accused could have availed himself by a plea to the merits. 14 Am. Jur. 954. The plea has been described as a quasi confession of guilt, a confession, an implied confession, a plea of guilty substantially though not technically, a substitute for a plea of guilty, and a query directed to the Court to decide the defendant's guilt. 14 Am. Jur. 165 (1956 Pocket Part) Sec. 275. Counsel for the Government has described it as "a plea of guilty in Latin." Regardless of the label attached, it seems beyond question that for the purpose of the case a plea of *nolo contendere* is the full equivalent to a plea of guilty. That a sentence of either fine and/or imprisonment may be imposed after a plea of *nolo contendere* was established in *Hudson v. U. S.*, 272 U. S. 451

(1925). *U. S. v. Norris, supra,* at page 623 stated the rule ". . . upon the question of guilt or innocence the plea of *nolo contendere* was as conclusive as a plea of guilty would have been."

The plea of *nolo contendere* unquestionably has the same effect as a plea of guilty so far as concerns the proceedings upon the Information, and although it does not create an estoppel in subsequent cases, it constitutes for purpose of the case an admission of guilt which is considered to be conclusively established.

Judgment of conviction follows upon such plea as well as upon a plea of guilty or conviction by a jury.

"Imposition of sentence follows as a matter of course, and a defendant who is sentenced upon a plea of *nolo contendere* stands convicted of the offense for which he was indicted. In imposing sentence, the Court's power to punish is in no way limited except as provided by law, and testimony bearing on the issue of punishment can be submitted to the Court." 152 A. L. R. 276.

In Judge Rossman's article, "Arraignment and Preparation for Trial," 5 F. R. D. 63 at 69, it is stated:

"In recent years thousands of defendants have pleaded *nolo contendere* to indictments and criminal informations charging them with violating the antitrust laws. (Lenvin and Meyers, Nolo Contendere: Its Nature and Implications, 51 Yale L. J. 1255)."

"The committee which drafted the Criminal Rules said concerning the plea of nolo contendere:

" 'While at times criticized as theoretically lacking in logical basis, experience has shown that it performs a useful function from a practical standpoint.'

"We again quote from a treatise which we have frequently cited:

" 'The plea of *nolo* serves a practical function in the administration of justice. There are many situations, of which antitrust prosecution is one, where the crime is considered *malum prohibitum* rather than *malum in se,* and in such situations the prosecutor is often inclined to agree to the interposition of the *nolo* plea. This realistic policy dispenses with lengthy and expensive trials. A law enforcement agency having concurrent equitable and criminal power, like the Federal Antitrust Division, frequently follows an indictment with a civil complaint, thereby seeking appropriate injunctive relief against the continuance of the offense charged in the indictment. Thus, the closing out of criminal cases by a *nolo* plea is simply preliminary to getting down to the job of eradicating the improper practices. At the same time, the pleader has paid his debt to society for past offenses and it can hardly be said that in making a *nolo* plea the accused leaves the question of his guilt undetermined.' (Lenvin and Meyers, p. 1268)."

[*Defendant's Record*]

The Government objects to the acceptance of defendants' plea of *nolo contendere.* One of the principal grounds for objection is that Safeway is a multiple offender, and has been convicted or has plead *nolo contendere* in at least five other cases, as follows:

Jan. 29, 1941 *U. S. v. Food Distributers Assn.* et al. (D. Col. Cr. 9306) Safeway plead *nolo contendere,* and on Feb. 14, 1941 was fined $7,500.00.

June 26, 1941 *U. S. v. Food and Grocery Bureau of So. Cal. Inc.* (S. D. Cal. Cr. 14952). Safeway plead *nolo,* and on March 30, 1942 received a suspended sentence.

March 4, 1942 *U. S. v. Cal. Retail Grocers Assn. et al* (N. D. Cal. Cr. 27526-R). Safeway plead *nolo* and on Aug. 18, 1942 was fined a maximum of $5,000.00.

Jan. 20, 1943 *U. S. v. Safeway,* 140 F. 2d 834 (C. A. 10, 1944). Safeway plead *nolo* and on March 26, 1948 was fined $30,000.00.

March 8, 1948 *U. S. v. Md. and Va. Milk Producers,* (D. D. C. Cr. 294-48) CCH 1950-1951 TRADE CASES, Par. 62,940. Safeway was convicted and fined a nominal amount.

Cliff was not charged in any of these five cases and Warren was charged and fined in only one.

This record, says the Government, shows a disrespect by Safeway of the law. If this be accepted as a fact, it still does not follow that the defendants' plea of *nolo contendere* should be rejected in the case at the bar. The fact that the courts accepted pleas of *nolo contendere* in four of the five cases cited by the Government indicates that the courts regarded this as the most practical, logical and just disposition of the cases. It has not been contended that justice was not done in those cases by acceptance of pleas of *nolo contendere.*

"In recent years thousands of defendants have pleaded *nolo contendere* to indictments and criminal informations charging

them with violating the antitrust laws." 51 Yale L. J. 1255.

These prior convictions should have more bearing upon the sentence or punishment to be assessed than upon the issue pertaining to the acceptance or rejection of Safeway's plea of *nolo contendere.* In spite of a bad past record, there is nothing to prevent the court from permitting Safeway to enter its "plea of guilt in Latin" and assessing the appropriate punishment forthwith.

[*Clayton Act, Section 5*]

Another reason urged by the Government for rejecting Safeway's offered plea of *nolo contendere* is that acceptance would deprive private litigants of the benefits to be derived from a verdict of guilty under Section 5 of the Clayton Act. Under this section a contested judgment or decree rendered in a suit brought by the Government under the antitrust laws shall be prima facie evidence against the defendants as to all matters respecting which judgment or decree would be an estoppel as between the parties thereto.

While the "Congress has . . . provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party", *Radovich v. Nat. Football League* [1957 Trade Cases ¶ 68,628], 352 U. S. 445 (pp. 453-454), in suits under Section 4 of the Clayton Act (38 Stat. 731, 15 U. S. C. Sec. 15), for treble damages; and Section 5 of the Clayton Act was held in *Emich Motors v. General Motors* [1950-1951 Trade Cases ¶ 62,778], 340 U. S. 558 to "reflect a (Congressional) purpose to minimize the burdens of litigation for private suitors by making available to them all matters previously established by the Government in antitrust actions"; nevertheless, the Court's view in the instant case has been accurately expressed as follows: [1]

> ". . . the Government's responsibility in bringing cases of this nature is to vindicate the public interest in preserving a competitive economy rather than to redress private wrongs and recover damages for injuries sustained by individuals."

It is fundamental that the primary responsibility of the Government in a criminal case involves the consideration of public interests, not private interests.

As stated by Judge Tolin in *U. S. v. Jones,* 119 F. Supp. 288 at 290 (S. D. Cal. 1954):

> ". . . it is always important for Courts to avoid permitting criminal prosecutions to be used as a means of redressing civil wrongs and, by means of a criminal judgment, procuring either directly or indirectly some advantage in a civil case."

The Government cites the case of *U. S. v. Standard Ultramarine and Color Co.* [1955 Trade Cases ¶ 68,237], 137 F. Supp. 167 (S. D. N. Y. 1955) in support of its position. In that case six corporations were charged with conspiring to fix and maintain prices in the sale of dry colors throughout a nine year period. The volume of business involved amounted to some 37½ percent of the total national sales. The Court rejected the defendants' plea of *nolo contendere.* The aggravated nature of the offense is indicated by the Court's reference to the offense as "one of the more serious infractions of the law" (page 172). The Court in *Ultramarine* was concerned about securing the benefits of the criminal judgment for private litigants. However, the reasoning of *Ultramarine* strongly indicates that the Court took this position because no companion civil suit had been filed by the Government. *Ultramarine* distinguished the holding therein from that in *U. S. v. Cigarette Merchandising Assn.* [1955 Trade Cases ¶ 68,188], 136 F. Supp. 212 (S. D. N. Y. 1955) where a plea of *nolo contendere* had been granted upon the point that in the *Cigarette* case a companion civil suit had been filed, whereas in the *Ultramarine* case there was no civil suit which might aid private litigants.

In the case at bar there is a civil suit pending on this Court's docket which may be brought to trial by the Government.

Judge Sugarman in *U. S. v. Cigarette Merchandisers Assn. Inc., supra,* has provided the answer to the Government's objections

[1] Part V (pp. 1-2) of Bill of Particulars Filed by the United States Pursuant to Order of the Court, dated December 6, 1956, requiring specification of businesses in competition with Safeway that have sustained economic injury as a consequence of the illegal activities charged, states:

"Since the Government's responsibility in bringing cases of this nature is to vindicate the public interest in preserving a competitive economy rather than to redress private wrongs and recover damages for injuries sustained by individuals, the specification made herein is not intended to be a comprehensive list of all persons in the grocery business who may have sustained economic injury by reason of the illegal activities charged in the charging paragraphs of the Information."

to acceptance of the defendants' *nolo contendere* pleas in the instant case. At page 213 his opinion states:

> "As to the first objection—i.e., the oppressive manner in which the defendants enforced their restraints upon their victims—it is sufficient answer that the sentencing court, on a plea of *nolo contendere,* may impose as severe a fine as upon a plea of guilty or a finding of guilt after trial.
>
> "As to the second objections—i.e., the necessity of preserving to those victims in private treble damage suits the benefit of the Government's prosecution, if it succeeds—this may be accomplished by the simple process of the Attorney General going forward in the trial of the civil suit."

This Court does not believe that Congress intended that pleas of *nolo contendere* be refused in criminal antitrust cases for the purpose of aiding private litigants under Section 5 of the Clayton Act. That section, as amended (69 Stat. 283; 15 U. S. C. § 16) in the concluding paragraph provides:

> "That this section shall not apply to consent judgments *or to decrees entered before any testimony has been taken* or to judgments or decrees entered in actions under Section 4a."

If such had been the intent of Congress it would have been a simple matter to delete the phrase *"or decrees entered before any testimony has been taken"* from this provision of Section 5a of the Clayton Act, and by so doing private litigants would have secured the benefit of criminal convictions as prima facie evidence upon acceptance of a plea of *nolo contendere.* It must be assumed that Congress was aware of the fact that a plea of *nolo contendere* results in a judgment *before any testimony has been taken.* It must further be assumed that Congress was conscious of the fact that "a great majority of these cases are disposed of without trial" (Judge Yankwich, "Observations on Anti-Trust Procedure", 10 F. R. D. 165-166).

[*Sherman Act Amendment*]

Further indication of Congressional intent is to be found in the 1955 amendment to the Sherman Act by the Eighty-fourth Congress, 1st. Session, 69 Stat. 282. That amendment increased the maximum fine from $5,000.00 to $50,000.00 for violations of the Sherman Act. Congress at that time evidenced an intense interest in increasing the maximum penalty that could be assessed by the Court upon acceptance of a plea of *nolo contendere,* but in no way indicated that pleas of *nolo contendere* should not be accepted. After due consideration of this phase of the antitrust laws Congress left the acceptance or rejection of the pleas of *nolo contendere* to the discretion of the Court.

[*Rules of Criminal Procedure*]

By the Act of June 29, 1940 (54 Stat. 688) Congress conferred upon the Supreme Court the authority to prescribe the Federal Rules of Criminal Procedure. The rules became effective March 21, 1946, after having been reported to Congress by the Attorney General in January 1945; and Rule 11 has expressly provided that "a defendant may plead not guilty, guilty, or with the consent of the Court, *nolo contendere.*" In the years since the promulgation of these rules no legislation has been enacted that could be construed as withdrawing from the court its discretion under Rule 11 concerning *nolo contendere* pleas. It must be assumed that Congress is satisfied with the rule and its application. In discussing Rule 11, *4 Barron & Holtzoff, Federal Practice & Procedure, Criminal,* Sec. 1973 states: "the plea of *nolo contendere* is frequently entered in prosecutions under the anti-trust laws, where civil actions for injunctions based upon the same acts are pending or contemplated."

[*Legislative History—Clayton Act*]

Judge Nordbye in *Twin Ports Oil Co. v. Pure Oil Co.,* 26 F. Supp. 366 at 371 made an extensive analysis of the legislative history of the Clayton Act as related to pleas of *nolo contendere.* It was stated:

> "Congress apparently intended to encourage consent judgments and decrees. It sought to induce a prompt surrender to the Government's demands by excluding consent judgments and decrees from the prima facie rule. . . . The query is, however, does the exception also apply to judgments entered on pleas of guilty and pleas of *nolo contendere* in criminal cases? . . . Congress intended to refer to both criminal and equity proceedings in exempting consent judgments and decrees. At page 373 . . .
>
> "Reason and common sense suggest that if Congress intended to avoid long civil proceedings by encouraging consent decrees, the same consideration would apply

to criminal proceedings. Congress was not obligated to make the way easier for private litigants. The prima facie feature of judgments and decrees entered in proceedings instituted by the Government was an innovation of the Clayton Act, and in considering the past experience with reference to the advantage of consent decrees and pleas of guilty, it was apparently assumed that the provisions would rebound to the public good."

[*Minority View*]

The following statement from the *Ultramarine* case tends to support the Government's position concerning the exemption under Section 5 of the Clayton Act, but it seems that this is a small minority view:

> "Its use for practical purposes to avoid the issues inherent in a guilty plea does not necessarily reflect Congressional purpose to extend the exemption provision of Section 5 to the defendants in criminal antitrust suits. In any event, the short answer to the defendants' contention is that Rule 11 of the Federal Rules of Criminal Procedure vests in the Court the discretion to accept or reject the tendered plea."

With the last sentence of the above statement there is no disagreement. However, the general acceptance of the thesis that wide discretion is vested in the Court to accept or reject the plea of *nolo contendere* offers no reasonable or logical connection with the previous statement concerning Congressional purpose. That portion of the above statement seems to be contrary to the expressions of Congress, and to the thousands of cases in which pleas of *nolo contendere* have been accepted.

[*Court's Docket*]

While the condition of the Court's docket would not be reason for the acceptance of the pleas of *nolo contendere,* the fact is that all other litigation in the Fort Worth, Abilene and San Angelo Divisions of the Northern District of Texas would necessarily be delayed and all other litigants would be denied the right to speedy trial during the trial of this case, estimated at a minimum of three months, if such pleas be not accepted. The benefits to be derived from a long, expensive trial are not sufficient in the instant case to justify the rejection of defendants' offered pleas of *nolo contendere.* The saving of time and expense has been recognized as a factor in the acceptance of pleas of *nolo contendere.*

In *U. S. v. Allegheny County Retail Druggists Assn.* (W. D. Pa. Cr. 13470, Oct. 8, 1953) the Court observed (pp. 17-18):

> "That a plea of *nolo contendere* substantially saves the Government a tremendous expense — a tremendous expenditure in proceeding to trial."

[*Motion Granted*]

Because acceptance of the pleas of *nolo contendere* is supported by the overwhelming weight of authority, and because the Court is of the opinion that the ends of Justice will be served and the public interest will be vindicated by the acceptance of the pleas, the motion of defendants for leave to withdraw their respective pleas of not guilty and enter pleas of *nolo contendere* is granted, and consent is granted to the acceptance and entry of the pleas of *nolo contendere* by each of the defendants.

It is so ordered.

[¶ 68,771] United States v. Guerlain, Inc. United States v. Parfums Corday, Inc. United States v. Lanvin Parfums, Inc.

In the United States District Court for the Southern District of New York. Civ. Nos. 93-267, 93-268, 93-269, respectively. Filed July 9, 1957.

Case Nos. 1195, 1196, and 1197, respectively, in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Monopolies—Attempt To Monopolize—Monopolization—Utilization of Tariff Act of 1930 To Exclude Competition in Trade-Marked Products.—An American company, having a French affiliate which granted to it the trade-mark rights to toilet goods and the exclusive right to distribute such goods in the United States, attempted to monopolize and did monopolize, in violation of Section 2 of the Sherman Act, the importation into, and sale within, the United States of such trade-marked goods by utilizing Section 526 of the

Tariff Act of 1930 to exclude potential competitors from dealing, in the United States, in the products sold abroad by its French affiliate. The American company and its French affiliate constituted a single international enterprise. Section 526 of the Tariff Act of 1930, which enables a trade-mark owner to prevent the competitive importation of products bearing its registered trade-mark, does not apply to the American part of a single international enterprise to enable it to prevent the importation into the United States of authentic products sold abroad by the foreign part of the enterprise. The section does not constitute an implied exception to the Sherman Act. Purchasers from the French part of the enterprise were prevented, by means of the utilization of Section 526, from competing in the United States with the American part of the same enterprise. The American company expanded its trade-mark monopolies beyond their proper scope. In view of this, the relevant market was defined as the trade-marked toilet goods of the American company. The American company possessed monopoly power, that is, the power to exclude competition and to control prices, and it exercised such power by excluding potential competition and by maintaining prices. Also, the company specifically intended to exercise its monopoly power. Two other American companies were held to have likewise violated the Sherman Act.

See Monopolies, Vol. 1, ¶ 2510.250, 2515, 2530.10, 2580, 2610.340, 2610.550.

Monopolies—Relevant Market—Trade-Marked Products of Single Company.—In an action charging that an American company attempted to monopolize and did monopolize the importation into, and sale within, the United States of trade-marked toilet goods, the relevant market was defined as the trade-marked toilet goods of the American company. It was found that the most important appeal of such goods is a highly exploited trade-mark, and that the name is purchased rather than the product itself. Objectively, the products may be more than reasonably interchangeable with others; however, the lack of objectivity in consumer demand impairs the basis of interchangeability and negates a finding of cross-elasticity of demand. In the instant case, the relevant market had to be defined in the context of the extension of a trade-mark monopoly into illegal proportions by deliberate exclusionary conduct. The contentions that the relevant market should be the aggregate of products of similar price and quantity, and that the product of a single company cannot constitute a relevant market, were rejected.

See Monopolies, Vol. 1, ¶ 2540.

For the plaintiff: John D. Swartz & Joe F. Nowlin, New York, N. Y.

For the defendants: Shearman & Sterling & Wright for Guerlain, Inc.; Joseph L. Hochman for Parfums Corday, Inc.; and Jay Leo Rothschild for Lanvin Parfums, Inc.; all of New York, N. Y.

Memorandum

[*Defendants*]

EDELSTEIN, District Judge [*In full text*]: In three separate but similar civil actions consolidated for trial to the court without a jury, the Government charges each of the three defendants with a violation of § 2 of the Sherman Act, 15 U. S. C. § 2. There is no allegation of conspiracy. The defendants are American corporations [1] marketing trade-marked toilet goods [2] of better quality and relatively high price. Each of the American companies is closely associated with a French company that originated the trade name, first marketed products under the trade-marks and supplies the products, manufactured under secret formulae, sold by the American company, or the essential ingredients of those products. The Government alleges that, in each case, the American company and the French company constitute a single international enterprise. The toilet goods sold in the United States

[1] Guerlain, Inc. and Parfums Corday, Inc. are organized under the laws of the State of New York and Lanvin Parfums, Inc. is organized under the laws of the State of Dalaware.

[2] The term "toilet goods" as defined in the complaint includes perfumes, colognes, toilet waters, bath preparations and similar products; however, the business of the defendants is mainly in perfumes, colognes and toilet waters.

by the defendants are obtained from the French companies in packaged form ready for sale, or in bulk and bottled in the United States, or compounded in the United States by adding alcohol to the essences or concentrates obtained from the French company. These products are sold in the United States under trade-marks identical with those used by the French company upon similar products, and the advertising emphasizes the prestige factor of origin with Parisian perfumers.

[*Use of Tariff Act and Trade-Marks*]

In each case the French company has given to its associated American company an exclusive right to distribute its products in the United States and has transferred to the American company trade-mark rights intended to be sufficient to justify registration in the United States Patent Office on the basis of a claim of ownership by the American company.[3] And each of the defendants has filed with the Bureau of Customs, United States Treasury, certificates of registration of certain trade-marks for the purpose of preventing the competitive importation of products bearing those trademarks without the written consent of the American registrant, under the terms of § 526 of the Tariff Act of 1930.[4]

The Government takes the position that such utilization of § 526 by each defendant is unwarranted and constitutes a violation of § 2 of the Sherman Act: an attempt to monopolize and a monopolization of the importation into and sale within the United States of these trade-marked products, by preventing the importation and reselling by others who purchase such goods from the French company that forms but the foreign part of a single international enterprise with a defendant.

[*Issues*]

Most of the factual questions in the case were disposed of by stipulation and the remaining proof was largely documentary. Left for decision are the following issues: (1) the factual issue of whether, for each defendant and its associated French company, there exists a single international enterprise; (2) the legal issue of whether, where such a single international enterprise is found, the American part of that enterprise may exclude the competitive importation of the trade-marked products sold abroad by the French part of the enterprise, under the provisions of § 526 of the Tariff Act of 1930; (3) the legal issue of whether, if a defendant is not authorized to exclude competitive imports under § 526, conduct in doing so constitutes monopolization under § 2 of the Sherman Act; and (4) involved in the legal issue of monopolization under the Sherman Act, the factual issue connected with the determination of the relevant market, the issue of the uniqueness of the defendants' products.

1. Relations Between Defendants and Their Associated French Companies

I have found as a fact in each case, beyond any gnawing doubt, that the defendant and its French counterpart constitute a single international enterprise. In order to avoid any undue extension of this opinion, reference is made to the appended specific findings of fact [not reproduced].[5] The defendants, with varying degrees of vigor, deny integral existence with their foreign associates, but an examination of the facts leaves the denials utterly unconvincing. The asserted independence is contrived and the "corporate veil" is easily pierced by the merest glance through the forms of the business organizations to the realities of the relationships. See *United States v. Reading Co.*, 253 U. S. 26, 62-63.

2. § 526 of the Tariff Act of 1930

[*Government Contention*]

The Government urges a construction of § 526 of the Tariff Act of 1930 that is not to be derived from a literal reading of the words of the statute. Subsection (a) of § 526 reads as follows:

> "It shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trade-mark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent Office by a person domiciled in the United States, under the provisions of

[3] The Government does not, in these cases, challenge the right of the defendants to register their trade-marks with the Patent Office.

[4] 46 Stat. 741, 19 U. S. C. § 1526.

[5] In the *Guerlain* case, see Findings of Fact 13, 14, 15 and 16; in the *Corday* case, see Findings of Fact 15, 16, 17, 18 and 19; in the *Lanvin* case see Findings of Fact 12, 13, 14, 15 and 16.

sections 81 to 109 of Title 15, and if a copy of the certificate of registration of such trade-mark is filed with the Secretary of the Treasury, in the manner provided in section 106 of said Title 15, unless written consent of the owner of such trade-mark is produced at the time of making entry."

The Government contends that this provision may apply only to the advantage of an independent American trade-mark owner which may, by registering a trade-mark of a foreign producer in its own name, prevent the importation of authentic products by anyone else. But it is argued that the provision does not apply to the American part of a single international enterprise to enable it to prevent the importation into the United States of authentic products sold abroad by the foreign part of the enterprise. Despite the absence of specific language to that effect in the legislation, I am constrained to agree, in view of the litigated history of the issue involved and of the legislative history of the section.

[*First Statutory Limitation*]

The first statutory limitation on trade-marks borne by imported articles was § 27 of the Trade-Mark Act of 1905 [6] which later became, substantially, § 42 of the Lanham Act.[7] Prior to 1905 it was held that a person who purchased exclusive United States rights to a trade-mark identifying imported merchandise did not have an infringement remedy against a competitor who imported goods bearing the same trade-mark bought from the foreign manufacturer. *Apollinaris Co. v. Scherer,* (C. C. S. D. N. Y.) 27 Fed. 18. After the enactment of § 27 of the 1905 Act, which prohibited the importation of merchandise bearing a mark "which shall copy or simulate a trade-mark registered in accordance with the provisions of this Act * * *," the same result was obtained, the section being restricted to spurious goods. *Fred Gretsch Mfg. Co. v. Schoening,* (2 Cir.) 238 Fed. 780. The Court of Appeals for the Second Circuit followed these precedents in the case of *Bourjois v. Katzel,* (2 Cir.) 275 Fed. 539, involving a French manufacturer of face powder which sold plaintiff its American business, including trade-marks. The plaintiff continued to import the French powder and to sell it in boxes similar to the French ones. The defendant purchased the same product from the French firm abroad and sold it in the original French boxes. The court held that there was no infringement. The case went to the Supreme Court which, after a considerable delay of decision, reversed the Court of Appeals, 260 U. S. 689. In *Bourjois v. Aldridge,* 263 U. S. 675, the Court adhered to *Katzel* and held that where an American trade-mark was so infringed, the Collector of Customs was required by § 27 of the Act of 1905 to exclude products with infringing marks.

[*Section 526—Legislative History*]

However, prior to the decision of the Supreme Court in the *Katzel* case, § 526 of the Tariff Act of 1922,[8] currently § 526 of the Tariff Act of 1930, was passed by Congress. The record of the Congressional debate is brief, with the inclusion of § 526 being characterized as a "midnight amendment" [9] and with floor debate in the Senate limited to ten minutes.[10] Nevertheless, it appears from that debate that the purpose of the section was to protect the rights of Americans who bought foreign trade-marks and that it was aimed at the *Katzel* decision in the Court of Appeals, involving an American trade-mark owner independent of the foreign manufacturer.[11] That this was obviously the target of the legislation was pointed out by Judge Learned Hand in *Coty v. Le Blume Import Co.,* (D. C. S. D. N. Y.) 292 Fed. 264, 269, and by Judge Augustus N. Hand in *Sturges v. Pease,* (2 Cir.) 48 F. 2d 1035, 1037.

The Supreme Court, in reversing the Court of Appeals in the *Katzel* case, did not refer to § 526. But one basis for the decision was that the defendant's use of the French trade-mark could harm the plaintiff's reputation, because the trade-mark so used in this country did not truly indicate the origin of the goods; for the trade-mark in the United States indicated that the goods came from the plaintiff. It can hardly be claimed by the defendants in the cases at bar that the trade-marks indicate an origin with them in the United States, inasmuch as the whole burden of their advertising is to

[6] 33 Stat. 730.
[7] 60 Stat. 440 (1946), 15 U. S. C. § 1124.
[8] 46 Stat. 975.
[9] 62 Cong. Rec. 11602.
[10] *Id.* at 11585.
[11] *Id.* at 11602-11605. However, the fact situation of the *Katzel* case was misrepresented to be a situation where the firm which sold the trade-mark rights was the one seeking to import the trade-marked product. *Id.* at 11605.

emphasize French origin. A competing importer's identical toilet goods coming from the French part of the international enterprise could in no way harm a defendant's good will and reputation, as was stated to be possible in the *Katzel* case.

The defendants press the legislative history of § 526 negatively. In 1954, certain proposals of the Treasury Department were introduced in Congress to prevent affiliated concerns from invoking the import prohibitions.[12] From the fact that the amendments were not enacted into law, the defendants argue that they, embodying substantially the Government's position in these cases, were "rejected" by Congress. But actually the proposals were withdrawn, and from this situation I am able to derive no ulterior significance. The reasons for the withdrawal are not clear,[13] and nothing appears to prevent a re-introduction [14] and possible future enactment. If the failure of enactment of every amendment offered for the consideration of Congress were necessarily held to shed light on the legislation sought to be amended, the search for Congressional intention would be endless and fruitless.[15]

[*Good Will—Protection*]

But the defendants insist that it would destroy the very essence of the trade-mark and the property values represented by it to permit those who do not contribute to the good will, identified with the mark, nevertheless, to divert that good will to themselves, on a "free ride." The argument is one for the protection of advertising expenditures and expected profits not necessarily related to good will. Obviously advertising is for the purpose of building good will, but the defendants make an exclusive American market an element of that good will. The exclusive right to sell in the American market on the part of an international concern exploiting world markets is not an element of good will except in so far as it may be made so artificially by import prohibitions. A competing importer selling identical merchandise under the same trade-mark would not be a "pirate" or a "cheat." The public would not be deceived about the authenticity or origin of the product and the reputation of the trade-mark owner could not suffer from the marketing of inferior merchandise under his mark. Even the trade-mark owner's advertising expenses bear fruit, in some measure, from the activities of the "free riders", for the international enterprise reaps some benefit from all sales.[16] That the defendants may be disappointed in their expectations of profit from an exclusive domestic market, after having made substantial expenditures for advertising, involves not the diversion of their good will or the repudiation of their trade-mark rights, but the denial of a special privilege. And I am not persuaded that it was the intention of Congress to grant such a special privilege for the benefit of an international enterprise.[17]

[*Exception to Sherman Act*]

Moreover, to ascribe such an intention to Congress would have the effect of reading into the legislation an implied exception to the Sherman Act. Indeed, the defendants maintain, as a reason why they should not be held in violation of the Sherman Act, that their conduct is under the legal license of § 526. Assuming a case where the products involved are unique so as to constitute a relevant market in themselves, a construction permitting the American part of a single international enterprise to exclude

[12] For the form of the proposed legislation, see Note 64 Yale L. J. 557 (1955) footnote 17 at page 560.

[13] Counsel for the Government suggested at oral argument that at the time of the proposed amendments, it was the purpose of the Administration to make a far-reaching customs simplification, and the sponsor of the amendments, the Treasury Department, withdrew them in order to avoid controversy that might becloud the Administration's purpose.

[14] It was stated at oral argument that one or two further bills have been introduced at the present session of Congress.

[15] See the dissenting opinion of Mr. Justice Frankfurter in *Schwegmann Bros. v. Calvert Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384, 397. It was widely assumed for many years that the Miller-Tydings Amendment to § 1 of the Sherman Act, 50 Stat. 693, 15 U. S. C. § 1, authorized State acts with "nonsigner" provisions, and amendments offered to remove such presumed authorization failed of enactment. The Supreme Court held, nevertheless, that "non-signer" provisions were not authorized by the Miller-Tydings Amendment.

[16] See Developments in the Law-Trade-Marks and Unfair Competition, 68 Harv. L. Rev. 814, 915-16 (1955).

[17] "The rationale underlying trade-mark protection does not support the exclusion of genuine products by *independent* American trade-mark owners any more than it supports exclusion by related importers." Note, 64 Yale L. J. 557, 567 (1955). But § 526 was passed specifically to protect independent American trade-mark owners from the importation of authentic products.

imports by purchasers from the foreign part of the enterprise would authorize monopolization by permitting a manufacturer to prevent purchasers of his merchandise from competing with him.[18] See *United States v. Klearflax Linen Looms* [1944-1945 TRADE CASES ¶ 57,407], 63 F. Supp. 32; *cf. FTC v. Beech-Nut Packing Co.,* 257 U. S. 441. But exemptions from the operation of the antitrust laws are explicitly made by Congress,[19] and repeals by implication are not favored. "The intention of the legislature to repeal 'must be clear and manifest.' * * * There must be 'a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy.'" *United States v. Borden Co.* [1932-1939 TRADE CASES ¶ 55,250], 308 U. S. 188, 198-99; *Georgia v. Pennsylvania R. Co.* [1944-1945 TRADE CASES ¶ 57,344], 324 U. S. 439; *United States Alkali Export Association, Inc. v. United States* [1944-1945 TRADE CASES ¶ 57,372], 325 U. S. 196. I find no "clear and manifest" intention on the part of Congress to limit the scope of the Sherman Act for the benefit of an international enterprise by means of § 526, and to construe that section in accordance with the purpose disclosed by the history detailed avoids a "positive repugnancy" in favor of a harmonious consistency between the two laws. See *Takao Ozawa v. United States,* 260 U. S. 178, 194.

3. § 2 of the Sherman Act

[*Relevant Market*]

The charge of illegal monopolization requires a finding of monopoly power and a finding of intent to monopolize, *American Tobacco Co. v. United States* [1946-1947 TRADE CASES ¶ 57,468], 328 U. S. 781, or, obviously, an actual exercise of the power. Inasmuch as monopoly power is "the power to control prices or exclude competition * * *", *United States v. du Pont & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 391, it must be determined by defining the market and assessing the defendant's power in that market. In the definition of the relevant market, the defendants maintain that the recent decision in the cellophane case, *United States v. du Pont & Co., supra,* is dispositive. In that case the majority opinion stated:

> "[W]here there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from the others. If it were not so, only physically identical products would be a part of the market. * * * What is called for is an appraisal of the 'cross-elasticity' of demand in the trade."[20] "The 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered."[21]

And it is argued that the defendants' products vie in a highly competitive market with each other and with similar products of numerous other manufacturers, products that are highly comparable and reasonably interchangeable for the purposes for which they are produced, considering price, use and quality.[22] It is therefore submitted that the cellophane case conclusively precludes the consideration of the trade-marked products of any one manufacturer as a relevant market.

[*du Pont Case*]

But the *du Pont* case also pointed that "[t]he varying circumstances of each case determine the result * * *",[23] citing in a footnote *Maple Flooring Assn. v. United States,* 268 U. S. 563, 579:

> "It should be said at the outset, that in considering the application of the rule of decision in these cases to the situation presented by this record, it should be remembered that this Court has often announced that each case arising under

[18] See discussion under "§ 2 of the Sherman Act," *infra.*

[19] For a listing of Acts containing specific exemptions from the antitrust laws, see *United States v. du Pont & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, footnote 14 at page 388.

[20] *United States v. du Pont & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 394.

[21] *Id.* at 404.

[22] About 90 different manufacturers sell over 408 perfumes of different names in the United States, and of these manufacturers, 61 sell toilet goods in the same price range as the toilet goods sold by the defendants. Based on retail sales prices, the total annual sale in the United States of toilet goods in the same price range as defendants' products is approximately $100,000,000, with $3,500,000, accounted for by Guerlain, $2,000,000 by Corday and $6,000,000 by Lanvin.

[23] *United States v. du Pont & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 395.

> the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied."

The product involved in the *du Pont* case, cellophane, was a raw material for use by manufacturers in packaging their products. In determining whether to use cellophane or some other flexible packaging material, manufacturers were guided by careful and objective considerations of utility and price. As the district court found in that case, a finding sustained by the Supreme Court, there was a great sensitivity of customers in the flexible packaging markets to price or quality changes. Thus, small variations in price or quality would induce a manufacturer to shift from one flexible packaging material to another, in accordance with a balance of all the utilities toward the achievement of the most efficient economic operation. But the products involved in the cases at bar do not compete with each other on such terms. Although each perfume is manufactured under a secret formula and possesses a distinctive fragrance, there is nevertheless undisputed testimony that many purchasers were unable to distinguish between the different scents of various perfumes. Indeed, Guerlain insists that it competes not only with other fragrances, but also with fragrances that an average customer could not distinguish from its products. For a good perfumer can, it appears, and frequently does come so close to reproducing another fragrance that the average person cannot distinguish between the two. There is even evidence in the record of expert difference of opinion in the classification of individual scents.

From these facts the defendants would draw the conclusion of the substantial fungibility of their products with innumerable others, so that the relevant market must be considered to constitute no one single brand but the aggregate of products of similar price and quality. But this conclusion, I feel, ignores certain other meaningful evidence, evidence that came from defendants' witnesses. This evidence supports the conclusion that the most important element in the appeal of a perfume is a highly exploited trade-mark. There seems to be agreement that no quality perfume can be successfully marketed without a famous name. It would appear that, to a highly significant degree, it is the name that is bought rather than the perfume itself. This fact gives the market a rigidity not found in the *Cellophane* case. In applying its test of market to cellophane, the Supreme Court said:

> "An element for consideration as to cross-elasticity between products is the responsiveness of the sales of one product to price changes of the other. [Footnote omitted.] If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a high cross-elasticity of demand exists between them; that the products compete in the same market." [24]

There is no evidence in the cases at bar on responsiveness of the sales of one product to the price changes of another. But there is evidence, not disputed, that the leading perfume of one of the defendants would not sell satisfactorily if offered under an unknown name without national advertising. There is agreement that this result would prevail for any quality perfume similarly offered. And it would be fair to conclude from the evidence that an unexploited product, packaged and merchandised without its trade-mark, would have a negligible effect on the sales of the same product, exploited and trade-marked, even though the former may be sold at a substantial price differential from the latter. The kind of cross-elasticity discussed by the Supreme Court in the *Cellophane* case does not exist for perfumes bearing the names and trade-marks of the defendants. Objectively, the products may be more than reasonably interchangeable with others. But the lack of objectivity in consumer demand impairs the basis of interchangeability and negates a finding of cross-elasticity.

The cases at bar are distinguishable from the *Cellophane* case, in the search for the relevant market, in another important particular. For in these cases the defendants conducted themselves in accordance with a specific intention to exclude competitors and to control prices. This consideration was absent from the *du Pont* case. Indeed,

[24] *Id.* at 400.

the Supreme Court distinguished this situation and said: "Illegal monopolies under § 2 may well exist over limited products in narrow fields where competition is eliminated." [25] In the footnote to that statement,[26] the cases set out as illustrative of the principle were (with one exception) attempt and conspiracy cases, rather than monopolization cases. The defendants have been charged with attempt to monopolize as well as with monopolization, but inasmuch as the attempts in the markets contended for by the Government have been completely successful, it is perhaps inaccurate to speak of attempts. Nevertheless, the cases are much more closely akin to attempt and conspiracy cases than they are to a monopolization case like the *Cellophane* case. The most singular and certainly the most indisputable element in the cases is the intentional exclusion of potential competitors through the instrumentality of § 526. The exclusion of competition is the essence of monopoly. If my opinion about § 526 is correct, the defendants have intentionally and illegally excluded competition. The means were not illegal in the sense of immoral, predatory and bad faith practices familiar in many cases, but they were not "honestly industrial" [27] in that they were actuated solely by a desire to prevent competition. In cases where there is no specific intent to exclude competition, even maneuvers "honestly industrial" having an exclusionary effect may supply the requisite purpose and intent for a finding of monopolization,[28] though the market may not be narrowly defined. Where, however, exclusionary conduct demonstrates a specific intent to prevent competition, the analogy to the attempt and conspiracy cases is forceful. The fact that an attempt is successful is hardly reason to destroy the analogy, and a limited definition of the market is therefore appropriate. See Turner, *Antitrust Policy and The Cellophane Case,* 70 Harv. L. Rev. 281 (1956).

[*Cases Distinguished*]

But the defendants cite two recently decided cases as holding that the product of a single manufacturer cannot constitute a relevant market. *Schwing Motor Co. v. Hudson Sales Co.* [1956 TRADE CASES ¶ 68,292], 138 F. Supp. 899, aff'd per curiam (4 Cir.) [1956 TRADE CASES ¶ 68,564], 239 F. 2d 176, and *Webster Motor Car Company v. Packard Motor Car Company* [1955 TRADE CASES ¶ 68,171], 135 F. Supp. 4, reversed (D. C. Cir.) [1957 TRADE CASES ¶ 68,682], 243 F. 2d 418 [29]. The *Schwing* case, which was substantially followed by the Court of Appeals for the District of Columbia in the *Webster* case, involved an alleged combination or conspiracy by means of an agreement between an automobile manufacturer and a retail dealer, pursuant to which the manufacturer refused to renew expiring agreements with two other dealers, thus giving one dealer a "virtual monopoly" of the sale of one make of automobiles within one city. In the first place, it would seem that the element of cross-elasticity of demand for automobiles is much greater than for highly exploited, trade-marked perfumes, or that, in any event, the automobile market does not possess the rigidity of the quality perfume market, as discussed. But more significantly, Chief Judge Thomsen, whose opinion in the district court was adopted as the opinion of the Court of Appeals for the Fourth Circuit, pointed out that every manufacturer has a natural and complete monopoly of his particular product, especially when sold under his own private brand or trade name, and he may sell his product as he chooses, exercising his own independent discretion about the parties with whom he will deal. *United States v. Colgate & Co.,* 250 U. S. 300. He may reduce the number of his dealerships in any area and, obviously, if he chooses to do so he will discuss the matter with the dealer or dealers whom he wishes to retain.

> "To say that a manufacturer may legally decide to reduce the number of its dealers in a given area if it does not discuss the matter with the dealers beforehand, but violates the anti-trust laws if it does discuss the matter with them before the new agreements are made, ignores the realities." [30]

But Judge Thomsen went on to say that a horizontal arrangement between competitors

[25] *Id.* at 395.
[26] *Ibid.* (footnote 23).
[27] *United States v. Aluminum Co. of America,* (2 Cir.) [1944-1945 TRADE CASES ¶ 57,342], 148 F. 2d 416, 431.
[28] *American Tobacco Co. v. United States* [1946-1947 TRADE CASES ¶ 57,468], 328 U. S. 781, 813-14, quoting from the *Alcoa* case.

[29] See also *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824.
[30] 138 F. Supp. at page 906; but see the dissent of Judge Bazelon in the *Webster* case, *supra,* in which he takes the position that the manufacturer's decision to sell through an exclusive dealer is unlawful unless made unilaterally.

to effect the same purpose would be invalid, for that would constitute a true conspiracy, notwithstanding that its subject matter would be a relatively minor brand, constituting about 2% of the automobiles sold in the city, in a highly competitive market. Nor could a manufacturer, without the element of conspiracy, seek to monopolize by preventing purchasers of his merchandise from competing with him. *United States v. Klearflax Linen Looms* [1944-1945 TRADE CASES ¶ 57,407], 63 F. Supp. 32; cf. *FTC v. Beech-Nut Packing Co.*, 257 U. S. 441.[31] This situation does not present a case of the natural monopoly that a manufacturer has in his own product, but an extension of such a monopoly. Neither the *Schwing* case nor the *Webster* case involved an effort of a manufacturer to extend the natural monopoly of his own product.

[*Illegal Extension of Trade-Mark*]

The defendants stress heavily the sentence in the *Cellophane* case that the "* * * power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly."[32] But such power of the defendants over their trade-marked products is not here under attack. What is under attack is, in effect, an attempt (successfully executed) by each defendant, as a part of a single international business enterprise, to limit the resale of its products for the express purpose of excluding competition and controlling prices. Purchasers from the French part of the enterprise are prevented, by means of the utilization of § 526, from competing in the United States with the American part of the same enterprise. Such exclusion, if it were accomplished by agreement, would violate § 1 of the Sherman Act. For, "[a] distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act." *United States v. Bausch & Lomb Co.* [1944-1945 TRADE CASES ¶ 57,224], 321 U. S. 707, 721, quoted in *United States v. McKesson & Robbins* [1956 TRADE CASES ¶ 68,368], 351 U. S. 304, 310. These defendants have achieved the same result unilaterally, without agreement, with the effect of expanding their trade-mark monopolies beyond their proper scope. In the cellophane case there was no evidence that du Pont had attempted to control the use or resale of cellophane, and there is nothing in the case to indicate that the power of a manufacturer of a trade-marked product may not be expanded into an illegal monopoly. It is in the context of the extension of a statutory monopoly into illegal proportions by deliberately exclusionary conduct that the relevant market must be defined.

[*Monopoly Power*]

With the relevant market defined as the trade-marked toilet goods of each defendant, there can be no doubt about the possession and exercise by each of them of monopoly power. Monopoly power is "the power to control prices or exclude competition."[33] That this power has been extensively utilized by the defendants is obvious. Each of them intentionally excludes potential competitors from dealing, in the United States, in the products sold abroad by the French part of its enterprise. The result has been the maintenance of substantial price differentials in the United States and in France—price levels so different that the removal of their artificial protection would threaten defendants' American monopolies. For it is clear that the price differentials are sufficient to make competitive dealing in these products profitable. The defendants argue the inaccuracy of this conclusion by citing the cost of promotional and administrative expenses of their American businesses, expenses that largely make up the price differentials, and without which there could be no profitable business in any event. But the evidence of these expenses, admitted upon the trial, I now find to be irrelevant. If price differentials may not be maintained under the Sherman Act by means of the exclusion of competition, the expenses that the defendants choose to undertake may not be offered in exculpation. The economic justification of expenses furnishes no legal justification for price differentials resulting from an illegal monopoly.

[31] The *Beech-Nut* case directly involved the Federal Trade Commission Act and involved the Sherman Act indirectly in that the public policy embodied in that Act was considered in determining what were unfair methods of competition within the Federal Trade Commission Act.

[32] *United States v. du Pont & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 393.

[33] *Id.* at 391.

[*Sherman Act Violated*]

Accordingly, I append findings of fact and conclusions of law [not reproduced] separately in each case, substantially as submitted by the Government, holding that each defendant is in violation of § 2 of the Sherman Act, entitling the Government to relief in the form of an order enjoining the continuation of the conduct constituting the violation. Proposed decrees may be filed within 30 days from the date of the filing of this opinion and a hearing will thereafter be scheduled upon due notice.

[¶ 68,772] State Wholesale Grocers, a corporation; Zeigmund Wholesale Grocery Co., Inc., a corporation; Ralph C. Berg, d/b/a Berg's Food Store; Leo Bernard, d/b/a Leo's Food Mart; Bernard Bruski, d/b/a United Meat Market; Eph. Goldstein, d/b/a Goldstein's Progressive Foods; Earl Larson and Warren Larson, co-partners, d/b/a Franklin Grocery and Market; Jack Levin and Harvey Berebitsky, co-partners, d/b/a Harvey's Supermart; O. V. Makela, d/b/a Makela's Food Store; John L. Maleviti's, d/b/a Fruitland Foods; Jack E. Markus, d/b/a Alliance Meat Shop; Carmen Mastri, d/b/a Cicero Lake Food Mart; Steven J. Minarik, d/b/a Norward Park I. G. A.; Henry E. Muir and Hugh A. Muir, co-partners, d/b/a Fifth Avenue Food Mart; Stanley Piekarz, d/b/a Steven's Certified Super Marts; Anthony Racz, d/b/a Save-Way Food Mart; Edw. J. Schuetz, d/b/a Schuetz's I. G. A. Super-Marts; Joseph D. Stone, d/b/a Clover Food Mart; Robert M. Wagner and Elizabeth Wagner, co-partners, d/b/a Wagner Grocery and Market; Atlas Market Company, a corporation; Dominicks Finer Foods, Inc., a corporation; Carl A. Schletz, Inc., a corporation v. The Great Atlantic and Pacific Tea Company, a corporation; Woman's Day, Inc., a corporation; General Foods Corporation, a corporation; Hunt Foods, Inc., a corporation; Morton Salt Company, a corporation.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 56 C 418. Dated July 25, 1957.

Robinson-Patman Price Discrimination Act

Price Discrimination—Payment for Services or Facilities Furnished by Customer—Advertising in Customer-Owned Magazine.—Payments by food product manufacturers to a retail grocery chain for publishing advertisements of the manufacturers' products in a magazine published by a wholly-owned subsidiary of the retail grocery chain and sold only in the retail grocery chain's stores were not in violation of Section 2(d) of the Clayton Act, when it appeared that the manufacturers chose to advertise in this magazine after having weighed the same criteria that they considered before advertising in any medium; that there was no ulterior motive on the part of the manufacturers, nor intention to favor the retail grocery chain over other customers; that the manufacturers received full value for their payments for their advertisements; that the advertisements made no references to prices of the products nor the names nor locations of the stores where they might be purchased; that the advertisements were national brand advertisements of grocery products as distinguished from grocery store advertisements; that the advertisements were primarily designed to benefit the manufacturers rather than the retail grocery chain; that the magazine was not an "in-store" promotion device, since shoppers would not read the magazine until they had left the stores and, therefore, the advertisements would benefit all grocery stores and not merely the retail grocery chain; and that the evidence failed to reveal that the retail grocery chain shifted substantial portions of its own advertising costs to the manufacturers.

See Price Discrimination, Vol. 1, ¶ 3522.250.

Price Discrimination—Payment for Services or Facilities Furnished by Customer—Meaning of "Available"—Proportionally Equal Terms.—When food product manufacturers made payments to a retail grocery chain for advertisements appearing in a magazine published by a wholly-owned subsidiary of the retail grocery chain and distributed only in the retail grocery chain stores, and a group of retail and wholesale grocers filed a treble damage suit against the manufacturers and retail grocery chain, charging violation of Section 2(d) of the Clayton Act on the ground that equal payments were not afforded to them, the suit was dismissed because the plaintiff retail and wholesale grocers did not

publish or sell a store-distributed magazine and, thus, were unable and unequipped to render or furnish the services for which payment would be made and for which the manufacturers in this case paid the magazine. Being so unable to furnish these services, plaintiffs have no standing to complain about the manufacturers' advertising in the magazine even if it were assumed that these payments violated the Act. The suggestion by plaintiffs that the magazine could be made available for sale in all grocery stores, including plaintiffs', was untenable, as the Clayton Act "imposes no duty on one customer of a common supplier to furnish for his competitor services which the competitor is unable to render and for which the common supplier would make payment to him." The suppliers could not make proportionally equal payments to the plaintiffs if the plaintiffs could not furnish the service for which payment was made. As stated in Congress, payments are to be proportional "to those customers' purchases and to their ability and equipment to render or furnish the service or facilities to be paid for."

See Price Discrimination, Vol. 1, ¶ 3522.525, 3522.650.

Price Discrimination—Services or Facilities Furnished by Seller—Furnishing Magazine.—Payments by food product manufacturers to a retail grocery chain for advertisements appearing in a magazine published by a wholly-owned subsidiary of the retail grocery chain and distributed only in the retail grocery chain stores did not constitute the furnishing of a service or facility to the retail grocery chain, even though the greater part of the cost of the magazine was covered by advertising fees paid by defendants and other food manufacturers who sold supplies to the retail grocery chain. The argument that the advertising fees paid by suppliers "made" the magazine "possible" was refuted on the ground that the success of the magazine was due to the expertise of the management, that it was the high quality of the editorial content of the magazine that sold the magazine to the public, and that the sales, in turn, attracted the advertising revenue.

See Price Discrimination, Vol. 1, ¶ 3524.140.

Price Discrimination—Miscellaneous Preferential Practices—Advertising in Customer-Owned Magazine.—When the price discrimination alleged as a violation of Section 2(a) of the Clayton Act consisted of violations of Sections 2(d) and 2(e) through payments by food manufacturers to a retail grocery chain for publishing advertisements of the manufacturers' products in a magazine published by a wholly-owned subsidiary of the retail grocery chain, and the court found that Sections 2(d) and 2(e) were not violated, the court necessarily held also that Section 2(a) was not violated.

See Price Discrimination, Vol. 1, ¶ 3508.420.

Price Discrimination—Knowingly Inducing or Receiving Discrimination.—A treble damage action by a group of grocery retailers and wholesalers, charging that a retail grocery chain knowingly induced discriminations in price by inducing some of its food suppliers to advertise in a magazine published by the retail grocery chain, was dismissed on the ground that the record was devoid of evidence tending to prove that the retail grocery chain knowingly induced a discrimination. The court held further that there was no violation of the Clayton Act by the suppliers.

See Price Discrimination, Vol. 1, ¶ 3526.15.

For the plaintiffs: Robert Marks and William S. Kaplan. (Marks, Marks & Kaplan, and Libit, Lindauer & Henry, both of Chicago, of counsel.)

For the defendants: Thomas R. Mulroy, Daniel Walker, Hopkins, Sutter, Owen, Mulroy & Wentz, Chicago, for The Great Atlantic and Pacific Tea Company and Woman's Day, Inc. (Cahill, Gordon, Reindel & Ohl, New York City, by John T. Cahill, Lawrence J. McKay, Oleg P. Petroff, Fred E. Campbell, of counsel.) Edward R. Adams, Sidney S. Gorham, Jr., Miller, Gorham, Wescott & Adams, Chicago, for General Foods Corporation. Frederick F. Mack, Hubert G. Hanson, Eugene C. Nicolato, of counsel.) L. M. McBride, John P. Ryan, Jr., McBride & Baker, Chicago, for Morton Salt Company. Edward R. Adams, Sidney S. Gorham, Jr., Miller, Gorham, Wescott & Adams, Chicago, for Hunt Foods, Inc.

For a prior opinion of the U. S. District Court, Northern District of Illinois, Eastern Division, see 1956 Trade Cases ¶ 68,420.

Memorandum, Findings of Fact, Conclusions of Law and Judgment

[*Parties*]

CAMPBELL, District Judge [*In full text*]: This is a private action for treble damages and injunctive relief brought under Sections 4 and 16 of the Clayton Act.[1] Plaintiffs are twenty retail and two wholesale grocers located in the Chicago Metropolitan Area who bring this action on behalf of themselves and all retail and wholesale grocers similarly situated as an alleged class suit under Rule 23(a)(3) of the Federal Rules of Civil Procedure. Defendants are The Great Atlantic and Pacific Tea Company (New Jersey), Woman's Day, Inc., General Foods Corporation, Hunt Foods, Inc., and the Morton Salt Company.

The Great Atlantic and Pacific Tea Company (New Jersey), hereinafter referred to as A&P (New Jersey), is a wholly owned subsidiary of The Great Atlantic and Pacific Tea Company of America, hereinafter referred to as A&P (Maryland). A&P (New Jersey) operates the A&P retail stores in the Chicago Metropolitan Area and is one of the three A&P companies which operate retail grocery stores throughout the United States. Where distinction between these two companies is not material, they will be referred to herein, individually or collectively, as "A&P."

Woman's Day, Inc., publishes *Woman's Day,* a women's magazine which is issued monthly and sold to A&P operating companies, including A&P (New Jersey), for resale only through A&P stores. Woman's Day, Inc. is a wholly owned subsidiary of A&P (Maryland).

General Foods, Hunt Foods and Morton Salt are food product manufacturers whose brand name products are sold throughout the United States by practically all retail grocers, including the plaintiff retailers and A&P (New Jersey). These three food manufacturers will hereinafter be referred to collectively as the Defendant Suppliers.

[*Damages Issue Severed*]

By the Court's Memorandum & Order of June 21, 1956 the issue of liability, including the issue of the fact of damages, was severed for trial from the issue of the amount of damages, the issue of the amount of damages having been reserved for reference to a Master when and if the issue of liability was resolved in favor of the plaintiffs. Subsequently, through the efforts of able and experienced counsel representing all the parties to this action, the issue of liability was tried on facts agreed upon and exhibits admitted into evidence pursuant to stipulations entered into by and between the respective parties in many pretrial conferences. The interpretation and legal effect to be accorded these facts were argued by the parties in written briefs, and the issue of liability was taken under advisement by the Court.

[*Clayton Act*]

Plaintiffs anchor their claim upon Sections 2(d) and 2(e) of the Clayton Act as amended by the Robinson-Patman Act.[2, 3] Additionally, however, plaintiffs, in an attempt to hold A&P (New Jersey) liable under Section 2(f) of the Act, 15 U. S. C. Section 13(f), assert that the practices of the Defendant Suppliers, which the plaintiffs claim violate Sections 2(d) and 2(e), violate Section 2(a) as well.[4] Specifically, and in capsule form, plaintiffs complain that the Defendant Suppliers advertise their various products in *Woman's Day* without making these "services" or "facilities" available to the plaintiffs on proportionally equal terms. This activity, plaintiffs argue, violates Sections 2(d) and 2(e) of the Act and, as a consequence, Section 2(a) as well.

Sections 2(d) and 2(e) of the Clayton Act as amended by the Robinson-Patman Act provide as follows:

> "(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

[1] Title 15 U. S. C. Sections 15 and 26.
[2] Title 15 U. S. C. Sections 13(d) and 13(e).
[3] Plaintiffs dropped all charges under the Sherman Act during the pretrial period.
[4] Title 15 U. S. C. Section 13(a).

"(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

It seems clear, upon a study of these sections, that Sections 2(d) and 2(e) are companion sections and that distinctions between them should not be drawn merely because of the differences in terminology employed in each section. These sections are companion sections to the extent that they have the same purpose and seek to eliminate the same evil; but although they have the same purpose, each section achieves the same result by proscribing different methods of attaining the common result condemned. Thus, while Section 2(d) prohibits *payment by the seller for services or facilities undertaken by the buyer,* Section 2(e) proscribes *services or facilities furnished by the seller to the buyer.* I shall first consider whether the evidence establishes that the defendants have violated Section 2(e) of the Act.

The Section 2(e) Issue

Here plaintiffs argue, in effect, that food suppliers, of whom the Defendant Suppliers are but three, furnish, or contribute to the furnishing of, *Woman's Day* magazine to A&P (New Jersey) since their payments for advertisements in *Woman's Day* recoup for A&P a substantial part of the annual cost necessary to produce *Woman's Day.* It has been stipulated that the annual cost of producing *Woman's Day* exceeds $9,000,000. Of that sum, less than one-quarter is recovered through the sale of copies, the remaining three-quarters being recovered from the sale of advertising space. The advertisers in *Woman's Day* are categorized as either "suppliers" or "non-suppliers." Supplier advertisers are manufacturers, such as the Defendant Suppliers, whose products are sold in A&P stores; conversely, non-supplier advertisers are manufacturers whose products are not sold in A&P stores. It has been stipulated that in 1954, 73.3 per cent of the advertising revenue, or $6,905.021, was received from supplier advertisers as against 26.7 per cent, or $2,508,822 received from non-supplier advertisers. In 1955, 65.5 per cent, or $6,073,693 was received from suppliers while 34.5 per cent, or $3,205,488 was received from non-suppliers. These figures, plaintiffs argue, conclusively show that *Woman's Day* magazine is "made possible" by the paid advertisements of food suppliers, such as the instant Defendant Suppliers. Plaintiffs reason that without the payments for the advertising of the food suppliers, *Woman's Day* magazine could not exist, unless this multi-million dollar cost expenditure was assumed by A&P itself. Plaintiffs conclude, therefore, that the Defendant Suppliers furnish, or contribute to the furnishing of, a service of facility, *Woman's Day* magazine, "to or for" the benefit of A&P (New Jersey).

It is, of course, true that, in a loose sense, a patron of a store, an advertiser in a magazine or newspaper, "makes" that particular business "possible." However, it seems that this is a clear case of the proverbial tail wagging the proverbial dog. Business patrons, whether the purchaser or the advertiser, are attracted by the quality of the business entity with which they place their patronage. For example, a leading department store, such as one of the several that we have in the Chicagoland area, is not made possible by the customers that patronize that store—it is made possible by such things as the quality and variety of merchandise offered for sale, pleasant shopping facilities and salespeople, liberal charge and exchange policies, eagerness to stand behind the products offered for sale at its store, and all such factors which contribute to the successful operation of any business. The store's success is made possible by the policies adopted and executed by its management. Thus, it is the store itself, through the expertise of its management, that makes the business of its customers possible, and it is not the customers that make the store possible.

[*Woman's Day of High Quality*]

And so it is with any leading newspaper or magazine, such as *Woman's Day.* Advertisements placed in these media are made possible or attracted by the quality of the medium itself. Thus, prescinding from the fact that A&P (Maryland) must have made a substantial investment in

Woman's Day at the very beginning, if not later, and prescinding also from the fact that the direct copy sales of *Woman's Day* and the advertising of the non-suppliers, together, comprise a substantial percentage of the cost of producing *Woman's Day* (not to mention the supplier advertisers whose products, perhaps, are not handled by the plaintiffs), it seems quite obvious that *Woman's Day* magazine, and the advertisements therein, are "made possible" by the admitted high quality of the magazine itself, which high quality, in turn, is "made possible" by the expertise of the management of Woman's Day, Inc. There is a considerable amount of ingenuity, skill, creativeness and perserverance which goes into the publishing of any high quality magazine much the same as these qualities go into the successful operation of any business in a highly competitive business world. These qualities, apparently, are possessed by the management of *Woman's Day,* which, admittedly, is a high quality magazine, having been, for 14 years, among the top ten national magazines in circulation and among the top twenty-five in advertising revenue. Thus, it is the high quality of *Woman's Day* reflected by its editorial content, that sells the magazine to the public —these sales, in turn, attract the advertising revenue of such manufacturers as the Defendant Suppliers. It seems manifestly clear that a magazine the public will not buy cannot earn advertising revenue and it seems equally clear that the public does not buy a magazine for its advertisements but for its editorial content. As counsel for A&P and *Woman's Day* argue, the advertiser's payment and all other revenue of the publishing entity lose all identity in the process of publishing the magazine.

[*No "Furnishing" of Magazine*]

Thus, the conclusion is inescapable that the Defendant Suppliers do not furnish or contribute to the furnishing of *Woman's Day* magazine to A&P within the meaning of Section 2(e)of the Act. What we have here are advertisements placed by food suppliers in a top ranking magazine which is published by a wholly owned subsidiary of A&P (Maryland). Both the magazine and the advertisements therein contained are furnished by A&P (Maryland) through Woman's Day, Inc. The evidence fails to reveal that the Defendant Suppliers have furnished, or have contributed to the furnishing of, any services or facilities to or for the benefit of A&P. If plaintiffs can be heard to complain of any activity on the party of the Defendant Suppliers, it is the payments by these suppliers for their advertisements which they place in *Woman's Day* magazine. Therefore, if plaintiffs have a cause of action at all it is for possible violations of Section 2(d) which prohibits payment by the supplier for services furnished by the purchaser.

[*Sec. 2(e) of Clayton Act Not Violated*]

For the reasons stated, I hold that the plaintiffs have failed to prove that the Defendant Suppliers have furnished, or have contributed to the furnishing of, any service or facility to A&P within the meaning of Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act.

The Section 2(d) Issue

In discussing Section 2(d), it becomes necessary to examine the methods employed by each of the Defendant Suppliers in determining the medium in which each should advertise, and particularly whether each should advertise in *Woman's Day* magazine.

General Foods

General Foods is a large food merchandising company which handles more than 50 different grocery store products. In its 1956 fiscal year it sold $759,200,000 worth of grocery products and spent more than $75,180,000 in advertising them.

General Foods is comprised of eleven operating divisions. The marketing function of each division selling grocery store products is in charge of a marketing manager who is responsible for the advertising and selling of all the products of that division. Reporting to the marketing manager are the product group managers or the particular product managers. Product group managers and product managers are responsible for the development and execution of marketing plans, including advertising plans, for the specific products assigned to them. Both the initial and final decision on the contents of a marketing plan are made by the product group manager or product manager, subject to the approval of his superiors. The responsibility of selecting and recommending the specific advertising media within the framework of the

marketing plan rests with the particular advertising agency retained by the company.

In determining what medium should be used to advertise a particular product (whether magazines, newspapers, outdoor posters, car cards, radio or television), General Foods' advertising agencies take many factors into consideration. These factors include the stated objectives of the advertising program; the nature and strength of the competition; who are the prospective purchasers of the products—i.e., men, women, children, age, income bracket, educational level; the locality where these prospects live—i.e., in small towns and rural communities, in cities, in metropolitan centers, in which geographical areas of the country; and the distribution pattern of the particular product.

If the agency retained by General Foods determines that an advertising effort or part of any advertising effort should be through magazines, the selection of the magazines, or of a particular magazine, requires the weighing of many considerations, such as circulation, geographical distribution of readers, cost per thousand circulation, number of readers for each copy, characteristics of the magazine and its readers, education and income level of the magazine's audience, the prestige of the magazine, and the nature and quality of its editorial material.

Applying these general considerations to the case at bar, it has been stipulated that the criteria considered by General Foods in determining whether or not *Woman's Day* was to be included in a media schedule for a particular product were the same criteria that were considered by General Foods in the selection of any other magazine or medium.

Hunt Foods

Hunt Foods is a large food merchandising company which handles more than 15 different grocery store products. In its 1955 fiscal year Hunt sold $85,588,310 worth of grocery products and spent $5,741,000 advertising them. Hunt's advertising program is prepared by its advertising department in consultation with the particular advertising agency retained by it.

Hunt considers many criteria and factors in selecting publications in which to advertise its products. Among these factors are the publication's circulation, and all aspects thereof including not only the total figure but also the pattern of this circulation by geographical areas. Hunt also considers the cost of using the publication, and specifically, the base page rate and quantity and frequency discounts. Another criterion that Hunt considers is the audience statistics such as the relation of men to women readers and how large the total audience becomes as a result of secondary and pass-along readership. Hunt also considers the editorial policies of the publication and its mechanical quality, such as the process by which it is printed and the quality and size of its paper. Hunt gives primary consideration to an adequate "national" advertising program using media whose circulation figures bear a proper relationship to the national population pattern. After providing for national coverage, Hunt then considers those media which have a more regional than national influence.

The extent of Hunt's advertising in any particular medium is determined by the amount of money which can be allocated to advertising in a given period and by selecting the medium that it feels best reaches the potential customers of its products and also best serves its designated purposes.

In deciding to advertise in *Woman's Day* magazine, Hunt has used and considered the same factors and criteria which it considered in determining to advertise in any other publication.

Morton Salt Company

Morton Salt is a substantial producer of various salt products. In 1955 Morton sold $7,327,672 worth of salt products and spent $2,342,619 in advertising them. Morton's advertising program is the result of consultations and deliberations between Morton's advertising agency and Morton's advertising department.

In determining whether to advertise in a particular publication, Morton considers that publication's total circulation; its cost per thousand circulation; its gross cost; the characteristics of the publication's readers according to age, education, etc.; the publication's geographical circulation and circulation in terms of population density both as compared with Morton's sales and total grocery store sales; and, finally, Morton also considers the quality of the printing reproduction. In deciding to advertise in *Woman's Day*, Morton has been guided by

the same factors that it considered in determining to advertise in any magazine.

In summation, viewing the processes which the Defendant Suppliers utilized in choosing to advertise in *Woman's Day* magazine, the evidence is clear that these defendants chose to advertise in *Woman's Day* after having weighed the same criteria that they considered before advertising in any medium and, more specifically, in any magazine. *Woman's Day* magazine met the test to which each of the Defendant Suppliers placed any magazine, passed it, and, as a consequence, each of the Defendant Suppliers placed their advertisements therein. Thus, there is no evidence of any ulterior motive on the part of the Defendant Suppliers in advertising in *Woman's Day* nor does it appear that the Defendant Suppliers had intended to favor A&P (New Jersey) over any of its other customers. It is also interesting to note that it has been stipulated that the extent to which A&P promotes or merchandises the products of its suppliers is and has been in no way affected by the fact that such suppliers do or do not advertise in *Woman's Day* or by the extent of such advertising if there is any. Additionally, the evidence also reveals, through the testimony of Harry B. George, National Director of Purchases of A&P, that whether manufacturers or processors of grocery store products do or do not advertise in *Woman's Day* is never considered in any manner by A&P in deciding whether, or to what extent, to purchase their products for resale in A&P retail stores. George also testified that the advertising in *Woman's Day* by such manufacturers or processors has no effect on the prices paid by A&P for products purchased for resale in A&P retail stores. Plaintiffs, however, attach no significance to this evidence, which they do not dispute, but argue that, nonetheless, the Act has been violated, if equal payments have not been afforded to them.

Nor do the plaintiffs attach any significance to the evidence which clearly reveals that the Defendant Suppliers receive full value for their payments for their advertisements in *Woman's Day*. *Woman's Day* is, admittedly, a high quality magazine enjoying a substantial circulation. This fact, when considered with the fact that the advertising rates charged by Woman's Day, Inc. to all advertisers in *Woman's Day*, including the Defendant Suppliers, for advertisements in said magazine are comparable to and competitive with the rates charged and prices paid per thousand circulation in magazines of comparable national circulation, makes the conclusion inescapable that the Defendant Suppliers receive full value for their advertisements in *Woman's Day*. Plaintiffs do not contend otherwise but argue that whether the Defendant Suppliers receive full value is immaterial in view of the fact that like payments by the Defendant Suppliers were not made available to the plaintiffs on proportionally equal terms.

[*Legislative History*]

In support of their position, plaintiffs cite a passage from Congressman Utterbach's speech which was given just before the adoption of the Act. Congressman Utterbach stated:

> "The existing evil * * * is, of course, the grant for discriminations under the guise of payments for * * * services which, *whether or not * * * actually rendered as agreed,* result in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves." (emphasis, plaintiffs) 80 *Cong. Rec.* 9418.

Plaintiffs emphasize the words, "whether or not * * * actually rendered as agreed," as indicating that it does not matter that the supplier receives value for his payments for such "services." This reasoning, however, is clearly untenable for it is manifest that Congressman Utterbach was speaking there of services which, of their very nature, were designed primarily to benefit the customer. Thus, if the service paid for is designed primarily to benefit the customer then it matters little if the services are rendered or not—on the one hand, the customer is benefited by the services which the supplier pays for, and on the other hand, the customer, instead of having the services performed, is benefited by keeping the money given him by the supplier. Either way, the customer is benefited and the Act is violated *if* the service to be rendered is designed primarily to benefit the customer.

Thus, in the Senate and House Committee Reports, it is stated:

> "Still another favored medium for the granting of oppressive discriminations is found in the practice of large buyer customers to demand, and of their sellers to

grant, special allowances in purported payment of advertising and other sales-promotional services, which the customers agree to render with reference to the seller's products, or sometimes with reference to his business generally. Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when, in any case the *customer is deriving* from it *equal benefit* to *his own business* and *is thus enabled to shift to his vendor substantial portions of his own advertising cost* while his smaller competitor, unable to command such allowances, cannot do so." (emphasis added) Senate Report No. 1502, p. 7; House Report No. 2287, p. 15; 74th Cong. 2d Sess. 1936.

[*"Primary Benefit" Argument*]

It is apparent, therefore, from a study of this section, as well as from a study of the entire legislative history of the Act, that where there is a service paid for by the supplier, and the service is actually rendered and the amount so paid is not in excess of the value of the service, it is necessary to determine: (1) whether the service would benefit only the supplier; (2) whether the service would benefit only the customer; or (3) whether the service would benefit both the supplier and his customer. If a service can be said to benefit only the supplier or if the service benefits only the customer, there is no difficulty, as in the one case the Act is violated while in the other it is not. However, where it is conceivable that a service might benefit both the supplier and the customer, then, and only then, it becomes necessary to determine whom the services were *primarily* designed to benefit. If the services were primarily designed to benefit the supplier, the Act has not been violated; if the services were primarily designed to benefit the customer, then the Act has been violated unless proportionally equal treatment has been given that customer's competitor. If it is made to appear that equal benefits accrued to both the supplier and his customer from the service, then also the Act has been violated; and in determining whether the customer receives equal benefit, it must be made to appear that the customer has been able to shift to his supplier "substantial portions of *his own advertising costs.*" It becomes necessary, therefore, to examine the nature and extent of the benefits flowing from the Defendant Suppliers' paid advertisements in *Woman's Day* magazine.

[*Basis for Selection of Woman's Day*]

As has been indicated, the advertisements in *Woman's Day* of each of the Defendant Suppliers were the result of a careful evaluation of *Woman's Day* as an advertising medium, each Defendant Supplier, through its advertising department and advertising agency, employing the same criteria in choosing to advertise in *Woman's Day* that it considered in choosing to advertise in any medium. *Woman's Day* is a high quality magazine of national prominence and it is considered an excellent advertising medium as attested by the list of nationally prominent advertisers (both food suppliers and non-food suppliers) that place their advertisements regularly in *Woman's Day.* And it is manifest that the Defendant Suppliers receive full value for their payments for their advertisements in *Woman's Day.* These facts, when considered with the absence of any evidence tending to establish any purpose or intent on the part of the Defendant Suppliers, individually or collectively, to favor A&P (New Jersey) over the Defendant Suppliers' other customers, clearly establish that each of the Defendant Suppliers' advertisements in *Woman's Day* was a component part of each supplier's advertising program which was designed only to promote public acceptance of the product advertised and, as such, was designed primarily to benefit each of the Defendant Suppliers. Indeed, there is no evidence of any ulterior motive on the part of any Defendant Supplier in advertising in *Woman's Day.*

[*Type of Woman's Day Advertisements*]

Plaintiffs seem to suggest that the advertisements of each of the Defendant Suppliers in *Woman's Day* were A&P advertisements. To answer this, it is necessary to distinguish between grocery store advertising and national brand advertising of groceries. Grocery store advertising is designed and intended to bring people into a particular store and features the price of the product and the location of the store. National brand advertising, conversely, mentions no price and does not mention the name or location of any store or stores—it merely attempts to acquaint the reader with the desirability of trying a particular nationally known, brand name product.

In the instant case, the evidence reveals that the advertisements of each of the Defendant Suppliers were advertisements of the various products handled by each supplier; the advertisements failed to make any reference to the price of the particular product advertised, nor did they include any mention of the name or location of any store where these products might be purchased. Indeed, the copy of each of the Defendant Suppliers' advertisements in *Woman's Day* was identical with the copy run by each Defendant Supplier in other magazines and newspapers that were issued at or about the same time as was the particular issue of *Woman's Day*. Thus, the copy of each of the Defendant Suppliers' advertisements in *Woman's Day* was not in any way tailored to that magazine. The conclusion is inescapable that the advertisements of each of the Defendant Suppliers in *Woman's Day* were national brand advertisements of grocery products as distinguished from grocery store advertisements. This is but one of the facts which conclusively establish that the advertisements of each of the Defendant Suppliers were not A&P advertisements but were advertisements primarily designed to benefit each Defendant Supplier by promoting the sales of Defendant Suppliers' products to as many potential purchasers as possible, with the benefits accruing to A&P being only incidental.

[*Advertising Benefits All Grocers*]

That the advertisements of the Defendant Suppliers in *Woman's Day* were not A&P advertisements but national brand name grocery product advertisements with the benefits accruing to A&P being incidental to the benefits accruing to the Defendant Suppliers, is also established by the evidence that conclusively shows that the Defendant Suppliers' product advertising in *Woman's Day* aids in the sale of the advertised products by all grocers who carry the product advertised. This finding is based on several facts, the most important of which is that purchasers of food products do substantial shopping in more than one store. Indeed, the plaintiffs themselves, in attempting to show competition between A&P stores and independent retailers, argue, in their briefs, that the A&P and the independent are competing for the trade of the same customer "who interchanges his patronage."

The document entitled *Bench Marks for the Next Five Years in Grocery Selling* (Morton's Ex. 11), which was an address given to the National-American Wholesale Grocers Association, on September 13, 1955 by Curtis C. Rogers, Executive Vice President of the Market Research Corporation of America, contains some rather illuminating statistics concerning store loyalty of shoppers. On page 5 of this document, Rogers states, with respect to Chart VI appearing on that page:

"But families don't shop in just one grocery store. The average family shops in 3.7 stores per month. The families shopping in independent stores average 2.6 stores per month, while the exclusive chain store families shop in nearly 2 stores per month. But remember that ⅔ of all of the families shop in both chains and independents, and this group are really shoppers—they average 4½ stores per month."

And on page 11 of Morton's Exhibit 11, Rogers states with respect to Chart XII appearing on that page:

"We find that out of each 100 families who bought coffee in Store A, 44 made their next purchase of coffee at some other store—on canned vegetables, 56 bought their second purchase at some other store —and on frozen vegetables, 52 bought next at a different store. The *housewife shops* where she can get the *brands* and the *products* that she wants at prices that represent the best value to her." (Emphasis, his)

The findings contained in Chart XII of Morton's Exhibit 11 were the result of a two-week shopping history of typical grocery items, while the findings reflected by Chart VI appear to be the result of a 15-year study of that particular topic. These findings are persuasive in corroborating what I believe to be facts that cannot be seriously disputed. Competition between grocery stores is very keen and in these days of the high cost of living, the housewife is well aware of the necessity of seeking out a bargain. As a result, the housewife shops "where she can get the *brands* and the *products* that she wants at prices that represent the best value to her." She becomes acquainted with the necessary facts concerning a bargain in a number of ways, one of which being the grocery store advertisements appearing in newspapers and in handbills distributed to the homes in the vicinity of a particular store. On the other hand, the national brand

grocery product advertising by the Defendant Suppliers appearing in *Woman's Day* might acquaint the reader with the desirability of trying a particular brand name food or keep the name of that product before the public, much the same as it does when it appears in other magazines such as *Life, McCall's, Look,* etc., but that advertising is not a suggestion, much less a command, to purchase the article at A&P. The food shopper buys where she can purchase the brands and products at the least cost to her. If an advertisement in *Woman's Day* attracts her attention favorably, she will purchase that product at one of the stores which she patronizes, if the price is right. Thus, viewing the lack of store loyalty among grocery store shoppers, and considering the fact that the grocery shopper interchanges her patronage and buys where she can get the quality product for the least money, and considering also the fact that the Defendant Suppliers' advertisements in *Woman's Day* are national brand name grocery product advertisements, which suggest neither the price nor place where the products might be purchased, I find that the advertisements by the Defendant Suppliers in *Woman's Day* magazine are designed to aid in the sale of the advertised products by all grocers who carry that product and not merely A&P. Accordingly, I find that, assuming that said advertisements in *Woman's Day* do the job that they were intended to do, the advertisements in *Woman's Day* have, in fact, aided in the sales of the advertised products in all grocery stores and not merely A&P stores.

Corroborative of this finding is a letter (A&P EX. 61) received by Woman's Day, Inc. from Heublein & Bro., makers of A. 1 Sauce. After informing *Woman's Day* that Heublein's experience was that *Woman's Day* produced an unusually high number of requests for an advertised A. 1 Sauce booklet, the letter dated December 3, 1943, stated as follows:

> "Therefore, I am very happy to tell you of the swell job *Woman's Day* is doing for A. 1 Sauce. Even more significant is the fact that we can definitely trace a substantial increase in the sales of A. 1 Sauce since we started using *Woman's Day* several years ago; not only through the A&P Stores, where the magazine is distributed but also through the other stores located in the neighborhood of the A&P stores.
>
> "This indicates to us an increased sale through all outlets catering to and competing for the business in the shopping neighborhoods adjacent to an A&P Store where *Woman's Day* is distributed."

Plaintiffs seek to discredit the weight of this letter by arguing that *Women's Day* apparently could find only one such document from thousands of documents that were available to it. Assuming that this is true, nevertheless no document was introduced which stated a position contrary to the contents of Heublein's letter. Furthermore, the Heublin letter merely corroborates the conclusion drawn from the other evidence adduced; that is, the nature of the particular type of advertising in *Woman's Day* and the lack of store loyalty among grocery shoppers conclusively show that the Defendant Suppliers' advertisements in *Woman's Day* aided in the sales of the products advertised not only in A&P stores but also in all grocery stores carrying that particular product.

[*"In Store" Promotion*]

Underlying the conclusion that advertisements in *Woman's Day* aid in the general sale of the particular product advertised, is the fact that *Woman's Day* is not an "in-store" promotional device. In other words, although the shopper purchases the magazine in an A&P store, she does not read the magazine in the store. Thus, the shopper picks up a copy of the magazine at the check-out counter of an A&P store and does not get an opportunity to read the magazine until she leaves the store. That being the case, she is not exposed to Defendant Suppliers' advertisements in *Woman's Day* until after she leaves the A&P store. Assuming that an advertisement in *Woman's Day* arouses her desire to purchase a particular product, the shopper is free to purchase that product in the next store she visits if the price is acceptable. And it should be observed that many copies of *Woman's Day* are passed along to other readers who perhaps do not shop at an A&P store. Clearly, therefore, *Woman's Day* is not an "in-store" promotional device and, as such, the advertisements therein may benefit all grocery stores and not merely A&P stores.

[*Advertising Costs Not Shifted*]

Concerning the issue whether A&P shifts substantial portions of its own advertising

costs to the Defendant Suppliers, here again, plaintiffs' position is unsupported by the evidence. As has been indicated, the advertisements in issue were designed primarily to benefit each of the Defendant Suppliers for which each received full benefit for their payments. The benefit accruing to A&P from these advertisements was merely incidental to that accruing to each of the Defendant Suppliers. These advertisements were not A&P advertisements but national brand grocery products advertisements. The evidence reveals that A&P spends millions of dollars in advertising each year. It is also interesting to note that the various A&P manufacturing subsidiaries, which compete with the Defendant Suppliers, advertise their products in *Woman's Day* for which full payment to Woman's Day, Inc. is made. Plaintiffs attempt to belittle these facts by arguing that A&P derives cost-free advertising from the promotion and sale of *Woman's Day.* Underlying this contention, however, is plaintiffs' argument that the Defendant Suppliers make *Woman's Day* possible by their payments for advertisements therein; but this contention, as has been indicated hereinbefore in this memorandum, is totally without merit. Nor is it true that A&P receives cost-free advertising from *Woman's Day* because the record shows that A&P has paid for certain of *Woman's Day's* advertisements on radio, television and in the newspapers, and the record also reflects that the costs of distribution of the magazine from the warehouse to the store are assumed by A&P, not to mention the fact that certain A&P employees devote an appreciable amount of time in the promotion, distribution and sale of *Woman's Day.* It is quite apparent, therefore, from the evidence adduced that A&P does not shift substantial portions of its own advertising costs to the Defendant Suppliers.

[*Sec. 2(d) of Clayton Act*]

For the reasons stated, I hold that the advertisements of each of the Defendant Suppliers in *Woman's Day* magazine were not A&P advertisements but advertisements primarily designed to benefit each of the Defendant Suppliers who received full value therefrom with the benefits accruing to A&P being incidental to those accruing to each of the Defendant Suppliers. I also hold that the evidence fails to reveal that A&P has shifted to the Defendant Suppliers substantial portions of A&P's own advertising costs. Accordingly, I hold that the plaintiffs have failed to prove that the Defendant Suppliers have violated Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act.

[*Proportionally Equal Payments*]

There are, however, other reasons which compel such a finding. The evidence reveals that the Defendant Suppliers advertised in other store distributed magazines, such as *Family Circle, Better Living, Everywoman's* and *American Family. Better Living* was sold by seven of the plaintiffs until it suspended publication in May 1956. At present, none of the plaintiffs offers for sale a store magazine as apparently no such magazine is available for their distribution. However, I think a reasonable inference could be drawn from the evidence adduced that the Defendant Suppliers would advertise in a magazine distributed by any of the plaintiffs if it met the fixed standards that must be satisfied before each of the Defendant Suppliers decided to advertise in any magazine. The question arises, therefore, whether the Act is violated if the one purchaser is unable to furnish the service which that purchaser's competitor furnishes and for which the common supplier makes payment. Stated in another way, assuming *arguendo* that the payments by the Defendant Suppliers in this case for advertisements in *Woman's Day* violated Section 2(d) of the Act, how could the Defendant Suppliers have nullified that violation by making proportionally equal payments to the plaintiffs, if the plaintiffs could not furnish the service for which payments would be made? Congressman Utterbach answers this dilemma by stating:

> "But it is further claimed that the provisions of the bill with regard to advertising allowances work a hardship on the small manufacturer, in that they require such allowances to be granted to all competing customers on proportionally equal terms. But proportional to what? Proportional naturally to those customers' purchases and to their *ability and equipment to render or furnish the service or facilities* to be paid for." (Italics added) 80 Cong. Rec. 9416.

[*Plaintiffs Unequipped to Render Similar Services*]

In the instant case, the plaintiffs do not publish or sell a store distributed magazine and, thus, they are unable and unequipped

to render or furnish the services for which payment would be made and for which the Defendant Suppliers in this case pay *Woman's Day*. Being so unable to furnish these services, plaintiffs have no standing to complain about the Defendant Suppliers' advertising in *Woman's Day* even if it were assumed that these payments violated the Act. This seems manifestly clear from the overall intent of the Act and particularly from the quoted excerpt from Congressman Utterbach's speech. Plaintiffs' suggestion that this difficulty could be cured if A&P made *Woman's Day* available for sale in all grocery stores, including plaintiffs,' is untenable for the simple reason that the Act imposes no such duty on one customer of the common supplier to furnish for his competitor services which the competitor is unable to render and for which the common supplier would make payment to him.

Plaintiffs fail to cite any authority which militates against the conclusions reached in this memorandum. The cases they cite, unlike the case at bar, involved services which were inherently discriminatory in that they could in no way benefit any customer other that the customer to whom the service is given. Thus, in each case the service involved was primarily designed to benefit the one customer and not the supplier, or at least the benefits were equal between the two.

In *Corn Products Co. v. Federal Trade Commission* [1944-1945 TRADE CASES ¶ 57,363], 324 U. S. 726, Corn Products spent $750,000 in advertising Curtiss candy bars as being "rich in dextrose." Corn Products had sold dextrose to Curtiss which processed the dextrose into candy bars which Curtiss then sold to the consuming public. The Supreme Court held that Corn Products' failure to make those advertising services available to its customers on proportionally equal terms violated Section 2(e) of the Act. In that case it is quite clear that Corn Products was primarily advertising Curtiss candy bars and that it was assuming advertising costs which properly should have been borne by Curtiss. The results of these advertisements could have in no way benefited any of Curtiss' competitors and thus it could not have been said that the results thereof benefited Corn Products primarily and Curtiss only incidentally.

In *Elizabeth Arden Sales Corp. v. Gus Blass Co.* [1944-1945 TRADE CASES ¶ 57,400], 150 F. 2d 988, C. A. 8 Cir., Elizabeth Arden paid one customer for the entire salary of a store clerk who was provided by that customer to demonstrate Elizabeth Arden products. However, Elizabeth Arden paid another customer, who was a competitor of its first customer, only one-half of the salary of the demonstrator provided by it. The Court of Appeals for the Eighth Circuit held that this unequal treatment to competing customers of Elizabeth Arden bore no reasonable basis and was therefore discriminatory and violative of the Act. Thus, it is again manifest that the demonstrator's service could in no way benefit any competitor of the favored customer. The demonstrator's service was designed primarily to benefit the one customer with Elizabeth Arden assuming costs for services which ordinarily should be assumed by the customer who resells the product to the consumer.

And so it is with the services involved in the Federal Trade Commission cases cited by the plaintiffs. Each case involved services which were inherently discriminatory and which were primarily designed to benefit only the customer. No useful purpose would be gained by going into a more detailed discussion of those cases; suffice it to say that they are readily distinguishable on their facts from the instant case.

The Section 2(a) and Section 2(f) Issues

Plaintiffs admit that their claim against the Defendant Suppliers under Section 2(a) of the Act is bottomed on plaintiffs' claim that Sections 2(d) and 2(e) were violated. In other words, they argue that if Sections 2(d) and 2(e) are violated here, then Section 2(a) is violated as well. Plaintiffs urge this position in an attempt to hold A&P liable under Section 2(f) of the Act. Since I have held that the Defendant Suppliers have not violated either Section 2(d) or 2(e), it follows that I must also hold that plaintiffs have failed to prove that the Defendant Suppliers have violated Section 2(a) of the Act. Additionally, however, the record fails to reveal that the Defendant Suppliers have granted A&P either direct or indirect price discriminations; and, even if it could be assumed that plaintiffs sustained their proof under Section 2(a), the record is devoid of competent evidence tending to prove that A&P knowingly induced a discrimination in price within the purview of Section 2(f) of the Act.

Plaintiff Wholesalers' Claim

In this memorandum, I have considered plaintiff wholesalers and retailers as comprising one complaining group. Indeed, the wholesalers' claim is predicated on their assertion that their customers, who they claim are similarly situated with the instant retailers, have been injured the same as the instant retailers with the result being that the plaintiff wholesalers are thereby also injured because their customer will buy less from them as a result of Defendant Suppliers' challenged activities. Prescinding from the logic of such reasoning, it is obvious that the wholesalers' claim is no better than the retailers' claim and, accordingly, the issues must be resolved against them.

[*Purpose of Woman's Day*]

In their briefs, plaintiffs make the subtle suggestion that A&P (Maryland) had founded *Woman's Day* as a means of avoiding the consequences of the Robinson-Patman Act which, plaintiffs indicate, was primarily directed against A&P, among others. Suffice it to say, that this contention finds no support in the record. The record does indicate, however, that *Woman's Day* is a legitimate business enterprise founded for legitimate purposes. *Woman's Day* is accepted by the public as an excellent magazine and by established advertising agencies as an excellent advertising medium. The record is absolutely devoid of any evidence that *Woman's Day* was created for any purpose other than for legitimate business reasons. I find absolutely no conduct on the part of any defendant that could, in any conceivable way, be construed as violative of any of the anti-trust laws.

[*Post-Legislative History*]

In this case, all parties have cited excerpts from Congressman Patman's book, *The Robinson-Patman Act,* which was written after the Robinson-Patman Act was adopted by Congress. It should be observed that while resort to the legislative history of an act that appears to be ambiguously drawn is a practice that has long been accepted in American Jurisprudence, I cannot accept the practice of citing, as authority, books or other publications subsequently written by legislators concerning what was or was not intended to be covered by a particular act previously adopted by Congress while the author was a member thereof. In Congressman Patman's book, several questions were put to the author concerning whether, under certain facts, a particular practice would constitute a violation of the Act. The author then stated his opinion whether, on the facts so given, the Robinson-Patman Act would have been violated. The parties in this case have attempted to draw an analogy between the facts of this case and the facts of the particular example-case which best suits their purposes. They conclude this line of persuasion by urging a ruling consistent with the particular advisory opinion rendered by Congressman Patman. While resort by the courts to such a novel procedure of resolving an issue might be a convenient way of disposing of these Robinson-Patman Act cases, it is a practice which would amount to an abandonment by the courts of their judicial function and, as such, cannot be condoned. Although legislative histories may be considered by the courts, a book subsequently written by a legislator, even though he be a co-author of the Act, and with all respect to his good intentions in writing such a book, should be given no consideration by a court in determining whether there has or has not been a violation of a particular act. Such a book might be helpful to a businessman as a guide in conducting his business practices but courts of law should resort to more competent authority.

[*Defendants Above Reproach*]

In reaching the conclusions announced in this memorandum, I am not unmindful of the fact that the defendants have advanced other grounds which might bar the plaintiffs from recovering in the instant case. Since, however, I find Defendant Suppliers' as well as A&P and *Woman's Day's* conduct herein so above reproach as far as the Clayton and Robinson-Patman Acts are concerned, I feel it unnecessary to prolong this memorandum by discussing issues that are presented by these defendants in *arguendo* form.

One final word deserves mentioning. I have refrained from discussing much of the evidence submitted by the various parties. Suffice it to say that I have carefully considered all of the evidence submitted and to the extent that this evidence is found as facts to support the conclusions expressed in this memorandum, it will be incorporated in the Findings of Fact entered herein. Concerning planitiffs' objection to the ad-

missibility of the Shopping Survey (A&P Ex. 25) proffered by A&P, plaintiffs' objection is overruled and the same may stand as evidence together with the other exhibits that were admitted pursuant to stipulation.

I cannot close this Memorandum without commending all counsel of record herein for their outstanding efforts and genuine ability which enabled prompt disposition of the case by submitting it on stipulation.

The many pre-trial conferences in which counsel so effectively participated, the long and tedious hours spent in their various offices resolving differences on specific exhibits and preparing stipulations as well as the willingness of all properly to assist the Court and each other constitute an inspiring exemplification of the highest ideals of the legal profession. I am deeply grateful to all counsel.

Findings of Fact

1. This is an action brought on March 2, 1956, by certain named retail and wholesale grocers individually and purportedly as representatives of a class under Section 7 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraint and Monopolies," commonly known as the Sherman Act, and under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 736, as amended, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and For Other Purposes," commonly known as the Clayton Act, for a decree:

(a) Adjudging that the defendants have violated Sections 1 and 2 of the Sherman Act and Sections 2(a), (d), (e) and (f) of the Clayton Act, as amended;

(b) Adjudging that each plaintiff was injured in his business or property thereby;

(c) Preventing and enjoining continuing violations by defendants of said sections of said acts;

(d) Granting to plaintiffs three times the amount by which each of the named plaintiffs was damaged, together with costs and reasonable attorneys' fees; and

(e) Requiring all other members of the class allegedly represented by plaintiffs to file their claims with the Court and have their damages established and granted.

2. On October 23, 1956, plaintiffs abandoned their claim that defendants had violated the Sherman Act, thus leaving only the claim that each plaintiff was injured by alleged violations of Sections 2(a), (d) and (e) of the Clayton Act, as amended, by General Foods Corporation, Hunt Foods, Inc. and Morton Salt Company and of Section 2(f) by The Great Atlantic and Pacific Tea Company.

3. The plaintiffs named in the Complaint are twenty-three retail and two wholesale grocers located in the Chicago Metropolitan Area. The plaintiff retailers are retail grocers as distinguished from chain store retail grocers. With but few exceptions each of the plaintiff retailers operates a single store and said stores are located throughout the Metropolitan Area of Chicago. In addition, there are numerous other retail grocers situated within the Chicago Metropolitan Area who handle and sell at retail groceries, meat and produce commodities directly to the consuming public within said area. There are approximately 13,000 such retail grocers in the Chicago Metropolitan Area, all of whom are independent grocers as distinguished from chain store grocers. On October 17, 1956, three of the retail grocers withdrew as plaintiffs (Louis Janowitz, d/b/a Janowitz Finest Foods, Joseph Karas, d/b/a Kostner-Lake Food Market and Henry C. Surowiec, d/b/a Surowiec's Grocery and Market). Both of the plaintiff wholesalers are located in the Metropolitan Area of Chicago. They handle and sell grocery products to independent retailers (not including the plaintiff retailers) as distinguished from chain store retailers, located in the Chicago Metropolitan Area. There are numerous other wholesale grocers who handle and sell grocery products to independent grocers situated within the said area.

4. The action was brought by plaintiffs on their own behalf and also allegedly on behalf of all other retail and wholesale grocers similarly situated within the City of Chicago, Illinois, and also within such part of the area adjacent thereto commonly known as the Metropolitan Area of Chicago as is within the territorial jurisdiction of this Court.

[*Parties Described*]

5. The following corporations are defendants to this cause:

(a) The Great Atlantic and Pacific Tea Company (New Jersey), herein referred to as "A&P (New Jersey)," a New Jersey corporation.

(b) Woman's Day, Inc., a New York corporation.

(c) General Foods Corporation (herein referred to as "General Foods"), a Delaware corporation.

(d) Hunt Foods, Inc. (herein referred to as "Hunt Foods"), a Delaware corporation.

(e) Morton Salt Company (herein referred to as "Morton"), an Illinois corporation.

6. A&P (New Jersey) is a wholly owned subsidiary of The Great Atlantic and Pacific Tea Company of America, a Maryland corporation (herein referred to as "A&P (Maryland)"). The retail stores of The Great Atlantic and Pacific Tea Company (herein referred to as "A&P stores") throughout the United States are operated by A&P (New Jersey), and two other wholly owned subsidiaries of A&P (Maryland), i.e., The Great Atlantic and Pacific Tea Company (Arizona) and The Great Atlantic and Pacific Tea Company (Nevada). The A&P stores in the Chicago Metropolitan Area are operated by A&P (New Jersey). Where distinction between these various companies is not material, they will be referred to herein, individually or collectively, simply as "A&P."

7. Woman's Day, Inc. is a wholly owned subsidiary of A&P (Maryland) and is engaged in the business of publishing the magazine *Woman's Day.*

8. General Foods, Hunt Foods and Morton are engaged in the manufacture and sale of food products. These three defendants are sometimes referred to collectively herein as the "Defendant Suppliers."

9. The named plaintiffs are 20 individuals or partnerships operating a total of 24 retail grocery stores of varying sizes located in the Chicago Metropolitan Area, and two wholesale grocers in the City of Chicago who sell to independent retailers.

10. None of plaintiff retailers purchase products from plaintiff wholesalers. Most of plaintiff retailers are members of cooperative buying organizations such as Independent Grocers Alliance, Certified Grocers of Illinois, Grocerland Cooperative, Inc., Progressive Food Stores, Inc., and Central Grocers Co-operative, Inc.

11. Defendant A&P (New Jersey) operates retail grocery stores, including those in the Chicago Metropolitan Area. A&P operates 4000 retail grocery stores throughout the United States. There are, approximately, 216 A&P stores in the Metropolitan Area of Chicago and 125 in the City of Chicago.

12. Woman's Day, Inc. is engaged in the business of publishing the magazine *Woman's Day,* which is distributed in A&P stores.

13. A&P (Maryland) owns all of the stock of Woman's Day, Inc. and several corporations which manufacture food products. These products are sold only in A&P stores.

14. General Foods manufactures and distributes through eleven separate divisions a number of nationally known food products such as Jello-O Desserts, Birds Eye Frozen Foods, Post Cereals, etc. These are all advertised under their brand names.

15. Hunt Foods manufactures and distributes tomato catsup, chili sauce, tomato sauce and canned fruits and vegetables under its own name or that of "Snider's" or "Pride of the Farm".

16. Morton manufactures and distributes a variety of salt products, primarily the Blue Package, Miniatures and Salters.

17. Plaintiff retailers, plaintiff wholesalers and A&P sell one or more of the products of each Defendant Supplier.

18. Each retail plaintiff is a competitive seller of an A&P store in the sense that both stores are seeking to gain the trade of at least one customer. Each plaintiff wholesaler sells grocery products to retail stores, at least one of which is seeking to gain the trade of at least one customer whose trade an A&P store is seeking to gain.

19. At all times pertinent to this suit the sales by General Foods Corporation to A&P in the Chicago Metropolitan Area of some of its products which were advertised in *Woman's Day* at some time or times during the period from March 1, 1954 to March 31, 1956, were sales in interstate commerce.

20. All sales by Morton pertaining to the issues of this case which have been made to customers in the Metropolitan Area of Chicago, including any made to A&P and wholesaler plaintiffs herein, have been in interstate commerce.

21. Hunt Foods manufactures products in states other than Illinois and ships the same across state lines to wholesale grocers in Illinois and other states outside of the state of manufacturing, including plaintiff wholesalers and other wholesalers in Chicago and the Metropolitan Area thereof. Products of Hunt Foods, Inc. are sold and distributed by it in interstate commerce directly to A&P.

22. Certain of the products sold by A&P in the Chicago Metropolitan Area including certain products of Defendant Suppliers were shipped into the Chicago Unit warehouse of A&P by the suppliers from points outside the State of Illinois and thence distributed to A&P stores in said area.

23. All sales to the consumer by retailer plaintiffs and by A&P stores referred to in the Appendix to the A&P Stipulation were consummated in the stores of the respective retailer plaintiffs and said A&P stores. All sales by the two wholesaler plaintiffs were made to customers located in the Chicago Metropolitan Area, including Michigan and Indiana.

24. *Woman's Day* is printed and bound by Woman's Day, Inc. outside the State of Illinois, and distribution is made by Woman's Day, Inc. to the various warehouses of A&P.

25. The magazine *Woman's Day* has been published monthly by Woman's Day, Inc. in substantially its present form since October, 1937, and has a monthly circulation of over 3,300,000 copies.

26. *Woman's Day* is of comparable content and quality with the leading women's magazines such as *Good Housekeeping, Ladies' Home Journal, Woman's Home Companion* and *McCall's*. It has for 14 years been among the 10 top national magazines in circulation and among the top 25 magazines in terms of advertising revenue, and has won national awards for its accomplishments in editorial, art and homemaking fields.

27. In reporting on the effectiveness of various magazines as advertising media, *Woman's Day* has frequently been compared by leading independent advertising agencies with the women's service magazines like *Ladies' Home Journal* and *Woman's Home Companion* and other magazines such as *Better Homes and Gardens, Saturday Evening Post* and *Cosmopolitan*.

28. *Woman's Day* is distributed monthly and is sold solely through A&P retail stores, except in Colorado where the magazine is sold on newsstands. The magazine is shipped by Woman's Day, Inc. to A&P warehouses and from there is delivered by A&P trucks to individual retail stores.

29. *Woman's Day* is usually displayed in A&P stores at the check-out counters.

30. A&P pays Woman's Day, Inc. five cents per copy for the magazine, and it is sold in A&P stores for seven cents per copy.

31. The Board of Directors of Woman's Day, Inc. has included representatives of A&P. However, none of the operating staff or employees of Woman's Day, Inc. is an officer, director or employee of any A&P affiliated company.

32. The business of publishing *Woman's Day* is and has been conducted by Woman's Day, Inc. as a legitimate publishing business enterprise. Except for normal parent-subsidiary relationships and the distribution and promotion of *Woman's Day* by A&P, Woman's Day, Inc. has been kept separate from the grocery retailing business of A&P.

[*Woman's Day Statistics*]

33. The annual cost of producing *Woman's Day* exceeds nine million dollars ($9,000,000.00). Less than one-fourth of this cost is recovered through the sale of copies. The remainder is received through the sale of advertising space. For example, in the fiscal year 1956, the gross revenue of Woman's Day, Inc. was $9,075,729.00 of which $2,170,850.00 or 24 per cent came from sales of the magazine and $6,904,879.00 or 76 per cent from advertising revenue. The advertising revenue is divided between "supplier" and "non-supplier" advertising. "Supplier" advertisers are manufacturers or producers—such as the defendant suppliers—who products are sold in A&P stores. "Non-supplier" advertisers are manufacturers or producers whose products are not sold in and are not of a type sold in A&P stores. In 1954, of the total gross advertising revenue, 73.3 per cent came from supplier advertisers, while 26.7 per cent came from non-supplier advertisers. In 1955, of the total gross advertising revenue, 65.5 per cent came from the supplier advertisers while 34.5 per cent came from the non-supplier advertisers.

34. No purchasing agent or any other person employed by A&P has ever discussed with A&P suppliers the latter's advertising in *Woman's Day* or has ever intimated that such advertising would be considered by A&P in determining the extent of its purchases of their products or the prices it would pay for them.

35. Advertising in *Woman's Day* by manufacturers of food products has no effect on the prices paid by A&P for products purchased by A&P from such advertisers for sale in A&P retail stores.

36. Whether food manufacturers do or do not advertise in *Woman's Day* is not considered by A&P in deciding whether or to what extent to purchase their products.

37. A&P employees engaged in purchasing and selling grocery products have no contact with *Woman's Day* advertising space salesmen.

38. The extent to which A&P promotes or merchandises the products of its suppliers is not affected by the fact that such suppliers do or do not advertise in *Woman's Day* or the extent of any such advertising.

[*Merchandising Help*]

39. At no time has any merchandising help been given to Morton by A&P by virtue of the fact that Morton advertises in *Woman's Day* or for any other reason, despite repeated efforts by personnel of Morton's advertising agency to obtain such merchandising help.

40. General Foods and Hunt Foods knew at all times that they could not get any merchandising support from A&P by reason of their advertising in *Woman's Day*.

[*Selling Woman's Day Advertising*]

41. In selling advertising, Woman's Day, Inc. has consistently stated to the advertiser that the purchase of advertising space in *Woman's Day* is completely independent of the buying or selling activities of any A&P affiliated company.

42. Each advertising rate card issued by Woman's Day, Inc. since the inception of the magazine has contained substantially the following sentence:

> "It is distinctly understood that the purchase of advertising space in Woman's Day has no relation, direct or indirect, to the buying and/or selling activities of any affiliated company."

43. *Woman's Day* has always sold its advertising space, including that sold to Defendant Suppliers, solely on its merits as advertising and on no other consideration.

44. Woman's Day, Inc. has consistently refused requests from grocery product advertisers that Woman's Day, Inc. supply them with promotional material or assist them in procuring store promotion and merchandising of their products.

45. Woman's Day, Inc. has extended no merchandising aid to Defendant Suppliers.

46. *Woman's Day* space salesmen have not approached anyone in the General Foods, Hunt Foods or Morton organizations outside of the personnel in the advertising department. The presentation of such representatives of *Woman's Day* is identical with that made in the course of their calls upon advertising agencies and does not include any suggestion or intimation that advertising in *Woman's Day* would in any way aid or abet the advertiser with respect to merchandising his products in A&P stores.

47. Morton at its own expense prepared so-called "shelf-talkers" to be used in connection with Morton's product displays in stores. These shelf-talkers stated that the product is "as advertised in .... magazine." Woman's Day, Inc., however, refused permission to Morton thus to report its advertising in *Woman's Day* and use such shelf-talkers in A & P stores. However, permission to use such shelf-talkers was granted by *Life, Good Housekeeping,* and the other grocery store magazines.

48. *Woman's Day* is of comparable content and quality with the leading women's magazines such as *Good Housekeeping, Ladies' Home Journal, Woman's Home Companion* and *McCall's.*

49. Woman's Day, Inc. is operated as a legitimate business enterprise. Its business is that of publishing a magazine to be sold on its own merits as a magazine.

50. *Woman's Day* is not a device for giving merchandising aid to A & P suppliers, nor has Woman's Day, Inc. or A & P given any merchandising aid to Defendant Suppliers by virtue of their advertising in *Woman's Day.*

51. A & P's purchasing power is not utilized to obtain advertising for *Woman's Day* from A & P suppliers.

52. The grocery retailing business of A & P and the magazine publishing business of Woman's Day, Inc. are conducted as separate business enterprises.

53. All advertising in *Woman's Day,* including the advertising of the products of Defendant Suppliers and of A & P, its subsidiaries and divisions, is placed through independent advertising agencies pursuant to contracts between Woman's Day, Inc. and the advertising agency handling the account of the advertiser.

[*Suppliers' Advertising Agencies*]

54. The advertising agencies that have been used by Defendant Suppliers are as follows:

General Foods	Young & Rubicam, Inc.
	Benton & Bowles, Inc.
	Foote, Cone & Belding.
Hunt Foods	Young & Rubicam, Inc.
	Batten, Barton, Durstine & Osborne, Inc.
Morton Salt	Needham, Louis & Brorby, Inc.
	J. Walter Thompson Co.
	Kenyon & Eckart
	Hill Blackett & Co.

55. The advertising by Defendant Suppliers in *Woman's Day* is only a small portion of the carefully planned national advertising programs for their various products which in general include other magazines, newspapers, billboards, radio, television and other media.

56. Advertising programs for the products of Defendant Suppliers are periodically prepared by their advertising agencies based upon studies undertaken by the latter, are considered by the appropriate company executives and, if approved by them, are executed by the agencies.

57. Defendant Suppliers have placed their advertising in *Woman's Day* upon the recommendations of advertising agencies representing them, which recommendations are often arrived at after careful consultation between the advertising agency and the advertiser. These recommendations were based by the agencies solely upon their evaluation of *Woman's Day* as an effective advertising medium for the sale of the products of their respective clients to the consumer public.

58. The criteria used by the advertising agencies and executives of Defendant Suppliers in determining whether or not *Woman's Day* is to be included in a media schedule are the same ones that apply to the selection of any other magazine or medium.

59. In arriving at their advertising media decisions, the advertisers and the agencies take into consideration studies and surveys made by themselves and by others. Various factors are considered, such as circulation, number of readers, type and location of readers, cost, characteristics of the magazine and its readers, and comparisons with other advertising media.

[*Testimonial*]

60. G. W. Carrington, Advertising Manager of Morton, testified as follows:

"The sole factors considered by Morton in determining the media in which to advertise are as follows, but not necessarily in the order of importance: (1) total circulation, (2) cost per thousand circulation, (3) gross cost, (4) characteristics of the readers (i.e., sex, age, education, social status, shopping functions, etc.), (5) geographical circulation and circulation in terms of population density (metropolitan areas v. rural areas), both as compared with (a) Morton sales, and (b) total grocery stores sales, and (6) quality of printing reproduction.

"Morton considers all store distributed magazines, including *Woman's Day,* only in the light of the above factors. Viewed in this light, Morton has considered this type of advertising to be very effective because, in terms of factor (4) above, it reaches (1) women only, for the most part, and (2) women who do the grocery shopping for their families. Consequently, Morton's conclusion has been that there is virtually no advertising waste in store magazines, such as probably occurs in the use of general publications.

"Morton has always considered the use of all the store magazines simply as an integral part of its entire advertising program."

[*Hunt's Advertisements*]

61. During the period from January 1, 1954, to March 31, 1956, Hunt Foods advertised Hunt's Tomato Sauce in each monthly issue of *Woman's Day* commencing with the October, 1954 issue through March, 1956 excepting therefrom the December, 1955 issue. It advertised Hunt's Tomato Catsup in the issues of September, October, November and December, 1955. It advertised Hunt's Tomato Paste in *Woman's Day* in the November and December, 1955 and January and February issues of 1956. It had no other advertisements in *Woman's Day* from January, 1953 to March 31, 1956,

inclusive. It did not advertise any of its other products whether Hunt brand, Snider's brand or other brand in *Woman's Day* at any time between January 1, 1953 and March 31, 1956. None of Hunt Foods' advertisements in *Woman's Day* mention its Snider's brand or Pride of the Farm brand or any brand other than Hunt's.

[*General Foods Advertisements*]

62. The advertisements of General Foods products in *Woman's Day* since January 1, 1954 are as follows:

General Foods Products	*Whether, and Issue When, Advertised*
Baker's Coconut Products	No
Baker's Chocolate, Cocoa Products	No
Gaines Dog Foods	No
Log Cabin Syrups, Syrup Mixes	Mar. 1954
Satina Laundry Products	No
Go Laundry Products	No
La France Laundry Products	No
Birds Eye Meat Pies	Feb. 1956
Birds Eye Fish Sticks	Mar. 1956
Birds Eye Frozen Foods, Vegetables, Fruits	Jan., Feb. 1954; Nov. 1955; Jan., Feb. 1956
Birds Eye Juices	No
Jack & Jill Cat Food	No
Minute-Man Instant Frosting	No
D-Zerta Gelatin	No
Jell-O Gelatin	July, Aug., Sept., Oct., Nov. 1955; Feb. and Mar., 1956
Jell-O Pudding and Pie Filling	Sept., Oct., Nov., Dec., 1954
Jell-O Instant Pudding	No
Jell-O Tapicoa Pudding	No
Minute Rice	Aug., 1955
Minute Mashed Potatoes	No
Minute Tapioca	No
Swans Down Cake Flour	Sept., Oct., Dec., 1955; Feb., 1956
Swans Down Cake Mixes	Feb., Apr., 1954; May, June, 1955
Calumet Baking Powder	No
Certo Pectins	No
Sure-Jell Pectins	No
Yuban Coffee	No
Kaffee Hag Coffee	No
Maxwell House Regular Coffee	No
Maxwell House Instant Coffee	Jan., Feb., March, 1954
Sanka Coffee	No
Sanka Instant Coffee	No
Kool-Aid Soft Drink Powder	No
Kool Shake Mix	No
Good Seasons Dressing Mix	No
Post Cornfetti	No
Post Toasties Corn Flakes	No
Post Bran Flakes	No
Post Raisin Bran	No
Post Wheat Meal	No
Post Grape-Nuts	No
Post Grape-Nuts Flakes	July, Aug., Oct., Nov. 1954
Post Sugar Crisp	June, Sept., 1954
Post Sugar Krinkles	No
Post Tens	May, Sept. 1954
Postum	Jan., Feb., Mar., 1955
Instant Postum	Oct., Nov., 1954

63. Morton did not advertise any of its products in *Woman's Day* from 1937 through 1940 or from 1943 through 1950.

64. The inclusion or absence of advertising in *Woman's Day* of products of Defendant Suppliers handled by A & P has had no effect on the prices paid by A & P for such products.

65. Total advertising expenditures and the amount spent for advertising in *Woman's Day* by each of Defendant Suppliers from 1953 through 1955 are shown in the following table:

Supplier	*Year*	*Total Advertising*	*"Woman's Day" Advertising*
Morton	1953	$ 1,766,836	$ 61,500
	1954	1,943,918	75 500
	1955	2,342,619	52,100
Hunt Foods	1953	3,415,000*	....
	1954	2,531,000*	31,500
	1955	5,741,000*	229,963
General Foods	1954	62,021,000*	376,281
	1955	62,015,000*	292,945
	1956	75,180,000*	199,060

* Fiscal years; remaining figures are for calendar years.

66. Various A & P divisions or subsidiaries advertise in *Woman's Day* the food products which they manufacture. These advertisements are placed in *Woman's Day* through the independent advertising agency of Paris & Peart, Inc. in the same manner and at the same rates charged all other advertisers.

[*Advertising of Non-Suppliers*]

67. Over half of the advertisers in *Woman's Day* are non-suppliers, i.e., manufacturers whose products are not sold in A & P stores. In 1954, 209 (50.7 per cent) of a total of 412 advertisers were non-suppliers. In 1955, the percentage of non-suppliers increased to 52.4 per cent. Among these non-

supplier advertisers are such companies as Frigidaire Division of General Motors, General Electric Co., International Harvester Co., Philco Corporation, Corning Glass Works, Western Electric Company, RKO Radio Pictures, Inc. and Inland Steel Container Co.

68. The non-suppliers provide a substantial portion of *Woman's Day* advertising revenue. In 1954, advertising revenue from non-suppliers amounted to $2,508,822 out of total advertising revenue of $9,413,843. In 1955, non-suppliers paid $3,205,488 out of the total advertising revenue of $9,279,181. In that same year, $2,170,850 was received by Woman's Day, Inc. from the sale of copies of *Woman's Day* to A & P and to distributors in Colorado.

69. *Woman's Day* advertising rates are comparable to and competitive with those charged by magazines of comparable national circulation.

70. *Woman's Day* advertising rates are based upon a guarantee of a specific net paid advertising circulation during the calendar year. Certifications of circulation are made periodically by the Audit Bureau of Circulations, of which Woman's Day, Inc. is a member.

71. As with all other advertisers in *Woman's Day,* payments for the advertisements of Defendant Suppliers therein are not made to Woman's Day, Inc. or to A & P but, rather, are made by the respective advertising agencies of Defendant Suppliers direct to Woman's Day, Inc. at the full published advertising rate applicable to all advertisers less the usual 15 per cent agency commission. The advertising agencies collect from the advertiser the full charge for the space purchased.

72. During the period pertinent to this case, neither Woman's Day, Inc. nor A & P has ever received any money or other consideration from any Defendant Supplier, except for certain advertising allowances to A & P offered simultaneously to all retail grocers in specified areas.

73. The A & P subsidiaries and divisions pay the full charge for all of their advertising in *Woman's Day*[,] and Woman's Day, Inc. has never given them any refunds, rebates, credits, gratuities or allowances with the exception of the circulation billing adjustments given to all advertisers when the circulation guarantee is not met.

74. The dividends paid by Woman's Day, Inc. to A & P (Maryland), averaging $39,736 per year since 1937, are negligible in comparison with A & P's total dollar sales which have been in excess of $4,000,000,000 per year since 1953.

75. There is no evidence that the payments by any or all of Defendant Suppliers for advertising in *Woman's Day* enabled A & P (New Jersey) to sell its products at prices lower than those charged by plaintiffs for identical or comparable products.

76. *Women's Day* is a legitimate advertising medium and is not, either in intent or effect, a device to give hidden price discriminations to a preferred buyer.

77. The payments by Defendant Suppliers for advertising in *Woman's Day* are made to their advertising agencies and are not made to A & P or to Woman's Day, Inc.

78. Defendant Suppliers have received bona fide advertising value, comparable in degree to that received from other leading national magazines, in return for their payments for advertising in *Woman's Day.*

79. Defendant Suppliers have received nothing but advertising benefit in return for their payments for advertising in *Woman's Day.*

80. *Woman's Day* is not made possible by the advertisements of any Defendant Supplier; nor do Defendant Suppliers furnish, or contribute to the furnishing of, *Woman's Day* to A & P.

81. *Woman's Day* is not connected with the resale by A & P of any specific product or products of any Defendant Supplier.

82. Inasmuch as *Woman's Day* is usually sold at the check-out counters it is customarily read outside the store.

83. None of the advertisements of Defendant Suppliers appearing in *Woman's Day* contain any reference to A & P (or to any other store) or the price at which the products may be purchased.

84. Advertising that is designed and intended to bring people into a particular grocery store customarily features the price of the product and the name or location of the store, and may be termed grocery store advertising. National brand grocery product advertising, on the other hand, advertises only the product, usually without mention of price or any particular store and does not suggest where the demand thereby

created may be satisfied. The advertisements of Defendant Suppliers in *Woman's Day* are national brand grocery product, not grocery store, advertising.

85. The average American family shops at 3.7 stores per month, and two-thirds of all families shop in both chain and independent stores, averaging 4-½ stores per month.

86. Plaintiffs have admitted that each day chain stores and independent stores within a wide radius "are actually competing for the trade of the same customer who interchanges his patronage."

87. The experience of G. F. Heublein & Bro. as stated in a letter to Woman's Day, Inc. on December 3, 1943, was that its advertisements of A-1 Sauce in *Woman's Day* substantially increased the sales of that product in stores competing with A&P, as well as in A&P stores.

88. The American housewife shops at the particular grocery store where she can get the brands and the products that she wants at prices that represent the best value to her.

89. Plaintiffs have admitted that *Woman's Day* is read by "large numbers of persons in addition to purchasers." It cannot be assumed, therefore, that all *Woman's Day* readers shop at A&P.

90. Of the readers of *Woman's Day* 16 per cent also read *Better Living,* 10 per cent also read *Everywoman's* and 32 per cent read *Family Circle.*

91. Inasmuch as Defendant Suppliers advertised frequently in other magazines, including other store magazines, as well as in other advertising media, *Woman's Day* readers are exposed to the same advertising influence from other media, including other magazines, as from *Woman's Day.*

92. Morton has customarily placed four full-color advertisements per year in every magazine used, and this policy has been followed in placing advertising in *Woman's Day* along with the other store magazines.

93. The products advertised by Morton in *Woman's Day* are the Blue Package salt, Miniatures and Salters.

94. The lack of relationship between unit sales of the Blue Package salt, which accounts for most of Morton's sales to A&P, and Morton's expenditures for *Woman's Day* advertising is shown by the following table:

	Total Morton Sales to all Buyers	*Total Morton Sales to A&P*	*% of A&P Sales to Total Sales*	*Total Morton Expenditures in "Woman's Day"*
1955....	7,327,672	756,688	10.3	$52,100
1954....	7,526,283	725,234	09.6	75,500
1953....	7,308,851	708,277	09.7	61,500
1952....	6,861,703	635,942	09.3	56,470
1951....	6,815,920	629,556	09.2	38,910
1950....	7,424,172	681,670	09.2	......
1949....	7,259,685	652,219	09.0	......
1948....	6,783,408	619,383	09.1	......
1947....	6,344,994	554,583	08.7	......
1946....	5,433,468	452,040	08.3	......
1945....	4,503,300	423,515	09.4	......
1944....	3,727,858	380,532	10.2	......
1943....	3,347,914	382,461	11.4	.....
1942....	2,765,282	389,132	14.1	14,065
1941....	2,449,521	333,111	13.6	10,051
1940....	2,302,277	312,348	13.6	......
1939....	2,270,094	298,101	13.1	......

95. Hunt Foods' sales to A&P did not increase as much percentagewise in 1955, the year in which it advertised substantially in *Woman's Day,* as did Hunt Foods' sales to all customers.

(a) In its fiscal 1954 Hunt Foods spent $31,500 in advertising in *Woman's Day;* in 1955 it spent $229,963 in advertising in *Woman's Day.*

(b) In the same two years Hunt Foods' sales to A&P, as reflected by its charges to accounts receivable, were $3,162,000 in 1954 and $3,972,000 in 1955, an increase of only 25.6%, whereas its total sales to all purchasers increased from $66,737,169 in 1954 to $85,558,310 in 1955, an increase of more than 28%.

96. A comparison of the tables showing sales of General Foods products to A&P and the time of advertising of the products in *Woman's Day* shows no pattern of relationship between the advertising and the sales to A&P.

97. A&P private brand products are sold in A&P stores in competition with some products of Hunt Foods and General Foods advertised in *Woman's Day.* Examples are as follows:

General Foods Products	*A&P Brand*
Birds Eye Chicken, Vegetables, etc. (frozen foods)	A&P
Instant Maxwell House Coffee	A&P Instant Coffee
Jell-O Gelatin	Sparkle
Jell-O Puddings & Pie Fillings	Anne Page
Log Cabin Syrup..........	Anne Page

General Foods Products	*A&P Brand*
Post Grape-Nuts Flakes...	Sunnyfield Cereals
Post Sugar Crisp..........	
Post-Tens	
Swans Down Cake Flour...	Sunnyfield Cake Flour
Hunt Foods Products	
Catsup	Anne Page
Chili Sauce	Anne Page
Tomato Sauce	A&P
Canned Fruits and Vegetables	Sultana and Iona

98. The General Foods advertisements appearing in *Woman's Day* feature the branded products sold by the various separately named divisions of General Foods, not General Foods itself.

99. The advertisements of Morton's, General Foods' and Hunt Foods' products appearing in *Woman's Day* are virtually identical with advertisements appearing in other magazines for the same products.

100. The opinion of Morton's Advertising Agency, as shown by the testimony of Otto R. Stadelman, Senior Vice-President and Media Director of Needham, Louis & Brorby, Inc., was that Morton's advertisements in *Woman's Day* did not increase the sales of its products in A&P except insofar as the over-all consumer demand for such products was increased in all grocery stores:

> "The reasons for the Agency's recommendation of store magazines for Morton in particular were as follows: (1) Because of the nature of the product, it was felt that store magazines hit a mass customer group which was not duplicated substantially by any other media; and (2) because virtually the only buyers of the magazines are women who engage in the shopping activities for the family, there is no waste advertising usage.
>
> "The Agency has never considered that the audience of store magazines is confined to the persons who shop only at the stores which distribute a particular magazine, but rather that their audience consists of persons who also shop at other grocery stores. The significance, then, of the fact that the store magazines are sold only within certain grocery stores is that their readers are thus confined to persons who buy groceries, without regard to where they may shop for them.
>
> "The Agency's recommendation of store magazines was not based on the thought that Morton sales in particular stores would be increased because of the sale of a store magazine in those stores. On the contrary, the thinking of the Agency was that the store magazines did not increase the traffic in the store handling them, nor the sales in those particular stores of the products advertised in the magazines, except (as to the latter) insofar as the overall consumer demand for such products was increased in all grocery stores, as it would be, for example, by advertisements placed in Life and other magazines of general circulation."

101. The opinion of Morton's Advertising Department, as shown by the testimony of G. W. Carrington, Morton's Advertising Manager, was that its *Woman's Day* advertisements were influential in all stores, not just in A&P.

102. Morton, to promote purchases of its products by independent grocery stores as well as by chain stores, intentionally brought to their attention (through trade journal advertising and its salesmen's "portfolios") the fact that among the advertising media used by Morton was *Woman's Day.*

103. General Foods brought their advertising in *Woman's Day* to the attention of the trade generally through their salesmen's kits.

104. The purpose and effect of advertising in *Woman's Day* by Defendant Suppliers is to help sell the particular advertised product wherever it can be bought and not to favor one retailer over the over. This advertising was primarily designed to benefit each of the Defendant Suppliers with any benefits accruing to A&P being merely incidental.

105. To the extent that the *Woman's Day* advertisements of Defendant Suppliers are beneficial, i. e., result in increased sales of the advertised products, such benefit is shared by all grocers who handle the advertised products.

106. In view of the preceding finding, the *Woman's Day* advertisements of Defendant Suppliers result in no competitive advantage to A&P, and the benefit derived by A&P from such advertisements—in terms of any increased sales of the Defendant Suppliers' products—is not significant compared with the same benefit derived by Defendant Suppliers.

107. A comparison of A&P total annual sales and *Woman's Day* circulation, as shown by the graphs stipulated by the parties, shows that there is no relationship between the two. *Woman's Day* circulation increased rapidly from 1948 to 1952 and decreased

from 1952 to 1955. However, A&P sales have increased steadily from 1948 to 1955.

108. The daily A&P sales in 65 A&P stores in the Chicago Metropolitan Area follow a regular weekly pattern of being low on Monday, Tuesday and Wednesday, increasing on Thursday and rising to a peak on Friday and Saturday. This pattern is not affected by the placing of *Woman's Day* on sale in those stores.

[*Shopping Survey*]

109. A&P and Woman's Day, Inc. caused to be made a Shopping Survey among 4,602 shoppers in 22 A&P stores located near each of plaintiff's stores.

(a) The persons who conducted the Shopping Survey and prepared the Survey Report are recognized experts in the field of consumer, customer and shopping surveys.

(b) The data gathered from the respondents is accurately reported in the Survey Report dated November 5, 1956.

(c) The sample design used in said Survey, the number of interviews conducted and the manner in which the interviews were conducted, were all in accordance with generally accepted standards of objective procedure in the field of opinion surveys.

(d) The form of the questions used and the manner of conducting the interviews were in accordance with generally accepted standards of objective procedure in the field of opinion surveys.

(e) The sample design utilized in the Survey was in accordance wtih generally accepted standards of statistical procedure for this type of survey.

(f) The entire Shopping Survey was conducted in accordance with prearranged operational schedules prepared by experts in the respective fields of statistical sampling, questionnaire drafting and field interviewing, and was designed by use of generally accepted scientific methods for opinion research and analysis.

(g) The sample design and all interviewer arrangements were prepared independently of A&P and its attorneys.

(h) Neither the interviewers nor the field supervisors engaged in the Shopping Survey were aware of the litigation, the purpose of the survey or the use to be made of the results of the survey.

(i) The A&P store managers did not know in advance on what day or at what hours the interviewing would be conducted in their stores, and the interviewers had no contact with A&P personnel other than to present their identification cards to the store managers.

(j) The testimony of the planners, supervisors and workers as to the planning, conducting and reporting of the Shopping Survey was stipulated by the parties.

[*Survey Results*]

110. The results of the Shopping Survey are as follows:

(a) Out of the 4,602 shoppers interviewed in the Shopping Survey, only 16 (three tenths of one per cent) gave *Woman's Day* as one of the reasons for shopping at A&P, and only 10 (two tenths of one per cent) gave "A&P magazines" as a reason for shopping at A&P.

(b) At least three of the ten persons who listed "A&P magazines" were not referring to *Woman's Day* since, in response to a later question, these three said they never purchased *Woman's Day*. Thus, only 23 shoppers out of 4,602 (less than five-tenths of one per cent) gave *Woman's Day* or "A&P magazines" as one reason for shopping at A&P.

(c) Later in the questioning, the persons who said that they bought *Woman's Day* were asked whether they would do less shopping at A&P if the magazine were available at all grocery stores. Only 11 shoppers (two-tenths of one per cent) said they would shop less at A&P and none said, in response to the next question, that they would shop more at any of the plaintiffs' stores.

(d) A series of probing questions were used to elicit all reasons for shopping at A&P that each shopper might think worthy of mention. The 9,621 reasons given by the 4,602 shoppers are collated and tabulated below:

Reasons	*Number*	*Per Cent*
Save money at A&P; like bargains; more reasonable than other stores	2708	28.1
Like A&P brands of specific groceries (meats, vegetables, produce, eggs, dairy); good food; like food	1397	14.5
Help courteous; pleasant; good service	1067	11.1

Reasons	*Number*	*Per Cent*
In neighborhood; close to work and/or home; saves time	913	9.5
Have anything you want; can do all shopping in one place	759	7.9
Like A&P products in general (specifics non-grocery items or could include non-grocery items)	673	7.0
Convenient (not specified whether to work and/or home or quick and easy check-out)	597	6.2
Self-service: quick and easy to find things and check out	434	4.5
Food fresher	374	3.9
Habit; used to shopping there	242	2.5
Neat clean store; shelves well-stocked	160	1.7
Like everything about the store	152	1.6
Special services: (parking lot, cash checks, evening hours)	91	.9
Have friends there; know help	28	.3
Like *Woman's Day*	16	.2
Like A&P magazines (do not say which)	10	.1

[*Conclusions from Survey*]

111. Among the reasons people shop at a particular grocery store are: prices; convenience of location; friendliness and helpfulness of personnel; quality of merchandise; variety of brands carried; extent of stock; quality of fresh meats, vegetables, fruits; arrangement of store; cleanliness; quickness of checkouts; convenient parking; air-conditioning; specials, premiums or trading stamps; delivery service; convenience of hours—if open some evenings; availability of credit; adjustment policy; policy on cashing checks.

112. S. W. Shea, who has been with A&P for 34 years, whose duties have required him to keep informed on sales volumes, trends and causes of increases or decreases in sales, and who is now General Sales Director of A&P, testified as follows:

> "It is his considered opinion that the availability of *Woman's Day* in A&P retail stores does not increase the traffic in such stores."

113. The testimony of Harley V. McNamara, President of National Tea Co., plaintiffs' only witness, is stipulated by the parties. Mr. McNamara states that in 1950, when National Tea did not distribute a store magazine, "it was his belief that food store magazines * * * helped develop customer good will, and might develop store traffic and sales for the merchandise advertised therein." However, after six years' experience with a store magazine (*Everywoman's*), Mr. McNamara concluded only that the magazine had aided "in maintaining and developing customer good will," saying nothing about the magazine as a sales or traffic builder.

114. In the Price Survey (A&P Exhibit 26), prices were checked on 99 different items in all plaintiffs' stores and, to make up a pair with each plaintiff's store, in an A&P store near each plaintiff. All but 5 of the items were those selected by the Bureau of Labor Statistics of the U. S. Department of Labor for use in its Consumer Price Index. Together, the items make up a typical "market basket."

115. In comparing prices between A&P and plaintiffs, the Price Survey established that:

(a) For every one of the twenty-four pairs of stores included in the survey, the total "market basket" was lower priced in the A&P store than in plaintiffs' store.

(b) The total "market basket" was 4.2 per cent higher in plaintiffs' stores than in A&P stores.

(c) On Friday and Saturday the price advantage of A&P stores over plaintiffs' stores on the total "market basket" was approximately double that which it was on other days. There was little variation between morning and afternoon or between each of the three weeks.

116. The Composites (A&P Exhibits 1 to 24) accurately reflect the following:

(a) A map of the locality in which each plaintiff retailer is situated, the area which the plaintiff marked on the map as approximating the area from which he believed he drew a majority of his customers, and the location of some of his competitors;

(b) A photograph of each plaintiff retailer, certain A&P stores and stores of independent and chain supermarkets in the vicinity of plaintiff's store; and

(c) The location of each of said stores on said map.

117. The Composites establish as to the area of each plaintiff's retail store one or more of the following factors:

(a) The nearest A&P is so far from plaintiff's store that competition between them is negligible.

(b) There are a number of chain stores or independent supermarkets, larger and more attractive than plaintiff, either close to the A&P or nearer to the plaintiff than the A&P.

(c) Price advantages, location, size, type of service, hours, parking facilities or variety of products make the A&P stores and other supermarkets more attractive to shoppers than plaintiff's store.

118. In addition to the grocery stores shown on the Composites, there are numerous other grocery stores near each plaintiff and each A&P in the same locality.

119. The Shopping Survey (A&P Ex. 25) was fairly and expertly planned and conducted.

120. If any plaintiff has lost or failed to gain any customers (and there is no evidence thereof), there are many stores other than A&P and many considerations other than *Woman's Day* which more logically are the cause of this loss or failure to gain.

121. If *Woman's Day* were no longer available at A&P, it would not necessarily follow that, even if some persons did stop patronizing A&P, they would choose plaintiffs' stores in preference to the many supermarkets and other grocery stores in the locality of the A&P.

122. The distribution of *Woman's Day* in A&P stores has no immediate impact on the sales of those stores.

123. *Woman's Day* cannot be isolated as a factor causing persons to shop at A&P stores.

[*A&P Benefits from Woman's Day*]

124. The only benefits received by A&P from *Woman's Day* (other than increased consumer demand shared by A&P and other stores, resulting from product advertising in the magazine) are the following:

(a) Dividends paid by Woman's Day, Inc. to A&P (Maryland) averaging $39,736 per year since 1937.

(b) Mention of the "A&P" name or the fact that *Woman's Day* can be purchased only at A&P stores in advertising and promotional activities involving *Woman's Day*.

(c) Gross profit of 2¢ per issue on the sale of the magazine by A&P stores.

125. The entity which receives dividends from Woman's Day, Inc. is A&P (Maryland), the parent company, and not the several A&P companies which operate the retail stores and do the buying and advertising therefor. The latter have never received any dividends of any kind from Woman's Day, Inc.

126. The dividends paid by Woman's Day, Inc. are negligible in comparison with A&P net profit, before and after taxes.

[*Profits of Woman's Day, Inc.*]

127. In 1953, the percentage of the net profit of Woman's Day, Inc. to that of A&P was five-tenths of one per cent; in 1954, it was seven-tenths of one per cent. In 1955, Woman's Day, Inc. suffered a substantial loss.

128. The amounts spent on advertising by A&P are shown annually in the following table:

Year	Amount
1948	$13,987,000
1949	17,298,000
1950	17,024,000
1951	18,100,000
1952	19,946,000
1953	20,620,000
1954	22,426,000
1955	23,697,000

129. The amount spent by Woman's Day, Inc. on newspaper, radio, and TV advertising which may result in advertising benefit to A&P is quite small:

	Newspaper Space & Preparation	Radio and TV Time
1952	$46,235	none
1953	32,192	none
1954	31,447	none
1955	4,665	$25,544

In 1953 and 1954, minor amounts, not segregated on A&P's books, were spent on preparing suggestions for radio and TV spot material. The actual programming was done and paid for by A&P.

130. In those instances where the advertising by Woman's Day, Inc. was directed to the public (promotional signs, TV commercials, radio and TV spots in the summer of 1950, ads in *New Yorker*) the A&P advertising is limited to mentioning the "A&P" name or a statement that the magazine can be purchased only at A&P stores.

131. A substantial portion of Woman's Day, Inc. magazine advertising expenditures is for obtaining non-supplier advertising and for trade journals advertising directed at the advertiser and the agency, not the consumer. Examples are the motion picture, "A Geography of Retailing" and advertisements appearing in *National Advertising Journal, Advertising and Selling, Printers Ink, Tide, Sales Management, Media*

Digest, P. I. B., Advertising Age, Electrical Merchandising, Retailing Daily, Woman's Wear Daily, Sales Management, Boot and Shoe Recorder, and other similar magazines.

132. A&P has, at its own cost, engaged in substantial promotion of *Woman's Day*. With the exception of commercials on the TV program "Today" and TV spots in six cities in the summer of 1950, A&P has paid for all radio and TV advertising of *Woman's Day*. A&P has paid the cost of all inserts in store newspaper advertisements featuring *Woman's Day*, except those appearing in the summer months of 1952, 1953 and 1954.

133. The net benefit which A&P receives from promotional activities of Woman's Day, Inc. is not significant in view of the relatively small amounts spent by Woman's Day, Inc. for such promotion, the limited advertising benefit to A&P from such promotion and the necessity of offsetting even these benefits by the expenses incurred by A&P itself in promoting *Woman's Day*.

134. No payment for advertising in *Woman's Day* by any A&P supplier enables A&P to shift to such supplier a substantial portion of the advertising costs of A&P.

135. Whatever benefit is derived by A&P from *Woman's Day* and the advertisements therein is incidental in comparison with the benefit derived by a supplier of A&P from its payments for advertising in *Woman's Day*.

[*Similar Magazines Analyzed*]

136. There are five major store magazines other than *Woman's Day* that are or were obtainable only at retail grocery stores. However, only three of these are currently being published. Pertinent facts concerning these five magazines are as follows:

Family Circle: This magazine started publication in September 1932. Its retail price is now 7¢, having been raised from 5¢ in April 1956. It is available to and obtainable in various stores (other than plaintiffs' stores) throughout the United States, including the stores of Albers Super Markets, Inc., American Stores Company, H. C. Bohack Company, Inc., H. E. Butt Grocery Company, Dixie-Home Stores, First National Stores, Inc., The Grand Union Company, H. G. Hill Stores, Inc., Jewel Tea Co., Inc., The Kroger Company, Red Owl Stores, Inc., The Safeway Stores, Inc., J. Weingarten, Inc., Winn & Lovett Grocery Company, Fur's Inc., Hinke & Pillot, Inc., Krambo Food Stores, Inc., Big Chain Stores, Inc., Child's Food Stores, Inc. and Food Fair Super Markets.

Western Family: This magazine started publication in June 1941. It is given away free in stores served by various outlets in the western part of the United States.

Everywoman's: This magazine started publication in January 1951. Its retail price is now 7¢, having been raised from 5¢. It is available to and obtainable at various independent grocery stores and chains throughout the United States. In the Chicago Metropolitan Area it is only available to and obtainable at the stores of the National Tea Company.

American Family: This magazine started publication in January 1948 and suspended publication in June 1954. Its resale price was 7¢, having been raised from 5¢. It was available at stores of 17 independent store groups, including the Independent Grocers' Alliance, Progressive Food Stores, Inc., Certified Grocers of Illinois, Inc., Central Grocers Cooperative, Cardinal Food Stores, Royal Blue Stores, Grocerland Cooperative, Inc., Spot-Lite Stores, and certain of the plaintiff's stores who were members of such groups. This magazine was also available to retail stores purchasing from a number of independent wholesalers throughout the United States, including Holleb & Co., Monarch Finer Goods (a Division of Consolidated Foods Corporation), and others in the Chicago Metropolitan Area.

Better Living: This magazine started publication in May 1951 and suspended publication in May 1956. Its resale price was 7¢, having been raised from 5¢. It was available in various independent grocery stores throughout the United States. In Chicago it was available to and obtainable at independent grocery stores who were members of the Super Market Institute, Certified Grocers of Illinois, Inc., Oh Boy Stores, various independent stores, and certain of the plaintiffs' stores as indicated in the Summary of Store Facts.

137. In the Chicago Metropolitan Area, the following purchasing cooperatives which independent retailers may join offered to its customers either *American Family* or *Better Living* at some times during the last two years:

Certified Grocers of Illinois, Inc. (Certified)

Central Grocers Cooperative, Inc. (Centrella)

Grocerland Cooperative, Inc. (Grocerland)

Independent Grocers' Alliance (IGA)

Progressive Food Stores, Inc. (Progressive)

138. *American Family* was available to retail stores purchasing from a number of independent wholesalers throughout the United States, including Holleb & Co., Monarch Finer Foods and others in the Chicago Metropolitan Area, and *Better Living* was available to members of the Super Market Institute, Oh Boy Stores and various independent stores.

139. Of the twenty plaintiff retailers, seventeen (operating 22 of the plaintiffs' 25 stores) purchased their groceries from one of these purchasing cooperatives or independent wholesalers who distributed *American Family* or *Better Living*:

Certified:	Dominick's Finer Foods, Inc., Cicero, Lake Food Mart, Stevens Certified Super Mart (2 stores), and Save-Way Food Mart
Centrella:	Berg's Food Store, Franklin Grocery and Market, Fifth Avenue Food Mart, and Carl A. Schletz, Inc.
Grocerland:	Fruitland Foods
IGA:	Norwood Park IGA, Wagner Grocery and Market, Schuetz' IGA Food Store (2 stores)
Progressive:	Goldstein's Progressive Foods, Harvey's Super Mart, Clover Food Mart
Oh Boy:	Leo's Food Mart
Holleb and Monarch:	Alliance Meat Shop (3 stores) and Supreme Meat Market

140. Not all of plaintiff retailers took advantage of the store magazines available to them. Thus, all four Certified stores handled *Better Living* or *American Family*. Two of the Centrella customers carried *American Family* and two did not. One of these, Muir (Fifth Avenue Food Mart), carried the magazine for only three months. Of the three IGA customers, only two distributed the available magazine and one of these (Schuetz) did not carry the magazine during all the time it was available. None of the plaintiffs who were customers of Progressive or Grocerland distributed *American Family*. Plaintiff Bernard (Leo's Food Mart), who bought from Oh Boy, occasionally handled *Better Living*, but Markus (Alliance Meat Shops and Supreme Meat Market), who bought from Holleb and Monarch, never sold a store magazine in any of his four stores, one of which is now closed.

141. Defendant Suppliers have each advertised certain of their products in store magazines other than *Woman's Day*, including those which were available to and distributed by certain of the plaintiff retailers.

142. A store magazine other than *Woman's Day* was available to a substantial number of plaintiff retailers during the entire two year period immediately preceding the filing of the Complaint herein.

143. Defendant Suppliers have advertised their products in store magazines other than *Woman's Day*, one of which was available to a substantial number of plaintiff retailers during the entire two year period immediately preceding the filing of the Complaint herein.

144. During the two year period immediately preceding the filing of the Complaint herein, none of the plaintiffs, individually or collectively, published and distributed, directly or indirectly, a store magazine. Thus, no plaintiff was able to furnish to any of the Defendant Suppliers advertising space in a magazine published and distributed by it and for which each of the Defendant Suppliers would make payment.

145. At all times pertinent to the Complaint, A&P purchased directly from Defendant Suppliers some of their products and is continuing so to do.

146. Hunt Foods has made no sales to any plaintiff retailer at any time during the period involved in the Complaint. No employee of Hunt Foods called on any plaintiff retailer during the period involved. Hunt Foods has not at any time exercised any control over the price at which plaintiff retailers or any one else have purchased or sold any Hunt Foods product.

147. Hunt Foods sells more than 15 different products, some under the brand name of "Hunt" and some under other brand names—"Snider's" and "Pride of the Farm." Only three products of Hunt Foods were advertised in *Woman's Day* at any time and only one product prior to September, 1955. The record is silent as to whether any product sold by Hunt Foods

to plaintiff wholesalers was advertised in *Woman's Day*, or as to whether any product of Hunt Foods sold by any plaintiff retailer was advertised in *Woman's Day.*

148. General Foods merchandises more than 50 different products, only 15 of which were advertised in *Woman's Day* at any time during the period involved in this suit and none was advertised regularly therein.

149. There is no evidence that either of the two plaintiff wholesalers sold any product of General Foods to any retailer who was competing with A&P in its resale at or near any time that it was advertised in *Woman's Day.*

150. The record is silent as to whether any product of General Foods sold by any plaintiff retailer was advertised in *Woman's Day* (except that Instant Maxwell House Coffee was advertised in the March, 1954 issue).

151. Hunt Foods made sales at all times pertinent to the Complaint and are still making sales to plaintiff wholesalers and other wholesalers and cooperative purchasing organizations situated within the Chicago Metropolitan Area, who in turn sold such products to some retailers.

152. All of plaintiff retailers at some time or times since March 1, 1954, and some of plaintiff retailers at all times since March 1, 1954, have handled and sold to retail consumers one or more products of Hunt Foods.

153. General Foods has made at all times pertinent to the Complaint, and still is making sales of various of its products to plaintiff wholesalers and to other wholesalers and cooperative purchasing organizations situated within the Chicago Metropolitan Area, which in turn have sold and sell such products to retailers.

154. Plaintiff retailers, Leo Bernard, Bernard Bruski, John E. Markus, Stanley Piekarz, Anthony Racz, Robert M. Wagner, and Elizabeth Wagner, d/b/a Wagner Grocery and Market, Atlas Market Company, a corporation, and Carl A. Schletz, Inc., a corporation, have made no purchases of any product from General Foods at any time since January 1, 1954. The only products that have been sold by General Foods to any plaintiff retailer since January 1, 1954, are some products of Maxwell House Division.

155. Plaintiffs Goldstein and Muir Bros. made no purchases of Maxwell House products for more than one and a half years after the appearance of the last issue of *Woman's Day* containing a Maxwell House advertisement.

156. Except as to Maxwell House products purchased from General Foods by some plaintiff retailers, the record is silent as to which, if any, products of General Foods advertised in *Woman's Day* were handled or sold by any plaintiff retailer.

157. General Foods paid for the advertisement of Instant Maxwell House Coffee which appeared in the March, 1954 issue of *Woman's Day* on February 28, 1954, prior to the period concerning which these suits are brought, and no Maxwell House advertisement has appeared in *Woman's Day* since that issue.

158. Each plaintiff retailer at some time since March 1, 1954, has handled and sold, and is presently handling and selling, to retailer consumers one or more products of General Foods.

159. General Foods does not exercise, and has not exercised at any time, any control of any kind over the resale price by anyone of any of its products.

160. Morton has sold and is selling its products to plaintiff wholesalers. All plaintiff retailers handled and sold to retail consumers products of Morton and have done so at all times pertinent to the Complaint. However, Morton at no time pertinent hereto sold any of its products to said retailers.

161. Morton neither possessed nor exercised any control whatever over the price at which plaintiff retailers either purchased or sold Morton products, nor did Morton possess or exercise any control whatever over the retailership between cooperatives, jobbers or wholesalers, on the one hand, and retailers on the other hand.

162. Save only for possible instances of meeting competitive situations created by other salt producers, Morton has granted no differentials in price, discounts, rebates, refunds, advertising allowances, cooperative advertising deals or allowances, free goods or any other consideration by reason of the purchases of its products which were not offered and made available to all customers or potential customers of Morton within a

given marketing area, including A&P and plaintiffs herein.

163. At times the prices of some of General Foods' grocery store products were based on volume of purchase. Such prices applied uniformly to A&P and all other purchasers from General Foods within a marketing area. In addition, General Foods has from time to time, for limited periods, offered free goods, premiums or allowances, based upon purchase of stated units of a particular product by retailers. Such offers were available to all, including A&P, on the same or proportionally equal terms within a marketing area.

164. All rebates, refunds, free goods, allowances and discounts to the purchasers of Hunt Foods' products were made available on the same or proportionately equal terms to all retailers and wholesalers, including A&P, and the prices charged by Hunt Foods were on the same basis to all.

165. The prices paid by A&P for each of the products purchased from each Defendant Supplier are the prices published by the respective Defendant Suppliers on printed price lists published to the trade in general, including where applicable any quantity or other price consideration likewise published to the trade in general.

166. With the exception of products of the Maxwell House Division of General Foods, no plaintiff retailer purchased products of Defendant Suppliers directly from Defendant Suppliers and (with the same exception) there is no evidence that any plaintiff retailer handled or sold any product of General Foods or Hunt Foods that was advertised at any time in *Woman's Day*.

167. Each of the defendant suppliers maintained a direct relationship with each of the plaintiff retailers and other retailers similarly situated. Each defendant supplier furnished to each of the afore-described retailers services in connection with the resale by that retailer of the commodity produced by the defendant supplier. Employees of the defendant, General Foods, known as sales representatives, visited the individual retailers within said area, including the plaintiffs, and made available directly to such retailers display and merchandising assistance and personnel, such as demonstrators, sign painters, window trimmers, artists, food display men, layout personnel and the like. Said defendant also furnished directly to said retailers a wide variety of in-store advertising material. In addition, promotional men were sent directly from the offices of the defendant, General Foods, to the said retailers, which promotional men took direct orders of General Foods' products which such representatives of General Foods themselves transmitted to a wholesaler or which said representatives of General Foods themselves wrote up for the retail grocer to send directly to his cooperative supplier, as the case might be. Such promotional representatives of General Foods made as many as eight or ten calls upon retail grocers in the Chicago area each and every day.

The defendant, Morton Salt, furnished direct sales advertising and promotional material to the aforesaid retailers and used personnel of Morton Salt to prepare the retailers' food, counter, window and shelf displays. In addition, Morton Salt salesmen made direct calls upon the individual retailers, giving them direct promotional assistance and materials. Frequently, the Morton Salt salesmen, to assure purchase of Morton products by the retailer, actually wrote out the order for the retailer on the order pad given by the cooperative buying group to the retailers. For retailers who were not members of such a cooperative, the Morton Salt salesmen themselves transmitted the order directly to the wholesaler or jobber designated by the retailer.

The defendant, Hunt Foods, made available to purchasers of the company's products window trimmers, stock cards and additional sales and promotional material.

168. None of the Defendant Suppliers have exercised any control over the prices at which their products are sold by the plaintiff retailers.

169. No Defendant Supplier has discriminated in favor of A&P in the prices at which its products are sold to wholesale or retail grocers.

170. There is no evidence that A&P knowingly induced or received any price discrimination from any Defendant Supplier.

171. There is no evidence that any plaintiff has lost sales or customers or profits as a result of the distribution of *Woman's Day* by A&P stores.

172. There is no evidence that the publication and distribution of *Woman's Day* has resulted in a decrease in A&P's cost of

doing business or an increase in any plaintiff's cost of doing business.

173. There is no evidence that *Woman's Day* has attracted customers to A&P stores away from any of plaintiffs' stores.

174. There is no evidence that any retailer purchased less from any wholesaler because of the existence of *Woman's Day* or its distribution by A&P.

175. The plaintiff wholesalers did not sell to any plaintiff retailer.

176. There is no evidence that any plaintiff paid any more for his supplies, nor that he spent more for advertising nor that he sold any less products by reason of any Defendant Supplier's advertising in *Woman's Day*.

177. There are many differences among the retailer grocery stores and wholesale grocers in the Chicago Metropolitan Area, such as type of store or business, size, parking and credit facilities, hours of business, type of merchandise handled, advertising activities and methods of purchasing.

178. There is no evidence to indicate the number of retailers in the Chicago Metropolitan Area who sold General Foods products which were advertised in *Woman's Day*.

179. There is no evidence to indicate the number of retailers in the Chicago Metropolitan Area who sold Hunt Foods products which were advertised in *Woman's Day*.

180. No plaintiff was authorized by any other person to sue on behalf of or represent such other person in this litigation.

181. Three of the original plaintiffs in this action have withdrawn and no additional parties have intervened or joined as plaintiffs.

182. The legislative purpose of Sections 2(d) and 2(e) is as set forth in the Committee Reports as follows:

> "Still another favored medium for the granting of oppressive discriminations is found in the practice of large buyer customers to demand, and of their sellers to grant, special allowances in purported payment of advertising and other sales-promotional services, which the customer agrees to render with reference to the seller's products, or sometimes with reference to his business generally. Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when in any case the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so."

183. The legislative interpretation of the phrase "proportionally equal terms" as provided in Sections 2(d) and 2(e) is set forth at 80 Cong. Rec. 9416:

> "But it is further claimed that the provisions of the bill with regard to advertising allowances work a hardship on the small manufacturer, in that they require such allowances to be granted to all competing customers on proportionally equal terms. But proportional to what? Proportional naturally to those customers' purchases and to their ability and equipment to render or furnish the service or facilities to be paid for."

Conclusions of Law

1. The Court has jurisdiction of the subject matter of this action and the parties hereto.

2. There can be no violation of the Robinson-Patman Act by reason of:

(a) The organization of Woman's Day, Inc. by A&P (Maryland) for the purpose of publishing the magazine *Woman's Day;* and

(b) The selection by Woman's Day, Inc. of A&P (New Jersey) as its customer to the exclusion of plaintiffs; and

(c) The rendering by Woman's Day, Inc. of advertising services as agreed and paid for in return for bona fide advertising payments from advertisers; and

(d) The acceptance by Woman's Day, Inc. of bona fide advertising payments from advertisers, including suppliers whose products are sold by A&P and plaintiffs, where the only benefit derived by A&P from such payments is incidental, both causally and quantitatively.

3. The payments of Defendant Suppliers for advertising in *Woman's Day* were not "to or for the benefit of" A&P for a "service or facility" furnished by A&P.

4. It was the intent of Congress that advertising payments are not unlawful under Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, where advertising services are rendered as agreed and paid for and where the recipient derives only an incidental benefit therefrom.

5. It was not intended by Congress that Sections 2(d) and 2(e) should be applied so as to hamper legitimate advertising.

6. To the extent that the *Woman's Day* advertisements of Defendant Suppliers are beneficial, i. e., result in increased sales of the advertised products, such benefit is shared by all grocers who handle the advertised products. Therefore such advertisements are inherently non-discriminatory and are not, within the meaning of Sections 2(d) and 2(e), "in connection with" the resale of Defendant Suppliers' products by A&P.

7. Payments made to Woman's Day, Inc. by Defendant Suppliers were for the advertisements of specific products placed in the magazine *Woman's Day* by Defendant Suppliers through their respective advertising agencies and were not payments for the maintenance of the magazine itself.

8. The fact that the advertising payments of the three Defendant Suppliers is part of the total income of Woman's Day, Inc., does not make any Defendant Supplier responsible for the continued existence of *Woman's Day*. In the sense that the payments for advertising by all advertisers in *Woman's Day* might be said to help to "make possible" the continued existence of *Woman's Day*, such "fact" is of no legal significance.

9. The payments of Defendant Suppliers for advertising in *Woman's Day* do not constitute the furnishing or contributing to the furnishing of a service or facility by Defendant Suppliers to A&P.

10. *Woman's Day* is not a service or facility within the meaning of Sections 2(d) and 2(e).

11. *Woman's Day* is not a service or facility furnished "in connection with" the resale by A&P of products manufactured by Defendant Suppliers.

12. The payments by Defendant Suppliers for advertising in *Woman's Day* are not in violation of Sections 2(d) and 2(e).

13. Inasmuch as plaintiffs are unable to furnish the Defendant Suppliers with advertising space in a store magazine published and distributed by it, Defendant Suppliers' payments for advertising in *Woman's Day* are not in violation of Section 2(d) since it was thus impossible for the Defendant Suppliers to make such payments available to the plaintiffs on proportionally equal terms.

14. The payments by Defendant Suppliers for advertising in *Woman's Day* do not constitute, either directly or indirectly, a discrimination in price in favor of A&P in violation of Section 2(a).

15. A&P has neither induced nor received a direct or indirect price discrimination in violation of Section 2(a) and is not, therefore, in violation of Section 2(f).

16. No plaintiff has established the right to injunctive relief by proving a "threatened loss or damage by a violation of the antitrust laws" within the meaning of Section 16 of the Clayton Act.

17. Plaintiffs have failed to discharge their burden of proving, by a preponderance of the evidence, the following:

(a) That the payments to Woman's Day, Inc. for advertising in *Woman's Day* constitute, directly or indirectly, a discrimination by Defendant Suppliers in the price of their products in favor of A&P and against plaintiffs;

(b) That A&P knowingly induced or received such a discrimination in price;

(c) That the payments to Woman's Day, Inc. for Defendant Suppliers' advertisements in *Woman's Day*, either—

(i) Constitute payments to or for the benefit of A&P as compensation for a service furnished by or through A&P in connection with the sale of Defendant Suppliers' products by A&P; or

(ii) Constitute discriminations in favor of A&P and against plaintiffs as purchasers of a commodity from Defendant Suppliers by contributing to the furnishing of a facility to A&P connected with the sale of such commodity;

(d) That these payments to Woman's Day, Inc. constitute a price discrimination to A&P in the guise of a payment for advertising or that A&P derives from these payments a benefit to its own business equal to that derived by Defendant Suppliers and can thus shift to Defendant Suppliers substantial portions of its own advertising costs.

18. Plaintiffs' objection to the admissibility in evidence of A&P Exhibit 25, the Shopping Survey, is overruled and the Shopping Survey is admitted in evidence.

Judgment

Accordingly let judgment enter for each and all of the defendants and this cause is hereby dismissed at plaintiff's costs.

[¶ 68,773] In the Matter of the Grand Jury Subpoena Duces Tecum, Addressed to Electric & Musical Industries, Ltd., Middlesex, England, c/o Electric & Musical Industries, (U. S.) Ltd., 38 West 48th Street, New York 20, New York.

In the United States District Court for the Southern District of New York. No. M 18-304. Filed June 27, 1957.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Grand Jury Investigation—Validity of Service of Subpoena *Duces Tecum*.—A subpoena *duces tecum* addressed to a British company and served upon one of its subsidiary companies in a certain judicial district in the United States in connection with a grand jury investigation of possible violations of antitrust laws through cartel activities in the radio-television industry was held to be properly served upon the British company when the British company held United States patents upon radio and television apparatus, exchanged the licensing rights of these patents with another American company, held 96.4% of the stock and had board members and officers in one large United States recording company, and held all of the preferred stock and the ordinary voting stock of and had officers and board members in the subsidiary company that was served. These two subsidiary companies were not mere distributors of the British company, but were reciprocating partners who recorded the same artists and promoted each other's labels. The United States subsidiary was a proper agent upon which to effect service.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8021.

For the United States: Harry G. Sklarsky, Herman Gelfand, Ralph S. Goodman, and Richard B. O'Donnell, Attorneys, Department of Justice, Antitrust Division, New York N. Y.

For the petitioner: Dwight, Royall, Harris, Koegel & Caskey (John A. Wells, Justin W. D'Atri, and Stanley Godofsky, all of New York, N. Y., of counsel) New York, N. Y.

Opinion

LAWRENCE WALSH, District Judge [*In full text*]: Electric & Musical Industries Ltd. moves to quash a subpoena directed to it and served upon its American subsidiary, Electric & Musical Industries (U. S.) Ltd. It claims that it is not within the jurisdiction of this Court because it is not present in this country. It further contends that E. M. I. (U. S.) is not its agent and that service upon E. M. I. therefore cannot be made through the officers of E. M. I. (U. S.). The motion is denied.

The subpoena was issued in aid of a current grand jury investigation of possible violations of the anti-trust laws through cartel activities in the radio-television industry.

Such a subpoena may run to any district in the United States. Clayton Act § 13, 38 Stat. 736, 15 U. S. C. § 23. Service must be made by delivering a copy thereof to the person named. Fed. R. Civ. P., Rule 45(c); Fed. R. Cr. P., Rule 17. In the absence of any rule to the contrary, service upon a corporation may be made by delivering a copy of the subpoena to an officer or a managing or general agent of the corporation named. See Fed. R. Civ. P., Rule 4(d). This agent may be an individual, a partnership, or another corporation. *United States v. United States Alkali Export Association, Inc.*, (I. C. I. case), Civ. No. 24-464, S. D. N. Y., July 16, 1946 (Unreported opinion, p. 8); *United States v. Watchmakers of Switzerland Inf. C.*, S.D.N.Y. [1955 TRADE CASES ¶ 68,096], 133 F. Supp. 40, 46.

[*Issues Defined*]

Like other process issued pursuant to the anti-trust statutes, a subpoena may be served only in a district in which the person named

is "found". Section 12 of the Clayton Act (38 Stat. 736; 15 U. S. C. § 22) provides:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found".

Accordingly, the question is whether E. M. I.'s activities within this district are sufficient to sustain service here, and, if they are, whether E. M. I. (U. S.) Ltd. is a proper agent upon which to effect service.

E. M. I. is a British corporation. It has subsidiaries in twenty-four countries. It is a manufacturer of (1) gramophone records; (2) domestic electronics, including radio, television, gramaphones, household appliances, dictating and tape machines, relay and sound amplification equipment; and, (3) electronic capital equipment, that is, electronic equipment for industry and commerce, such as television transmitting equipment, electronic business machines, and other equipment used by aircraft and as aids to navigation.

[*E. M. I. Activities in U. S. A.*]

With respect to the United States, E. M. I's activities are as follows:

1. Radio and television patents. It holds United States patents upon apparatus for radio and television. It has granted to Radio Corporation of America a non-exclusive license and the right to grant non-exclusive licenses to others with respect to these United States patents in return for a similar grant by R. C. A. with respect to patents held by it outside the United States, Canada and Australia.

2. Gramophone records. E. M. I. is the largest producer of gramophone records in the world. As stated in its 1956 annual report, it is "strongly represented" in the United States by two subsidiaries: Capitol Records, Inc., and E. M. I. (U. S.) Ltd.

[*E. M. I. Subsidiaries Described*]

Capitol is a California corporation. It is one of the largest producers of records in the United States. In 1954 E. M. I. acquired 96.4% of its common stock. Three of its nine directors are now officers or directors of E. M. I. but there has been no change in its management.

The second United States subdisiary is E. M. I. (U. S.) Ltd., a New York corporation, which concentrates upon the classical field in which its sales have become the fourth largest in the United States. It was organized in 1953. It became the licensee of E. M. I.'s listings under the Columbia label, replacing Columbia Recording Corporation, another American corporation which had enjoyed this position in prior years.[1] Next year it is expected to gain similar rights with respect to E. M. I.'s other classical label, His Master's Voice, which since 1901 has been licensed to Victor (now RCA-Victor). The development of E. M. I. (U. S.) Ltd. was apparently part of a larger plan by which E. M. I. decided to depend upon its own sales organizations for the exploitation of the United States market, rather than upon its former contractual arrangements with RCA-Victor and Columbia.[2] It is apparently underset by a policy of sharpened competition with

[1] From 1935 to 1954 this arrangement had been embodied in a contract between Columbia Recording Corporation and a wholly owned British subsidiary of E. M. I., Columbia Gramophone Company Limited.

[2] Its 1956 annual report states:

"Now I want to explain to you the reasons for the ending—after more than half a century of collaboration—of the matrix and artists exchange agreement between His Master's Voice and R. C. A. Victor.

"This step was the logical result of our experiences in the last three years, since the termination of a similar agreement we had with Columbia Records of America. As long as we were contractually tied to American sales organizations they had a free hand to publish or not to publish the vast wealth of our European catalougues. In 1953 we established E. M. I. (U. S.) Ltd. to sell our Columbia classical recordings in the U. S. A. In less than three years Angel—the trade mark under which we now sell the European Columbia catalogue in America—has made us one of the four leading classical record companies in America with an unrivalled reputation for the superior artistic and technical qualities of our records made with British producers, British technicians and pressed in our own Hayes factory.

"With our own powerful and enterprising sales organizations in America—Capitol and Angel—we shall, within a few months, be in a unique and unprecedented position properly and profitably to sell in the Americas the vast resources of Europe of which E. M. I. has the lion's share."

RCA-Victor which apparently has invaded the European field.[3]

E. M. I. (U. S.) Ltd. was organized pursuant to an agreement with a former independent record producer, Dario Soria, who became its president. E. M. I. financed the new company, holds all of its preferred stock and all of its voting ordinary stock. Soria has a twenty-five percent equity interest represented by non-voting stock which he must offer to E. M. I. before selling or encumbering. Of the five man board of directors, three are officers or directors of E. M. I.; two are Americans, including Soria. Soria states that he has in large part taken over his own pre-existing organization. His management of the American company is substantially without interference by the parent.

[*E. M. I. Activities Support Service*]

It is my conclusion that under the holding of *United States v. Scophony Corp.* [1948-1949 TRADE CASES ¶ 62,238], 333 U. S. 795, E. M. I.'s activities in this district are adequate to support the service of process.

[*E. M. I. Course of Conduct*]

Looking first to "the whole course of conduct" as urged by that opinion, it is apparent that E. M. I. is in world-wide conflict for supremacy in the field of musical recordings; that the United States is one of the most important world markets; that E. M. I. has two organizations here which it is using not as mere distributors which buy its products for resale but as reciprocating partners in this competition, partners who record both European and American artists and European and American music for distribution by E. M. I. abroad, as well as distribute E. M. I. listings here, and which are headed by men of aggressiveness, independence and prestige whose contribution to the E. M. I. organization goes beyond that of local distribution and includes the building up of a substantial part of the total E. M. I. repertoire, as well as counsel in the tactics of this competitive struggle. It was precisely this loyalty which E. M. I. was unable to develop under its former contractual arrangements notwithstanding their exclusivity and the express provisions emphasizing the personal quality of their joint undertakings and the duty to exchange information and promote each other's labels. It was precisely in order to secure the loyalty of Soria and Wallichs (President of Capitol) as its agents that E. M. I. in substance bought out their respective organizations. Once this agency is recognized, there is no doubt as to the continuity of the activity. E. M. I. (U. S.) Ltd. sells 1,250,000 records per year producing $3 million in revenue. Capitol's sales are over $25 million.

[*Corporate Fiction*]

Here, as in the *Scophony* case, E. M. I. relies upon the cases which hold that a manufacturing parent cannot be said to be present upon the basis of business done by a distributing subsidiary. *Cannon v. Cudahy*, 267 U. S. 333; *People's Tobacco Co. v. Am. Tobacco Co.*, 246 U. S. 79 and the dictum in *Eastman Co. v. Southern Photo Co.*, 273 U. S. 359. Although not overruled, these prece-

[3] Thus, the president of E. M. I. (U. S.) has reported to the chairman of E. M. I. (England):

"The future of E. M. I. (U. S.) Ltd., as a subsidiary of E. M. I. Ltd., is dependent on the development of its parent company. In appraising the future, two new elements have entered the picture.

"1) *The world expansion of RCA Victor.* RCA is now establishing its label beyond the western hemisphere and is encroaching on the European market.

"2) *The expansion on this continent of E. M. I. Ltd.* Through the recent acquisition of Capitol, E. M. I. Ltd. now has two companies in the United States, one specializing in the popular field, the other in the classical field. Through Capitol, E. M. I. Ltd. has also fortified its international position in the popular field.

"The purchase of Capitol relieves Angel of the obligation to promote popular music and artists from E. M. I.'s European labels. With the exception of a small catalogue on its Blue Label of 'light music from the Continent', folk music, and special 'snob' items, it is free to concentrate all its efforts on the development of Angel as a major classical label.

"With the bold growth of RCA Victor in the foreign field, it will be advisable and necessary for E. M. I. Ltd. to give new life to the traditional HMV label and to rebuild its catalogue, to the same strength as the Angel- Columbia catalogue. This will be a healthy and constructive move not only for the world market but for America where HMV has been languishing.

"When E. M. I. (U. S.) Ltd. was founded it was planned that if and when other E. M. I. Ltd. classical labels became free in this country, they would be transferred to Angel. With the coming expiration of the RCA-HMV contract, E. M. I. (U. S.) Ltd. envisages a magnificent and musically balanced future catalogue, drawn from European Columbia, HMV and Pathe, which will assure proper and equal promotion, sales and artist representation for each of the various elements concerned."

dents were limited to their facts by the holding in the *Scophony* case, 333 U. S. at p. 816. The court held that without reappraising their validity it was enough that they not be extended to defeat an anti-trust complaint against a foreign national. See 333 U. S. at p. 817. In other words, we may still indulge in a heavy-handed fiction of corporate personality to protect a parent corporation from service outside of a state in which it is active but there is a clear warning in *Scophony* that such a fiction is not to be used to protect the parent from being served at all, particiularly in a proceeding under the anti-trust laws.[4] The practical reality of these holdings should not be lost by laboring the fiction by which they were rationalized. The prevention of unfair forum-shopping in private litigation does not necessitate allowing a corporate veil to block a grand jury investigation into crime, particularly a violation of the anti-trust laws.

[*Convenience To Stand Trial*]

It would not be unfairly inconvenient to require the petitioner to stand trial in this district. See *Latimer v. S/A Industrias Reunidas F. Matarazzo*, 2 Cir., 175 F. 2d 184, 186, cert. den. 338 U. S. 867; *Kilpatrick v. Texas & P. Ry. Co.*, 2 Cir., 166 F. 2d 788, 791, cert. den. 335 U. S. 814; *Hutchinson v. Chase & Gilbert*, 2 Cir., 45 F. 2d 139. And there will, of course, be no need for a trial if the petitioner produces the records which the grand jury requests.

No question was raised in this motion as to the scope of the subpoena.

[*Motion to Quash Denied*]

The motion is denied.

It is so ordered.

[¶ 68,774] In Re: Petroleum Industry Investigation.

In the United States District Court for the Eastern District of Virginia, at Alexandria. Filed May 20, 1957.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Grand Jury Proceedings—Return of Subpoenaed Records.—When a court allowed Government attorneys to remove documents produced pursuant to a grand jury's subpoena *duces tecum*, a witness's motion to require that the documents be used by Government counsel in the instant proceeding only and be returned to the grand jury or the witness "with all copies" was denied. If books and papers coming to the knowledge of the Government attorneys in a grand jury investigation develop a demand, and an adequacy of proof, for resort to civil litigation in the public interest, it is both proper and incumbent upon them to use the information in their hands for that purpose. Reliance must be placed in the honesty of the officers of the Department of Justice to retain all such information for the sovereign and not for private competitors.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8021.750.

For Standard Oil Company of Texas: John F. Sonnet, of Cahill, Gordon, Rheindel and Ohl, New York, N. Y.

For Standard Oil Company of California: William M. Sayre.

For the United States: Joseph E. McDowell, Department of Justice.

Memorandum of the Court on Motion to Amend Receipt for Papers Subpoenaed

ALBERT V. BRYAN, District Judge [*In full text*]: For convenience in the study of the books and papers produced by the witnesses appearing before the grand jury, the court has allowed the Government Attorneys to remove this evidence to their offices in the Department of Justice, just across the Potomac in Washington. But it exacts of them a receipt for each document withdrawn. The receipt binds the attorney, as

[4] *Anderson v. British Overseas Airways Corp.*, S. D. N. Y., 144 F. Supp. 543; *State Street Trust Co. v. British Overseas Airways Corp.*, S. D. N. Y., 144 F. Supp. 241 and *Lane v. Maple Leaf Milling Co.*, S. D. N. Y., 87 F. Supp. 741 may be in conflict with these views but they need not be considered because none of them purports to interpret section 12 of the Clayton Act.

an officer of the court, to return the evidence to the Clerk, meanwhile to keep it from the public eye and separated from the records of other witnesses or companies.

[*Motion of Witness*]

Full ready to tender all the papers described in the grand jury's subpoena *duces tecum,* the Standard Oil Company of Texas, however, moves the court to straighten the receipt by adding the stipulation that, "unless otherwise directed by the court", the documents shall be used by Government counsel "in this proceeding only" and be returned to the grand jury or the witness "with all copies". The Government demurs to this restriction in the use of the papers as well as to the requirement for surrender of the copies. It recognizes, of course, its obligations to return the originals of the books and papers.

[*Use of Documents Feared*]

Obviously, the motion springs from the Company's fear lest the documents, or the information contained in them, be used by the Government for a purpose different from that for which they were subpoenaed. The Company further urges, in its concern, that access to the documents during the Government's custody be limited to those attorneys authorized by the warrant of the Attorney General to appear before the grand jury. The public interest would always be safeguarded, Standard maintains, by the suggested reservation in the receipt of the right to the Government, at any time or times, to ask from the court a different direction in respect to the evidence. Such directions could, presumably, include the impounding of the documents, together with all copies, while the court considered the legality of the requested use.

Without reflection, the possibility of the Government's devotion of the documents to another use affronts the sense of fair play. It implies an abuse of process. But, studied, the diversion proves to be altogether correct, legally and ethically. In the study it must be remembered, always, that the books and papers necessarily have first been obtained without treading upon the Fourth or Fifth Amendment, or upon any other Constitutional protection. This is true because the evidence would not otherwise be before the grand jury.

[*Motion Unsound*]

The present motion is unsound because it ignores realities. Suppose inspection of the documents in a given case should expose the commission of a criminal offense; or suppose the revelation should unearth a criminal scheme; and suppose the committed or the planned offense to be wholly foreign to the object for which the records have been requisitioned. Is the Government attorney to close his eyes to the disclosure or forswear his duty to enforce the law? To obtain the consent of the court before acting would, by delay or signal, thwart apprehension or prosecution of the accused.

[*Use of Documents*]

Akin is the anticipated use by the Government of the documents, or the knowledge derived from them, in a civil action should the grand jury not indict. A civil suit predicated on antitrust or similar legislation, when brought by the Government, is in fact and in law a prosecution. Its aim is not compensation but correction. The obligation of the Justice Department to invoke civil remedies in an appropriate situation is just as bounden as its duty to institute requisite criminal proceedings. Consequently, if books and papers coming to the knowledge of the Government's attorneys in a grand jury investigation develop a demand, and an adequacy of proof, for resort to civil litigation in the public interest, it is certainly proper, indeed incumbent upon them, to use for that purpose the information in their hands. This is nonetheless true though no process available in a civil action has the competency to discover this data beforehand.

[*Copies of Documents*]

Likewise impracticable is the position taken by Standard opposing the retention by the Department of copies of the papers produced. Indisputably, Government counsel would be entitled to make notes of the contents of the papers as they are produced in the grand jury room. If they can make notes, they can make extensive notes, and these might approach copies. Moreover, if notes or copies can be made in the grand jury room without impropriety, they can be made, under the surveillance of the court, in another room in the Federal building or

in the not-distant offices of the Department. The surrender of all of this memoranda at the end of the grand jury's deliberations would hardly be practicable. Officializing their work sheets, the very requirement would injuriously hamper the Government attorneys in the investigation.

[*Rights and Duties of Government Attorneys*]

If the notes consisted only of copies of the papers, the copies might be collected and returned. But a covenant for the return even of the copies seems but a futile gesture. The attorneys would know the papers' content; their right and their duty would enjoin them to use that knowledge in the public interest. *United States v. Wallace Co.,* 1949, 336 U. S. 793, 799. To hold that the Government may avail itself of the memory of its attorneys, but it cannot retain the same information in the form of copies of the papers, would be an absurdity.

The sovereign, not private competitors, retains the copies or the knowledge. It is preserved in the public interest. Against their improper use, as well as against an unjustified calling of a grand jury to educe the evidence, reliance must be placed in the honesty of the officers of the Department of Justice, with the right to seek the judgment of the court upon the validity of their acts. *United States v. United States District Court* [1956 TRADE CASES ¶ 68,540], 1956, 238 F. 2d 713, 721. These are not slender reeds. Our entire system of government rests on the integrity of its officials, always with recourse to the courts for determination of any doubt in the propriety of their conduct.

[*Witness's Motion Denied*]

Motion denied.

[¶ 68,775] Michael Rose Productions, Inc. v. Loew's Incorporated, Paramount Film Distributing Corporation, T. C. F. Film Corporation, R. K. O. Radio Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation, and United Artists Corporation.

In the United States Court of Appeals for the Second Circuit. No. 360—October Term, 1956. Docket No. 24506. Argued June 11, 1957. Decided July 8, 1957.

Appeal from an order of the District Court for the Southern District of New York dismissing that part of the amended complaint which claimed damages alleged to have been caused before the date of a general release executed by the appellant. HERLANDS, Judge. Appeal dismissed.

Clayton Antitrust Act

Private Enforcement and Procedure—Appeal and Error—Final Order.—An appeal from an order dismissing part of a claim for treble damages under the antitrust laws on the ground that the appellant had signed a valid and binding release releasing the appellees "from any and all claims of plaintiff accruing prior to February 4, 1954," was dismissed for want of jurisdiction on the ground that the order was neither final, and consequently appealable, nor appealable as an interlocutory order. The order merely dismissed part of the appellant's claim and left the remainder pending for trial in the district court.

See Private Enforcement and Procedure, Vol. 2, ¶ 9015.12.

For the appellants: Aaron E. Koota (Francis T. Anderson on the brief).

For the appellees: Simpson, Thacher & Bartlett (Albert C. Bickford, Whitney North Seymour, Jr., and William J. Manning of counsel), for all appellees except Columbia Pictures Corp. Schwartz & Frolich (Myles J. Lane and Bernard R. Sorkin of counsel) for Columbia Pictures Corp.

For prior opinions of the U. S. District Court, Southern District of New York, see 1956 Trade Cases ¶ 68,307, 68,392, 68,515.

[*Treble Damage Suit*]

PER CURIAM [*In full text*]: This suit was brought to recover treble damages under the anti-trust laws.

[*Order Appealed*]

The appellees answered with a general denial and, in an amended answer, pleaded the affirmative defense of a general release which the appellant had executed and delivered to appellees, United Artists Corporation and Loew's Incorporated on February 5, 1954. The appellees then moved for a summary judgment which was denied without prejudice. After further proceedings, which need not be set forth, there was a hearing before Chief Judge Clancy, without a jury, to determine whether the release was executed because of a mutual mistake of fact, or any unilateral mistake by the appellant, or the fraud of any appellee. Judge Clancy found no mistake and no fraud. Judge Herlands then adopted such findings, held the release valid and binding upon the appellant, and that it released the appellees "from any and all claims of plaintiff accruing prior to February 5, 1954." He dismissed the complaint, with prejudice, insofar as damages were claimed for anything which was alleged to have occurred before February 5, 1954. This appeal is from that order.

[*Order Not Appealable*]

We cannot reach the merits for the order was neither final, and consequently appealable, nor appealable as an interlocutory order under § 1292 of Title 28 U. S. C. It is perfectly obvious that all the order did was to dismiss only part of the appellant's claim and to leave the remainder pending for trial in the district court. *Baltimore Contractors v. Bodinger*, 348 U. S. 176. Rule 54(b) F. R. C. P. was inapplicable, see *Kam Koon v. E. E. Black Ltd.*, 9 Cir., 182 F. 2d 146, as the judge well knew since he was unwilling to make any determination or direct an entry of judgment pursuant to the provisions of that rule. So we have no jurisdiction. *Kuly v. White Motor Co.*, 6 Cir., 174 F. 2d 742.

[*Appeal Dismissed*]

Appeal dismissed.

[¶ 68,776] Walter Reade's Theatres, Inc. v. Loew's Incorporated and Loew's Theatre & Realty Corporation.

In the United States District Court for the Southern District of New York. Civil No. 115-62. July 2, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments To State Cause of Action—General Requirements.—A complaint by an operator of a drive-in theatre against certain motion picture producer-distributors and exhibitors, seeking treble damages under the antitrust laws, was stricken on the ground that it was not simple, concise, and direct within the requirements of Rule 8 of the Federal Rules of Civil Procedure. The complaint should have set out in reasonable detail the acts complained of, not the circumstances from which plaintiff drew its conclusion that violations of acts of Congress had occurred and that plaintiff had been damaged.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.170.

For the plaintiff: William Gold, New York, N. Y.

For the defendant: Benjamin Melniker for Loew's Inc., New York, N. Y.; Archie Weltman for Loew's Theatre & Realty Corp. (Joseph A. Macchia, of counsel), New York, N. Y.

[*Motion To Strike Complaint*]

RICHARD LEVET, District Judge [*In full text*]: This is a treble damage action under the anti-trust laws. The defendants move to strike the complaint in its entirety on the ground that it fails to comply with the requirements of Rule 8(a)(2) and Rule 8(e)(1) of the Federal Rules of Civil Procedure and for certain alternative relief.

[*Federal Rules of Civil Procedure*]

Rule 8(a)(2) is as follows:

"*(a) Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, . . ."

Rule 8(e)(1) is as follows:

"*(e) Pleading To Be Concise and Direct; Consistency.*

"(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motion are required."

[*Plaintiff and Defendants Described*]

Plaintiff, it is alleged, owns and operates the Woodbridge Drive-In Theatre in New Jersey. Defendants are Loew's Incorporated (a producer-distributor of motion pictures) and Loew's Theatre & Realty Corporation (an exhibitor of motion pictures). Certain distributors and exhibitors are named as co-conspirators, although not named as defendants.

[*Unreasonable Clearances Claimed*]

Stripped of verbiage, it appears that plaintiff claims that its theatre is not in substantial competition with theatres in downtown Newark, New Jersey; that the defendants, pursuant to agreements and arrangements with the co-conspirators, imposed unreasonable clearances upon plaintiff's theatre in favor of other threatres; and that plaintiff's request for earlier exhibition rights was denied because of unlawful agreements to maintain clearance.

[*Allegations Attacked*]

In addition, plaintiff makes the following allegations which the moving defendants seek to strike as an alternative to striking the entire complaint:

(1) A national conspiracy by the defendants and alleged co-conspirators to restrain and monopolize first run exhibition in the larger cities of the country. (Paragraph 5)

(2) Exclusion of independents from first run exhibition in said cities and allocation of pictures to the defendants and their alleged co-conspirators. (Paragraphs 6 and 11(c))

(3) The granting of unreasonable clearances, nationwide, to theatres (not limited to first run) formerly operated by the distributors. (Paragraph 8)

(4) Conclusions of law. (Par. 7(g))

(5) (a) Pooling agreements and joint interests throughout the United States formerly existing among the defendants and co-conspirators. (Paragraph 9(a))

(b) Continued relationships between the distributors and the divorced exhibitor companies. (Paragraph 9(b))

(c) References to the status of the divorcement proceedings between Loew's Incorporated and Loew's Theatre & Realty Company pursuant to the decree in *United States v. Paramount.* (Paragraphs 9(c), (d) and (e))

(d) References to ownership of theatres by the alleged co-conspirators RKO and Stanley Warner. (Paragraphs 11(b), (i), (iii))

(e) References to theatres situated between the Newark downtown theatres and plaintiff's theatre without regard to ownership. (Paragraph 12(b))

[*Failure To Show Relevancy and Damages*]

Paragraphs 5 and 6 allege a national conspiracy of the so-called "integrated distributors" with respect to so-called "first exhibitions." However, no allegation appears whereby the relevancy of these most general statements to the local situation is set forth, nor is there any allegation of damages to plaintiff as a result of the alleged nation-wide conspiracy.

[*Time Extended*]

Paragraph 9(a) goes far afield when it refers to "predecessors" of the "integrated distributors" and to "affiliates of both of them," thus extending the time backward in endless fashion.

[*Remote References*]

Paragraphs 9(b), 9(c), 9(d) and 9(e) again refer to formal corporate divorcement proceedings involving the "integrated distributors." Such references are most remotely connected with the present claims by plaintiff and should be eliminated.

[*Ambiguous Statements*]

Subdivisions (b)(i) and b(iii) of Paragraph 11 refer to theatres of "integrated distributors," some of which were "divested." Ambiguous statements are also set forth in Paragraph 11, such as "likewise owned and operated by integrated distributors and which still remain parts of their divorced circuits or which were of either of them, . . ." Paragraph 12(b), which refers to theatres "In the area of Newark and between said theatres in downtown Newark and plaintiff's theatre at Woodbridge," is equally vague, without identification of ownership or specification. The identification of theatres is made even more difficult by the usage of the words "some of which" in three separate clauses of a single sentence.

[*Averments Not Simple, Concise, Nor Direct*]

On the whole, the complaint is not in compliance with Rules 8(a)(2) and 8(e)(1). This statement is made with due consideration for the necessity of some detailing of facts in an anti-trust action. The averments are neither simple, concise nor direct. The allegations particularly referred to above have no relevance to the cause of action concerned. To such allegations, the defendants should not be required to plead.

[*Dissertations on Economics*]

Much of the remaining parts of the complaint consist of dissertations on the economics of the motion picture industry, the development of motion picture art and unnecessary historical commentary. For example: "It concerns the motion picture industry which involves a continuity of transactions consisting of [etc.]" (Paragraph 1(b)); "During the period of plaintiff's operation of the said theatre as aforesaid and for some time previous, [etc.]" (Paragraph 4(b)); "The motion picture is a relatively new art form recognized as an effective and universal medium for the diffusion of aesthetic, recreational and educational values [etc.]" (Paragraph 7(a)); "Over the years the defendants herein with and among the film distributors and the theatre operating subsidiaries of, and which were of, the largest of the said distributors, [etc.]" Paragraph 10(e)), etc. ad infinitum. Such prolixities and such complexities do not constitute sound pleading. The issues in an anti-trust action may be economic as well as legal, but counsel for the defendants are entitled to a short and plain statement of the claim in order to answer and to prepare to meet the issues presented. The purpose of Rule 8(a)(2) is to avoid verbose allegations; to notify the defendants of the claim upon which plaintiff seeks recovery; to assist and not deter the disposition of litigation on its meries to achieve brevity and clarity in pleading and to shape the issues for trial.

[*Acts Complained of To Be Set Out*]

It is necessary in an anti-trust action for treble damages to set out in reasonable detail the acts complained of, not the circumstances from which plaintiff draws its conclusions that violations of acts of Congress have occurred and that plaintiff had been damaged. A nation-wide conspiracy may be alleged only if plaintiff is properly alleged to be affected thereby and damages therefrom to this plaintiff are alleged. *New Dyckman Theatre Corp. v. Radio-Keith-Orpheum Corporation,* D. C. S. D. N. Y., 1954 [1954 TRADE CASES ¶ 67,853], 16 F. R. D. 203; *Metropolitan Theatre Co. v. Warner Bros. Pictures,* D. C. S. D. N. Y., 1952, [1952 TRADE CASES ¶ 67,304], 12 F. R. D. 516; *Brownlee v. Malco Theatres,* D. C. W. D. Ark., 1951 [1950-1951 TRADE CASES ¶ 62,911], 99 F. Supp. 312. A direction to make a more definite statement (Rule 12(e)) in this instance would merely compound the present complexity.

[*Complaint Stricken with Leave To Amend*]

Accordingly, the complaint is stricken with leave to plaintiffs within twenty days to file an amended pleading which contains simple, concise and distinct averments in conformity with Rule 8 of the Federal Rules of Civil Procedure. The amended complaint should avoid the infirmities of the present complaint herein referred to. Defendants shall file answers or move with respect to the amended complaint within ten days after service thereof.

Settle order on notice.

[¶ 68,777] Grand Opera Company and Marlow's Amusement Corporation v. Twentieth Century-Fox Film Corporation, et al.

In the United States District Court for the Eastern District of Illinois. Civil Action No. 2791. Dated May 31, 1957. Filed June 3, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Pretrial Procedures—Interrogatories.—It was no objection to interrogatories propounded under Rule 33 of the Federal Rules of Civil Procedure that the information sought was within the knowledge of the interrogating party since the purpose of interrogatories was to ascertain facts and to narrow the issues.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.875.

For the plaintiffs: William M. Wolff, Murphysboro, Ill.; Everett Prosser, Carbondale, Ill.; and Thomas C. McConnell, Chicago, Ill.

For the defendants: Fordyce, Mayne, Hartman, Renard & Stribling, St. Louis, Mo.; Kramer, Campbell, Costello & Wiechert, E. St. Louis, Ill.; John M. Ferguson of Baker, Kagy & Wagner, E. St. Louis, Ill.; Cohn & Cohn, E. St. Louis, Ill.; Simon & Collen, Chicago, Ill.; and F. W. Schwarz, St. Louis, Mo.

For a prior decision of the U. S. Court of Appeals for the Seventh Circuit, see 1956 Trade Cases ¶ 68,403, reversing and remanding a judgment of the U. S. District Court, Eastern District of Illinois, 1955 Trade Cases ¶ 68,185; for a prior decision of the U. S. District Court, Eastern District of Illinois, see 1955 Trade Cases ¶ 68,184.

[*Motion*]

JUERGENS, District Judge [*In full text*]: On March 17, 1954, certain defendants propounded a series of 72 interrogatories to the plaintiffs. On March 22, 1957, the plaintiffs filed their answer to the interrogatories so propounded. On April 1, 1957, the defendants filed their motion to compel the plaintiffs to make further answer to certain interrogatories designated in said motion. No objections have been filed by the plaintiffs to the motion of the defendants to compel the plaintiffs to make further answer to the interrogatories described in said motion. At the time of the hearing on the motion to compel plaintiffs to make further answer to the interrogatories the plaintiffs agreed that they would file further answers to interrogatories 24, 69, 70, and 71; therefore, the motion as pertaining to those interrogatories will not be considered by the court.

As to interrogatories 12a and 23, the defendants withdraw their motion to plaintiffs to make further answer.

[*Objection to Interrogatories*]

As to the remaining interrogatories, namely, interrogatories 4, 8, 11, 22, 22a, 30, 38, 39, 44, 49, 50, and 60, the plaintiffs orally objected because depositions were taken and the information sought to be elicited by the interrogatories could have been interrogated about at the time that the depositions were taken, also that the answers to the interrogatories with which the motion is concerned lie within the knowledge of the defendants as well as the plaintiffs and, therefore, the plaintiffs should not be required to answer same.

[*Federal Rules of Civil Procedure*]

The authority for propounding interrogatories and insisting on answers thereto being made is founded on Rule 33 of the Federal Rules of Civil Procedure. In *Bowles v. Safeway Stores,* 4 F. R. D., 469, the court said,

> "It is no objection to interrogatories propounded under Rule 33 that the information sought is within the knowledge of the interrogating party. The purpose of interrogatories, under Rule 33, is to obtain admissions from the adversary, thereby limiting matters in dispute to avoid unnecessary attendance of witnesses and waste of time of the parties and the court. The intent of said rule is that both parties have the same information, why compel formal proof to be made of things within their joint knowledge."

Rule 33 should be given a liberal and broad interpretation by the courts and under the several holdings it has been held and determined that the mere fact that the party propounding the interrogatories may have

the answers within his own bosom, that that is no valid reason for not requiring the party to whom the interrogatories are propounded to answer same. The propounding of interrogatories serves two separate and distinct purposes: (1) to ascertain facts, and (2) to narrow the issues. The court does not deem it necessary to go into a lengthy discussion as to these two purposes. In *Onofrio v. American Beauty Macaroni Co.*, 11 F. R. D. 181, the court said,

> "The prevailing general opinion seems to be that under the present rule the interrogator may seek facts relating to his adversary's case and is not limited to facts exclusively or peculiarly within the knowledge of the opponent. This is true even where the interrogator has at its disposal an adequate or even better source of information. In 7 F. R. D. 250, 'Although the interrogator may have the better source of information, it is not unfair to require that his opponent answer the interrogatories in question to the best of his ability so that the questions of fact may be reduced to a minimum before trial.'"

In Moore's *Federal Practice*, Volume 4 (2nd Edition), at page 2269, the following appears:

> "Under Equity Rule 58 it was the practice to obtain by proper interrogatories admissions by the adverse party of the possession, custody, or control of relevant documents before making his motion to the court for an order for their production for discovery purposes. Not only may such admissions be obtained by interrogatories under Federal Rule 33, but further disclosure, which some courts formerly might have regarded as a 'fishing expedition' under Equity Rule 58, may be sought, namely, disclosure of 'the existence, description, nature, custody, conditions, and location of any books, documents, or other tangible things' relevant to the subject matter involved in the pending action."

[*Motion Granted*]

Without going into detail as to each interrogatory, the court is using interrogatory 4 as an example. The answer to interrogatory 4 is as follows:

> "Plaintiffs know the location of the documents referred to in interrogatory 3, and have same, except for such of said documents as may have been destroyed by fire, which occurred at the Annex Theatre Building in August of 1955."

The answer is not complete and does not give a minimum answer to the interrogatory propounded and does not advise the defendants which of the documents are still in existence and which of the documents have been destroyed by the fire which occurred at the Annex Theatre Building in August, 1955. The above serves as an example of the answers to the interrogatories with which the motion is concerned, and the court is of the opinion that the interrogatories concerned in the motion should be answered by the plaintiffs and they are so ordered to answer same.

[¶ 68,778] Mieczyslaw M. Konczakowski, et al. v. Paramount Pictures, Inc. et al.

In the United States District Court for the Southern District of New York. Civil Action No. 106-55. Dated June 28, 1957.

Sherman, Clayton, and Robinson-Patman Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Pretrial Procedures—Interrogatories.—Interrogatories with respect to first run theatres were objectionable, since it was not shown how such information was relevant. Certain interrogatories seeking information as to activities of defendants for a period of more than twenty years were unreasonably oppressive, and other interrogatories referring to "affiliated" or "allied" corporations were improper since ambiguous. Interrogatories requesting information obtainable from available documents were oppressive since such documents could be secured and the information compiled from them.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.875.

For the plaintiffs: Hoffman, Buchwald, Nadel, Cohen & Hoffman; and Harry M. Pimstein; all of New York, N. Y.

For the defendants: Louis Phillips for Paramount Pictures, Inc., Paramount Pictures Corporation, and Paramount Film Distributing Corporation; Dwight, Royall, Harris, Koagel & Caskey for TCF Film Corporation and Twentieth Century-Fox Film Corporation; Herbert B. Lazarus for American Broadcasting-Paramount Theatres, Inc. and Buffalo Paramount Corporation; Robert Perkins for Warner Bros. Pictures Inc. and Warner Bros. Pictures Distributing Corporation; Adolph Schimel for Universal Pictures Company, Inc. and Universal Film Exchanges, Inc.; Schwartz & Frohlich for Columbia Pictures Corporation; Phillips, Nizer, Benjamin & Krim for United Artists Corporation; and Benjamin Melniker for Loew's Incorporated (E. Compton Timberlake, Marvin H. Ginsky, Bernard E. Kalman, and Herbert C. Earnshaw of counsel) all of New York, N. Y.

For prior decision in the U. S. District Court, Southern District of New York, see 1956 Trade Cases ¶ 68,472.

[*Motion to Strike*]

LEVET, District Judge [*In full text*]: Each of the defendants herein has moved for an order in accordance with Rule 33 of the Federal Rules of Civil Procedure striking all or part of the interrogatories propounded by plaintiffs to the respective defendants.

[*Allegations of Complaint*]

This is an action instituted pursuant to the Sherman, Clayton and Robinson-Patman Acts, 15 USCA §§ 1-27, for treble damages. The plaintiffs are the owners and operators of the Marlowe Theatre in Buffalo, New York, and the defendants are motion picture distributors or exhibitors, or both. The complaint alleges that the defendants have conspired with "affiliated exhibitors, large unaffiliated circuits, and locally favored exhibitors, to monopolize motion picture exhibition in the various localities in the United States including Buffalo. . . ."

Although during his examination before trial the plaintiff, Mieczyslaw M. Konczakowski, acknowledged that his grievance concerned the relative playing positions between his Marlowe Theatre and those of his competitor, the Niagara Theatre, the complaint states in broad terms that the plaintiffs are the victims of the local impact of a national conspiracy. The substance of the plaintiffs' allegations appears to be found in subdivisions (c) and (d) of paragraph 18, and in paragraph 19 of the complaint, which read as follows:

"(c) Pursuant to and in furtherance of such unlawful monopoly and conspiracy, the defendant distributors, acting illegally in concert and in combination with and for the benefit of the defendant affiliated exhibitors, unlawfully discriminated and conspired against plaintiffs by illegally usurping from plaintiffs' Marlowe Theatre in or about the year 1939 its long-established run of motion pictures and by granting said run to said Niagara Theatre and by unlawfully withholding from said Marlowe Theatre the right to exhibit motion pictures until long after they had been exhibited in downtown Buffalo first run and move-over theatres and in said Niagara Theatre.

"(d) Pursuant to and in furtherance of such unlawful monopoly and conspiracy, the defendant distributors and exhibitor defendants unlawfully discriminated and conspired against plaintiffs by engaging in monopolistic practices favorable to the exhibitor defendants and detrimental and injurious to plaintiffs relating to or concerning film rentals; maintenance of minimum admission prices; advertising allowances; deduction in film rentals on playing of double features; deduction in film rentals for extra expense incurred for patronage stimulants; granting of move-overs including the creation of a move-over run granted to the exhibitor defendants' Teck Theatre in downtown Buffalo; permitting extended runs and day and date runs; selection and rejection of films theretofore contracted for; tie-in sales (block booking); road show and so-called pre-release showings and privileges; requirements respecting playing of foreign produced pictures; playing of pictures on preferred play dates; overage and underages (i. e. permitting commitments for one theatre to be worked off in other theatres of the defendant exhibitors or their affiliates); playing of pictures out of order of release; bidding for pictures; checking box office receipts and auditing books; determining 'split figures' (allowance for theatre operation expense on percentage rental pictures); guaranteed minimum film rentals; joint advertising campaigns; rebates, discounts or allowances as to film rentals and advertising and other elements of exhibition expense.

"19. The distributor defendants and the exhibitor defendants combined, conspired and agreed to exclude arbitrarily the Marlowe Theatre from the motion

picture benefits to which it was clearly entitled by reason of its history, appointments, size, location, management and other relevant factors, and to award unjust and unlawful benefits to said Niagara Theatre and the Buffalo first run downtown and move-over and neighborhood first run theatres operated, managed or controlled by the exhibitor defendants. . . ."

[*Clearances Not in Issue*]

That the motion picture industry may establish successive runs or exhibitions of a feature in a given area, or prescribe the clearance or period of time which must elapse between runs of the same feature within a particular area or in specified theatres, is not now open to question. It has been judicially declared that "[T]he nature of the product with which motion picture distributors and exhibitors deal is such as to require the regulation of the manner of exhibition. . . . So preference must be given to certain theatres. And to make such preference effective, the exhibition of pictures at other theatres must be limited to a lapsed period after exhibition of the picture at first-run theatres." *Fanchon & Marco v. Paramount Pictures* [1950-1951 Trade Cases ¶ 62,909], D. C. S. D. Cal., 1951, 100 F. Supp. 84, 89, affirmed [1954 Trade Cases ¶ 67,843] 9 Cir., 1954, 215 F. 2d 167, cert. denied 348 U. S. 912. It is the manner in which the defendants regulated and awarded successive runs and clearances of films to the alleged detriment of plaintiffs' Marlowe Theatre in Buffalo upon which this action is bottomed. Mr. Konczakowski has testified that what the plaintiffs want for their Marlowe Theatre is a run after the Victoria Theatre and that when the Niagara Theatre came into existence on or about July 10, 1940, it was awarded a run following the Victoria run with clearance over the Marlowe. Mr. Konczakowski also said that since the Marlowe was an established theatre when the Niagara Theatre came into existence, it was his belief that "the established theatre should have a clearance over a new theatre."

[*Salient Rules as to Interrogatories*]

Before considering the specific interrogatories addressed to each defendant to which objections have been raised, it is appropriate to note certain salient rules which are applicable to some of the interrogatories propounded herein.

Where a complaint in an anti-trust action by a theatre owner against motion picture producers and distributors alleges that certain conduct in a designated area was part of a national conspiracy, the plaintiff may obtain answers to interrogatories concerning the size of the defendants, the amount of their business and the degree of integration between them, and these interrogatories need not be restricted to purely local matters. *Burroughs v. Warner Bros. Pictures, Inc.* [1952 Trade Cases ¶ 67,339], D. C. Mass., 1952, 12 F. R. D. 491. However, where the interrogatories seek information concerning the national or local activities of the producers and distributors which do not affect the plaintiff theatre owner, such interrogatories are irrelevant and improper. Thus, it was held in *T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.* [1954 Trade Cases ¶ 67,761], D. C. S. D. N. Y., 1954, Fed. Rules Serv. 33.321, Case 4, that in an anti-trust suit involving a conspiracy to deprive plaintiff's theatre of second run films, inquiries into the affairs and transactions of defendants' first run theatres in the community were not relevant and, moreover, where the inquiries were on a nationwide scale, they were clearly irrelevant. The plaintiffs have not shown how information concerning first run theatres in Buffalo is relevant. Indeed, Mr. Konczakowski indicated during his examination that he was not interested in theatres in Buffalo such as the Victoria and the Elmwood because these theatres enjoyed runs which were senior to his Marlowe and were, therefore, "no opposition." Since plaintiffs do not claim that they are entitled to a first run in said city, the defendants' objections to interrogatories with respect to first run theatres are sustained. See *Vilastor Kent Theatre Corp. v. Brandt* [1955 Trade Cases ¶ 68,102], D. C. S. D. N. Y., 1955, 18 F. R. D. 199; *Ball v. Paramount Pictures* [1944-1945 Trade Cases ¶ 57,311], D. C. W. D. Pa., 1944, 4 F. R. D. 195.

[*Available Documents*]

With regard to those interrogatories which request information and data obtainable from available documents, the general rule is that a party should not be permitted to compel his opponent to make compilations or perform research and investigations with respect to statistical information which he might make for himself by obtaining the production of the books and documents

pursuant to Rule 34 of the Federal Rules of Civil Procedure, or by doing a little footwork, as the case may be. *Leonia Amusement Corp. v. Loew's Inc.* [1955 TRADE CASES ¶ 68,134], D. C. S. D. N. Y., 1955, 21 Fed. Rules Serv. 33.321, Case 4; *Pappas v. Loew's Inc.* [1953 TRADE CASES ¶ 67,432], D. C. Pa., 1953, 13 F. R. D. 471; *Tivoli Realty Inc. v. Paramount Pictures* [1950-1951 TRADE CASES ¶ 62,598], D. C. Del., 1950, 10 F. R. D. 201; *Cinema Amusements Inc. v. Loew's* [1946-1947 TRADE CASES ¶ 57,622], D. C. Del., 1947, 7 F. R. D. 318; *Byers Theatres, Inc. v. Murphy,* D. C. W. D. Va., 1940, 1 F. R. D. 286. Accordingly, interrogatories which ask for the distances between forty named theatres in Buffalo or which seek a list of titles of all motion pictures produced or distributed by distributor defendants and which were exhibited in twelve named theatres during a period of approximately twenty years, are oppressive. If relevant, this information can be compiled by the plaintiffs. The plaintiffs can acquire the list of motion picture titles by obtaining the production of books and records, under Rule 34, which contain this information and by compiling the list of titles themselves. However, defendants may, if they wish, give plaintiffs a list of these titles rather than producing books and records for this purpose. See *Cinema Amusements Inc. v. Loew's, supra.*

[*Ambiguous Interrogatories*]

Some of the interrogatories contain ambiguous language in that they refer to "affiliated" or "allied" corporations. Words of such character are improper. See *Leonia Amusement Corp. v. Loew's Inc., supra; Savannah Theatre Co. v. Lucas & Jenkins,* D. C. Ga., 1943, 10 F. R. D. 461. Furthermore, interrogatories addressed to corporations which seek a list of agreements to which they or "any of their subsidiary, affiliated or allied corporations" were parties are objectionable because a corporation cannot be charged with knowledge of the acts of its subsidiaries where they are not in effect its agents. See *Stanzler v. Loew's Theatre and Realty Corporation* [1956 TRADE CASES ¶ 68,439], D. C. R. I., 1955, 19 F. R. D. 286; *Savannah Theatre Co. v. Lucas & Jenkins, supra.*

[*Oppressive Interrogatories*]

The defendants also object to certain interrogatories on the ground that the information sought relates to activities of the defendants for a period of more than twenty years. Objection to interrogatories of this character was sustained in *Stanzler v. Loew's Theatre and Realty Corporation, supra,* where the court said at page 288 as follows:

> ". . . Although it is true that in actions of this sort a certain amount of freedom should be permitted in the discovery of data of an historic nature and although at a trial on the merits it may well be that evidence of defendants' activities twenty or more years prior to institution of suit will be admitted, it is the opinion of this Court that to compel a defendant to produce prior to trial a great bulk of such information under the usual penalties for failure to obey a court order would be unreasonably oppressive and not within the scope of permissible discovery under Rule 33. To the extent that it is not unreasonable and oppressive, it is permissible and proper to compel answers concerning defendants' activities for some period beyond the statutory period of limitations but such period cannot be extended indefinitely . . . ."

As to the objections of the Paramount defendants and defendants American Broadcasting-Paramount Theatres, Inc. and Buffalo Paramount to all interrogatories which seek to elicit information for any period prior to December 30, 1949, on the ground that all claims which accrued against them prior to said date were dismissed, said objections are sustained. The interrogatories addressed to the other defendants which seek information prior to July 10, 1940, the time when the Niagara Theatre came into existence and allegedly usurped the run of plaintiffs' Marlowe Theatre, are objectionable in that they attempt to uncover evidence of all of the wrongdoings of the motion picture industry for the last twenty-two years without any relevance to the basic issues in this case.

[*Specific Interrogatories*]

There remains for consideration the defendants' objections to specific interrogatories. These objections are disposed of as follows:

Paramount Pictures Inc., Paramount Film Distributing Corporation and Paramount Pictures Corporation

The following interrogatories are to be limited to information subsequent to December 30, 1949: First through Fifteenth and Forty-First through Forty-Sixth.

Objections to the following interrogatories seeking detailed information as to the Buffalo, Paramount, Hippodrome, Great Lakes, Center, Teck, Elmwood, North Park, Allendale or Victoria Theatres are sustained: First, Second, Third, Fifth, Seventh, Eighth, Ninth and Fifteenth.

The objection to interrogatory Twelfth, in that it seeks irrelevant information beyond the Buffalo area, is sustained.

The objection to interrogatory Sixth, in that it seeks the release dates of motion pictures for over twenty years, both nationally and locally, is sustained.

The objections to interrogatories Tenth, Thirteenth and Fourteenth, in so far as they relate to "subsidiary, affiliated or allied corporations," are sustained.

The objection to the request for copies of documents contained in interrogatory Tenth is sustained without prejudice to plaintiffs' obtaining these documents under Rule 34 upon a showing of good cause.

The objections to interrogatories Tenth through Fourteenth, Forty-First, Forty-Fifth and Forty-Sixth, to the extent that they seek to elicit answers from corporations not parties to this action, or which are ambiguous in that they refer to "affiliated or allied corporations," are sustained.

American Broadcasting-Paramount Theatres, Inc. and Buffalo Paramount Corporation

The following interrogatories are to be limited to information subsequent to December 30, 1949: First through Fifth, Seventh through Sixteenth, Eighteenth through Twenty-Fifth, Twenty-Eighth through Thirty-Seventh and Forty-Second through Forty-Fourth.

Objections to the following interrogatories seeking detailed information as to the Buffalo, Paramount, Great Lakes, Hippodrome, Center, Teck, North Park, Kensington, Seneca and Roosevelt Theatres are sustained; First, Second, Third, Seventh, Eighth, Ninth and Tenth.

Objections to the following interrogatories seeking detailed information as to the Elmwood Theatre are sustained: First, Second, Third, Seventh through Tenth, Sixteenth, Eighteenth through Twenty-Third, Twenty-Seventh, Twenty-Ninth, Thirtieth through Thirty-Sixth, Thirty-Eighth, Thirty-Ninth, Fortieth and Forty-Fourth.

The objection to interrogatory Sixth, in that it seeks distances from the Niagara, Teck and Elmwood Theatres to numerous other specified theatres in Buffalo, is sustained.

The objection to interrogatory Thirteenth, in that it seeks irrelevant information beyond the Buffalo area, is sustained.

Objections to interrogatories Eleventh, Fourteenth and Fifteenth, in so far as they relate to "subsidiary, affiliated or allied corporations," are sustained.

Objections to interrogatories Seventeenth and Forty-First, in that they seek the salaries paid to defendants' employees who managed the Niagara and Elmwood Theatres and who negotiated, bought and booked motion pictures for such theatres, are sustained.

The objections to the following interrogatories are sustained in that they seek to elicit the names and addresses of patrons of the Niagara and Elmwood Theatres: Thirty-Fourth through Thirty-Sixth.

Interrogatory Fifth, which seeks the degree of competition between the Marlowe Theatre and defendants' theatres in Buffalo and which also asks for the facts and factors which are determinative of said degree, is improper in that it calls for a conclusion based upon defendants' opinion. The objection to this interrogatory is sustained.

Objections to the following interrogatories, to the extent that they seek to elicit answers from corporations not parties to this action, or which are ambiguous in that they refer to "affiliated or allied corporations," are sustained: Eleventh through Fifteenth and Forty-Second.

The objection to the request for copies of documents contained in interrogatory Tenth is sustained without prejudice to plaintiffs' obtaining these documents under Rule 34 upon a showing of good cause.

Twentieth Century-Fox Film Corporation (N. Y.), Twentieth Century-Fox Film Corporation (Delaware), Warner Bros. Pictures Distributing Corporation, United Artists Corporation, Columbia Pictures Corporation, Universal Pictures Company, Inc. and Universal Film Exchanges, Inc.

The following interrogatories are to be limited to information subsequent to July 10, 1940: First through Eighteenth, Twentieth and Twenty-First.

Objections to the following interrogatories seeking detailed information as to the Buffalo, Paramount, Hippodrome, Great Lakes, Center, Teck, Elmwood, North Park, Allendale or Victoria Theatres are sustained: First, Second, Third, Fifth, Seventh through Ninth and Eighteenth.

The objection to interrogatory Twelfth, in that it seeks irrelevant information beyond the Buffalo area, is sustained.

The objection to interrogatory Sixth, in that it seeks the release dates of motion pictures for a period of over twenty years, both nationally and locally, is sustained.

The objection to interrogatory Fifteenth is sustained in so far as it seeks information regarding the salaries paid to defendants' employees who negotiated licenses for the exhibition of motion pictures at certain theatres in Buffalo.

The objections to interrogatories Tenth through Fourteenth, Sixteenth, Twentieth and Twenty-First, to the extent that they seek to elicit answers from corporations not parties to this action, or which are ambiguous in that they refer to "subsidiary, affiliated or allied corporations," are sustained.

The objection to interrogatory Tenth, to the extent that it calls for copies of documents, is sustained without prejudice to plaintiffs' obtaining these documents under Rule 34 upon a showing of good cause.

Loew's Incorporated

The following interrogatories are to be limited to information subsequent to July 10, 1940. First through Twelfth and Forty-Sixth.

Objections to the following interrogatories seeking detailed information as to the Buffalo, Paramount, Hippodrome, Great Lakes, Center, Teck, Elmwood, North Park, Allendale or Victoria Theatres are sustained: First, Second, Third, Fifth, Seventh, Eighth and Ninth.

The objection to interrogatory Twelfth, in that it seeks irrelevant information beyond the Buffalo area, is sustained.

The objection to interrogatory Sixth, in that it seeks the release dates of motion pictures for a period of over twenty years, both nationally and locally, is sustained.

The objection to the request for copies of documents contained in interrogatory Tenth is sustained without prejudice to plaintiffs' obtaining these documents under Rule 34 upon a showing of good cause.

The objections to interrogatories Tenth, Eleventh, Thirteenth, Fourteenth and Forty-Fifth, to the extent that they seek to elicit answers from corporations not parties to this action, or which are ambiguous in that they refer to "subsidiary, affiliated or allied corporations," are sustained.

As to All the Defendants Herein

All objections to interrogatories which have not been specifically sustained, as indicated above, are overruled.

So ordered.

[¶ 68,779] Institutional Drug Distributors, Inc. v. Hon. Leon Yankwich, as Chief Judge of the United States District Court of the Southern District of California, Central Division.

In the United States Court of Appeals for the Ninth Circuit. Misc. No. 637. Dated June 2, 1957. Filed June 20, 1957.

Upon Application for Leave to File Petition for Writ of Mandamus.

Sherman Antitrust Act

Private Enforcement and Procedure—Antitrust Law Violations Charged as Counterclaims—Right to Trial by Jury.—The defendant in a trade-mark infringement case, who alleged by way of answer and also by way of counterclaim that plaintiff had violated the antitrust laws, was denied a writ of mandamus to require the trial court to try the counterclaim by jury trial either before or simultaneously with the trial of the complaint and answer, which the court had determined to try separately, sitting without a jury. A dissenting opinion held that the effect of the decision was to deprive the defendant of his right to jury trial which had been timely demanded.

See Private Enforcement and Procedure, Vol. 2, ¶ 9014.85, 9046.

For the appellant: Elwood S. Kendrick and Jack Corinblit, Los Angeles, Cal.

For the appellee: Harold A. Black and Philip K. Verleger, Los Angeles, Cal.

For a prior decision of the U. S. District Court, Southern District of California, see 1957 Trade Cases ¶ 68,724.

Before: LEMMON, FEE, and BARNES, Circuit Judges.

JAMES ALGER FEE, Circuit Judge [*In full text*]: An application for leave to file petition for writ of mandate has been lodged with Clerk of this Court. It sets up that a civil complaint was filed on May 7, 1956, in the United States District Court for the Southern District of California, Central Division, entitled *G. D. Searle & Co., a corporation, plaintiff, v. Institutional Drug Distributors, Inc., a California corporation, et al., No. 19884-Y.* There are three causes of action therein. One cause alleged infringement and the other two unfair competition. The relief sought is injunction pendente lite, and thereafter permanently, and accounting for profits and damages suffered by plaintiff as a result thereof. Petitioner filed an answer, which contains a general denial and a separate defense that Searle had used the alleged trademark in violation of the anti-trust laws and alleges by reason thereof Searle was in court with unclean hands. A defense that no claim is set forth in the complaint upon which any relief can be granted is also included.

[*Counterclaim*]

A counterclaim by Institutional against Searle is also set forth separately in the same answer. Stephen Chase, Lewis S. Hoyt and Julius K. Holbein were also named therein as third party defendants. The relief asked is that Searle and the third party defendants be enjoined from engaging in acts of conspiracy, boycott, monopoly and other acts in alleged violation of the anti-trust acts of the United States, that the complaint be dismissed, that the alleged trademark sued on by Searle be held to be descriptive and not a valid trademark, that the third party defendants be summoned and required to present any defenses they may have to the counterclaim, that Searle be adjudged to have used the alleged trademark in violation of the anti-trust laws so that the mark will be unenforceable against Institutional, that the trademark be ordered cancelled by the Commissioner of Patents and stricken from the Federal Register of Trademarks, that the court deny Searle all relief on the ground of unclean hands, "in view of its unconscionable conduct in entering into agreements with its distributors requiring said distributors to submit noncompetitive and sham bids to public bodies and institutions." There is also a prayer that defendant have judgment under its counterclaim for $100,000.00, trebled to $300,000.00, and reasonable attorney fees. There is a further prayer that the court grant "such other relief as to it seems just and proper."

[*Jury Demand*]

A demand for jury trial was filed by Institutional on the counterclaim as to Searle and the third party defendants.

The petition alleges no date as to the filing of the answer and counterclaim. There is no allegation that the third party defendants were served or filed answers to the counterclaim. There is an allegation that subsequently (no date given) the trial court "entered an injunction *pendente lite* against petitioner." We may infer from the blank text of the order attached that this action was taken in 1956. Again it is alleged that "subsequently, the court below set the entire action down for trial on April 23, 1957." When this action was taken the petition does not advise us.

[*Trial Without Jury*]

It is then alleged that on April 16, 1957, the trial judge in open court, on his own motion and over objection of petitioner, "made an order directing that the trial of the complaint and answer," including the defense of "unclean hands" by reason of claimed violations by Searle of the anti-trust laws but excluding trial of the counterclaim against Searle and the third party defendants, be held commencing April 23, 1957, before the District Judge sitting without a jury, and that the trial of and determination of these issues be made by the District Court before any trial by jury of the issues raised by the counterclaim.

The petition alleges such action deprives Institutional of a right to trial by jury on the counterclaim and that the order is without jurisdiction of the District Court.

This application to file the petition came on for hearing before this Court on April 23, 1957, the day which had been set for trial. The District Court postponed the hearing for one day to give this Court opportunity to act. There was a motion before this Court by Institutional that the District Court delay the trial further so this Court might advise of the matter. No one appeared for petitioner. There was an appearance for Searle.

The Court from the bench, one judge dissenting, ordered that a motion for further delay of the trial be denied.

[*Claims Separated*]

The reasons for this order, although not announced at the time, were obvious. First, the trial court had plenary power under the Civil Rules to take such action. For convenience, the "separate trial of any claim, cross-claim, counter-claim or third-party claim or of any separate issue" may be ordered by the trial court. Rule 42(b), Federal Rules of Civil Procedure. See also Rule 13(i). These rules are of the same force as any other. Second, the motion to postpone was presented to this Court on the morning that the trial was to proceed in the District Court. If counsel had only been advised of the intention of that court at the beginning of the trial or the day before, more consideration might have been given. An appellate court should not embarrass a trial court by preventing or intervening in the trial of a case already in progress or on the threshold. Third, there is some evidence that the parties and the court have been proceeding for a considerable period of time on the theory that equity had jurisdiction of the complaint and the defense of unclean hands because of violation of the anti-trust laws. The record shows that an injunction *pendente lite* was issued some considerable time ago and the whole case set for trial. Some of the issues were unquestionably already adjudicated, at least preliminary, and an equitable remedy granted.

The order denying the motion for a temporary stay was correct.

The question of whether this Court should allow the application for permission to file petition for writ of mandamus is next considered. This application might well be denied on the same grounds set out above.

[*Issue of Jury*]

The sole relief asked is that the trial court be required to try certain legal issues by jury either before or simultaneously with the trial of other issues by the judge.

This Court has insistently protected the right of trial by jury, guaranteed by the Federal Constitution "in Suits at common law where the value in controversy shall exceed twenty dollars." We have prevented courts from trying factual issues in a law action after withdrawing them from a jury.[1] Summary judgments have been set aside where factual issues which might have been tried to a jury were involved.[2] Waivers of the right by failure to file demand have been scrutinized here.[3] Where the case is essentially one at law, this Court has approved trial of legal issues where the complaint had asked for a declaratory judgment.[4] Nor has the position of this Court now changed. In these times, trial by jury is essential to preserve our system of government.

Nor do we raise the question of power.

[*Equity Jurisdiction*]

However, as we have heretofore pointed out, the right of trial by jury was limited to actions at common law at the time of the adoption of the Constitution.[5] Equity was a flourishing system at that period. The boundary between the systems was defined with some clarity. A jury trial was not accorded as of right by the Chancellor. There were two fields of equitable jurisdiction. There was the exclusive jurisdiction. There was also the field of concurrent jurisdiction with law. In the latter, if the court of equity first took jurisdiction, complete relief there could be afforded even though issues were decided upon which the common law gave a remedy

[1] *Palmiero v. Spada Distributing Company*, 9 Cir., 217 F. 2d 561; *Union Pacific Railroad Co. v. Bridal Veil Lumber Co.*, 9 Cir., 219 F. 2d 825, cert. den., 350 U. S. 981.

[2] *Cox v. English-American Underwriters*, 9 Cir., No. 15,235, filed April 19, 1957.

[3] *Richland Irrigation District v. United States*, 9 Cir., 222 F. 2d 112, cert. den., 350 U. S. 967.

[4] *Pacific Indemnity Co. v. McDonald*, 9 Cir., 107 F. 2d 446, 107 A. L. R. 208.

[5] *Dimick v. Schiedt*, 293 U. S. 474, 476.

which the Chancellor had determined was inadequate. In either field, incidental relief in damages might be afforded.[6]

It is not on every complaint now filed that a jury trial is accorded, even if there are issues normally triable at law and even if there is the requisite demand therefor. The Federal Rules of Civil Procedure did not change these principles, but affirmed them, since specific reference is made to the Seventh Amendment.[7] A law action may be pleaded in the same complaint as a suit in equity. But, if the whole matter fall within the limits of equity jurisdiction, even separate statement and timely demand will not suffice. It is obvious also that, although an independent counterclaim can be and often must be pleaded under the Rules, it does not change the limits of equity jurisdiction.

It would be improper for this Court, at this stage of the litigation, to pass upon the complaint or the counterclaim. Suffice it to say that neither clearly states an action at common law. It is true, a portion of the prayer for relief in the counterclaim sets up a claim for damages which might have been the subject of an action at law, and appropriate allegations of damage appear in the body thereof. Most of the prayers seem to sound in equity. Another consideration is that this Court has not the record of the proceedings in the District Court. Therefore, the District Court must not be trammeled by premature expressions on our part. If a mistake be made, there are methods of correction, which are no more expensive than retrials, which this Court has been compelled to order in other cases. The District Court has the full record before it and must determine whether Institutional was ever entitled to a jury trial and whether that right, if any, has been waived or still exists. As the record appears, the right of Institutional, if any, has not been formally denied. Perhaps it may only be held in abeyance. Equity had power to enjoin a trial even in a separate tribunal of common law, under certain circumstances, until the issues cognizable in chancery had first been determined.

Nothing in the record shows what the course of the trial judge may be. It is in his power to grant a jury trial sometime in the future,[8] or perhaps even before the equitable issues are determined.[9] In any event, the rule gives the trial judge discretion.[10] In case of appeal from the final judgment, this Court may be required to determine whether that discretion has been abused, if the complete record shows on appeal that a constitutional right of jury trial has been denied. The argument that petitioner had only a week to take action after the trial judge had decided to try the equitable issues is of no avail. This Court should not interdict a trial unless it is demonstrated that a right of petitioner has been infringed. We are bound to assume that the trial court is proceeding properly. There has been no showing to this Court that, if it be assumed Institutional had a right, appeal from the final judgment or some other course would be a clearly inadequate remedy.

As it is, we are haunted by the specter of multiple appeals to this Court.[11] That is indeed an evil. To avoid such appeals in this and other cases, no action should be now taken.

[*Application for Mandamus Denied*]

The application to file a petition for writ of mandamus is denied.

[Dissenting Opinion]

BARNES, Circuit Judge, Dissenting: I dissent from the Order denying leave to file petition for mandamus. This petition discloses a matter where the rarely to be used writ of mandamus would be justified. Juris-

[6] *Camp v. Boyd,* 229 U. S. 530, 551-552.

[7] Rule 38(a), Federal Rules of Civil Procedure.

[8] *Smith, Kline and French Laboratories v. International Pharmaceutical Laboratories* [1950-1951 TRADE CASES ¶ 62,907], 98 F. Supp. 899; *Forstmann Woolen Co. v. Murray Sices Corporation* [1950-1951 TRADE CASES ¶ 62,716], 10 F. R. D. 367. See also *Union Central Life Insurance Co. v. Burger,* 27 F. Supp. 554.

[9] *Forstmann Woolen Co. v. Alexander's Department Stores* [1950-1951 TRADE CASES ¶ 62,805], 11 F. R. D. 405. This case and those in Note 8 are simply practice opinions and lay down no principle.

[10] See *Tanimura v. United States,* 9 Cir., 195 F. 2d 329. *Bruckman v. Hollzer,* 9 Cir., 152 F. 2d 730, does not hold to the contrary, as it, in effect, merely affirms the election of the trial court to try jury and non-jury issues contemporaneously.

[11] See discussions of this matter in *Ex parte Fahey,* 332 U. S. 258; *LaBuy v. Howes Leather Co.* [1957 TRADE CASES ¶ 68,585], 352 U. S. 249, indicating that the extraordinary writs should be resorted to only where appeal is a clearly inadequate remedy.

diction being with this Court. (*U. S. Alkali Export Ass'n v. United States* [1944-1945 TRADE CASES ¶ 57,372], 325 U. S. 196, 204), I do not believe the petition should be denied.

The issue involved is petitioner's right to a trial by jury, for which timely demand was made, on an issue of fact. It is settled that an action for damages for an Antitrust violation is one at law. *Weeks v. Bareco Oil Co.*, 7 Cir. [1940-1943 TRADE CASES ¶ 56,173], 125 F. 2d 84. The majority opinion would deprive the counter-claimant of his jury trial. When the issue is once tried by the court, it has become moot, and the law of the case is fixed. An appeal, or appeals, may be available to petitioner, but they might well be "a clearly inadequate remedy," as is suggested by Judge Biggs in the first case cited below.

I would prefer to follow the path suggested, under very similar circumstances, in the case of *Canister Co., et al. v. Leahy*, 3 Cir., 191 F. 2d 255 (1951), Cert. Den. 342 U. S. 893, 72 S. Ct. 201.

See also 28 U. S. C. A., § 1292, § 1651; *Bereslavsky v. Caffey*, 2 Cir., 161 F. 2d 499 (1947), Cert. Den. 332 U. S. 770, — S. Ct. —; *Bereslavsky v. Kloeb*, 6 Cir., 162 F. 2d 862 (1947); *In re Pan American Life Ins.*, 5 Cir., 188 F. 2d 833 (1951); *Goldblatt v. Inch*, 2 Cir., 203 F. 2d 79 (1952), as well as the cases cited in petitioner's brief: *Bruckman v. Hollzer*, 9 Cir., 152 F. 2d 730, 732 (1946); *Forstmann Woolen Co. v. Alexander's Department Store* [1950-1951 TRADE CASES ¶ 62,805], 11 F. R. D. 405, (Judge Leibell, S. D. N. Y., 1951); *Leimer v. Woods*, 8 Cir., 196 F. 2d 828, 833-4, 836 (1952); *Sablosky v. Paramount* [1952 TRADE CASES ¶ 67,353], 13 F. R. D. 138, (Judge Grim, E. D. Penn., 1952).

And as to the procedure suggested, see: *Webster v. Kalodner*, 3 Cir., 145 F. 2d 316 (1947); *Paramount v. Rodney*, 3 Cir. [1950-1951 TRADE CASES ¶ 62,736], 186 F. 2d 111, Cert. Den. 340 U. S. 953, 71 S. Ct. 572 (1950).

The majority seem troubled by the alleged deficiencies in the record. We have before us the pleadings. They are enough. (*Schaefer v. Gunzberg*, decided April 26, 1957).

Next the majority finds fault in the presentation of this motion on the morning that the trial was scheduled to begin in the District Court. The District Court's Order severing the counterclaim was made on April 16, 1957. Until that time petitioner had no way of knowing that he would not be afforded full protection of his constitutional rights. Thereafter, it prepared the instant petition with diligence and argued it before this Court exactly one week to the day after the trial court had made its order. Under these circumstances I do not see how the moving party can be criticized for delay.

Of course the District Court has power under Rule 42(b) of the Federal Rules of Civil Procedure to order the separate trial of any claim, or counterclaim, or any separate issue. But it cannot do so in such a manner as to deprive a litigant of a constitutional right, which to all practical purposes is here accomplished.

No constitutional rights could be prejudiced were there here to be a simultaneous trial of the legal and equitable issues. This is that case where this should be done, and we should aid its accomplishment. To talk of our zeal in preserving the right to jury trial generally does nothing to aid its preservation for one about to lose that constitutional right.

[¶ 68,780] H. & A. Selmer, Inc. v. Musical Instrument Exchange, Inc.

In the United States District Court for the Southern District of New York. Civil No. 119-63. Dated July 22, 1957. Filed July 23, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Jurisdiction of Federal Courts—Removal of Proceedings from State to Federal Courts.—A motion by plaintiff to remand to the New York Supreme Court on the ground that removal from that court was improvident and without jurisdiction was denied. The court found that plaintiff's motion to strike two paragraphs from the answer, service of notice for the taking of depositions, and service of reply to defendant's answer and counterclaim constituted consent to the jurisdiction of the court, even assuming that such acts were taken through inadvertence.

See Private Enforcement and Procedure, Vol. 2, ¶ 9007.35.

For the plaintiff: Harper & Matthews (Verne G. Cawley, Harold Harper, and Vincent P. Uihlein, of counsel), all of New York, N. Y.

For the defendant: Friedland, Jobrack & Zurkow (Louis G. Greenfield and Sidney W. Rothstein, of counsel), all of New York, N. Y.

EDMUND L. PALMIERI, District Judge [*In full text*]*:* This is a motion, pursuant to § 1447(c) of the Judicial Code, 28 U. S. C. § 1447(c), for an order remanding this cause to the Supreme Court of the State of New York, County of New York, on the ground that it has been removed from that court improvidently and without jurisdiction, in violation of 28 U. S. C. § 1441(b).

The defendant contends that the removal to this court was proper in view of the fact that diversity of citizenship, the requisite jurisdictional amount in controversy, and the existence of a counterclaim under the anti-trust laws of the United States are not in dispute. Since I rest my decision on other grounds, however, I shall accept, for the purpose of this motion, the plaintiff's contention that removal was improperly secured in violation of the express provisions of § 1441(b). That section provides that, except in the case of civil actions of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States, "[a]ny other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." The defendant is a New York corporation, a fact plainly revealed on the face of the papers, and it is on that basis that the removal is claimed to have been improper.

The main thrust of plaintiff's argument in support of its motion to remand depends upon the interpretation to be given to the word "jurisdiction," as that word appears in § 1447(c). The pertinent portion of § 1447(c) reads as follows:

> "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs."

Plaintiff contends that the word "jurisdiction," as it there appears, means "removal jurisdiction," and not "original jurisdiction." Plaintiff's view is that if there was no right to removal, as distinguished from a situation where the right to removal was defectively exercised, then the motion to remand must be granted, provided it is made before final judgment.

Defendant urges the proposition that so long as the district court would have jurisdiction over the suit, had it originally been brought here, plaintiff does not have an absolute right to have it remanded prior to final judgment, but only a qualified right to obtain a remand, which right must be timely asserted. In this case, defendant claims, the plaintiff waived whatever right it had to secure a remand by taking certain affirmative steps in the district court proceedings.

This action might properly have been commenced in this court originally, on the basis of diversity together with the existence of the requisite jurisdictional amount in controversy. That this court has jurisdiction over the subject matter of the controversy is not disputed. Jurisdiction over the person of the plaintiff is all that is in question.

It is well established that jurisdiction over the person on removal may be conferred upon the court by consent. *Bailey v. Texas Company*, 47 F. 2d 153 (2d Cir. 1931), and cases there cited. In *Chevrier v. Metropolitan Opera Association, Inc.*, 113 F. Supp. 109 (S. D. N. Y. 1953), removal from the New York Supreme Court to this court was improper for the same reason that plaintiff contends (and I have assumed) removal was improper in the instant case, namely, that the defendant was a citizen of the State of New York. It was there held that, since the action might properly have been brought originally in this court, jurisdiction could be conferred by the consent of both parties notwithstanding the improper removal.

The issue before me is whether the plaintiff manifested such consent. In *Chevrier v. Metropolitan Opera Association, Inc., supra*, such consent was found from the following affirmative acts by the plaintiffs in recognition of and submission to the jurisdiction of this court: requesting notice of

defendant's appearance, serving notice of motion to substitute written interrogatories for proposed oral examination of plaintiffs, stipulating for adjournments of the return date of motion and of the examination pending decision, and appearing at argument of the motion without questioning the jurisdiction of the court. In *Green v. Zuck,* 133 F. Supp. 436 (S. D. N. Y. 1955), the affirmative acts of filing a note of issue and a demand for a jury trial were deemed sufficient to manifest and constitute plaintiff's consent to the jurisdiction of the court.

Plaintiff in this suit concedes that it took the following steps in this court: (a) Plaintiff moved on May 17, 1957, to strike two paragraphs from the answer. Its motion was granted on June 20, 1957. (b) On June 14 and 25, 1957, plaintiff served notices for the taking of the depositions of defendant's president and two other representatives. (c) Plaintiff served a reply to defendant's answer and counterclaim on June 28, 1957. The failure of plaintiff to have moved earlier to secure a remand is claimed to be the result of inadvertence. Plaintiff's attorneys were substituted as counsel in this matter only after it had already been removed to this court, and they did not notice until June 25, 1957, that the cause had been improvidently removed. Assuming *arguendo,* as plaintiff urges, that it took its affirmative acts in this court through inadvertence, those acts were sufficient nevertheless to establish consent to the jurisdiction of this court.

Accordingly, the motion is denied.

[¶ 68,781] A. L. Touchett, also known as Lawrence Paul Touchett v. E Z Paintr Corporation.

Eleanor Touchett v. E Z Paintr Corporation.

In the United States District Court for the Eastern District of Wisconsin. Civil Action Nos. 6013 and 6489. Dated March 14, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Antitrust Law Violations as Defenses—Misuse of Patents.—When a patentee assigned exclusive patent licenses under a contract whereby a corporate licensee agreed to pay royalties therefor, the licensee could not defend himself against an action of the patentee for royalties on the ground that the license was misused because its use was conditioned on an agreement that the patentee must not manufacture items similar to the patented items unless requested and ordered by the licensee to do so. The licensee was the moving party in the misuse of the patent to eliminate competition, while the patentee's actions were merely passive.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.400; Private Enforcement and Procedure, Vol. 2, ¶ 9043.35.

For the plaintiffs: Jerold E. Murphy and R. W. Ashton, Fond du Lac, Wis., for A. L. Touchett; Thomas E. Fairchild and Irvin B. Charne, Chicago, Ill., for Eleanor Touchett.

For the defendants: Chas. B. Quarles, Herbert L. Stern and Claude A. Roth, and Chas. J. Merriam, all of Chicago, Ill.

Opinion

[Action for Royalties]

K. P. Grubb, District Judge [*In full text except for omissions indicated by asterisks*]: This is an action for royalties allegedly due under a patent license agreement. For some years prior to October 1948, plaintiff* was engaged in the development, manufacture and sale of paint rollers and paint trays. Plaintiff had become experienced with paint rollers and paint trays in Fond du Lac, Wisconsin, at a time he was part owner of a casket company. On April 5, 1945 he applied for a patent No. 2427581 which was isssued September 16, 1947 on a paint roller. This patent was thereafter assigned to defendant's predecessor. On October 12, 1945 he applied for a patent on a paint tray. There was an interference proceeding involving one William R. Faust. Faust assigned his application to defendant's prede-

* The word "plaintiff" in this opinion refers to the plaintiff A. L. Touchett. Where the plaintiff Eleanor Touchett is referred to, she will be specifically named.

cessor and on July 6, 1947 letters patent 2444584 was issued on plaintiff's application to defendant's predecessor, and on June 29, 1948 letters patent No. 2444096 was issued on the application filed by Faust to defendant's predecessor.

[*Findings of Fact*]

In 1945 plaintiff caused a Wisconsin corporation to be organized, under the name of E Z Paintr Corporation, for the purpose of manufacturing and marketing paint rollers and paint trays on a national basis. Plaintiff had a substantial interest in the corporation. He became its president and remained president of it and its successor corporations until October 1948.

Plaintiff was thoroughly familiar with the details of the manufacture and sale of paint rollers and trays on a national basis. He had personal contacts with customers and potential customers. He personally effected sales to the United States government, to the shipping department of the Bethlehem Steel Corporation, to Sherwin-Williams Company, and to the Pittsburgh Plate Glass Company, among others. He persuaded the Fuller Paint Company in San Francisco to sell E Z Paintr products in all of its stores in thirteen states. The testimony establishes that he was one of the pioneers in the development, production and marketing of these products.

Notwithstanding the success of the products, the corporation found itself in serious financial difficulty. In July 1947 additional capital was put into the corporation by Stern & Co. through a loan of $25,000 and the purchase of stock in an amount of $25,000.

For reasons not clearly shown by the testimony and which are probably not material to the questions presented, plaintiff and others, in the management of the company, came to disagreement. In October 1949 a contract was entered into between the plaintiff and defendant's predecessor, the basic terms of which were that the plaintiff and his wife, the plaintiff Eleanor Touchett, sold all of their stock to the corporation, the consideration being set forth in paragraph 3 of the agreement. Under the terms of the agreement, the corporation agreed to assign to plaintiff the title to the three patents. Plaintiff agreed to enter into an exclusive license royalty agreement, the terms of which were outlined in that contract, Plaintiff's Exhibit 21. Thereafter, and on January 5, 1949 a contract was entered into between plaintiff and the corporation, reciting that plaintiff was the owner of the three patents, that he granted to the corporation an exclusive license, that the corporation agreed to pay royalties, and in paragraph 4 of Defendant's Exhibit 1,

> "Touchett (plaintiff) agrees to be precluded from manufacturing or selling or causing the manufacture or sale of any of any of the items covered by the foregoing patents or of any paint rollers or paint trays substantially similar to the items covered by said patents provided only that Touchett shall be entitled to manufacture such items upon the request and order of the corporation. * * *" (Parenthesis supplied.)

Plaintiff also reserved the right to manufacture and sell the items in Canada and to manufacture them and export them to Canada only.

* * *

[*Defenses*]

In the *A. L. Touchett* case, the defendant has pleaded several defenses. The principal defenses relied upon are (1) misuse of patents, and (2) eviction.

* * *

[*Damages Issue Severed*]

The issue of damages was severed, and the matters are now before the court for a decision on the other issues.

ALLEGED MISUSE OF PATENTS

It is the contention of the defendant that the contract to pay royalties is void because the patents were used to stifle and prevent competition, thereby extending the monopoly unlawfully. Plaintiff's position in that respect is that there has been no such misuse; that the doctrine of misuse of patents is applicable only in the main where there are "tie-in sales"; that a judgment in the county court of Fond du Lac county, dated March 13, 1950, in an action between the parties is *res judicata* on the validity of the contracts in question. Defendant claims that the judgment in question was a consent decree; that, in any event, a contract which is void as against public policy, such as one involving misuse of patents, cannot be made valid by the doctrine of *res judicata;* otherwise, the defense of misuse of patents could be avoided by the entry of such judgment.

[*Mercoid Case Ruling Applied*]

The basic principles of the doctrine of misuse of patents are set forth in *Mercoid Corporation v. Mid-Continent Investment Co.* [1944-1945 TRADE CASES ¶ 57,201], 320 U. S. 661. It is there set forth that public interest is the dominant consideration. The doctrine denies to the patentee the "power to use it in such a way as to acquire a monopoly which is not plainly within the terms of the grant." The patentee has the power to refuse a license but that does not enable him to enlarge the monopoly of the patent by the expedient of attaching conditions to its use.

Most of the many cases cited on the doctrine of misuse of patents involve "tie-in sales". The doctrine is broad enough and there are decisions applying it to situations where an attempt is made, by use of the patent, to stifle competition with unpatented articles. That is the claim here. Defendant's claim here is that plaintiff, who was a pioneer in the field of paint rollers and paint trays, who was thoroughly acquainted with the market nationally, has bound himself not to manufacture or sell "any paint rollers or paint trays substantially similar to the items covered by the patents."

The evidence shows clearly that there were many paint rollers and paint trays and devices on the market, other than the patented articles, which were used for the same purpose and which were in substantial and vigorous competition with the patented articles. Plaintiff's position is that the language quoted only goes as far as to cover the doctrine of equivalents, in other words, to prohibit plaintiff from manufacturing or selling articles which were the equivalent of those covered by the patents. The court does not believe that that language is susceptible of such narrow interpretation for the reason that the manufacture and sale of articles which were the equivalent of the patented articles (assuming the patents were valid) could be prevented in actions for infringement. That fact, together with a large number of competing devices which were clearly not covered by the patents, impels a finding that the language in question was intended to, and if the contracts are valid, did prohibit plaintiff from selling devices which were not covered by the patent, which were competitive on the market and which were used for the same purposes as the patented articles. The sentence in question uses the disjunctive "or" in stating he will not make or sell the items covered by the patent "or" articles substantially similar to the patented articles.

On the claim that the doctrine of *res judicata* prevents the defense of misuse of patents, the court is of the opinion that to sustain such a position would make it easy to void the defense of misuse of patents by collusive or friendly litigation. This doctrine is for the protection of the public and to prevent unlawfully extending the monopoly granted by a patent. This position is well brought out in the case of *Mercoid Corporation v. Mid-Continent Investment Co., supra.*

[*Public Policy in Issue*]

The doctrine of misuse of patents involves public policy. It involves more than the contracting parties. It is for the protection of the public. The many cases cited on that doctrine do not always draw a clear line of demarcation. It is an equitable doctrine and the rule seems to be that he who asserts it "must have clean hands". It is based upon the *use of the patent* for the purpose of unlawfully extending the monopoly.

[*Amending of Contract by Court*]

The court believes that if two separate transactions had been entered into, substantially the same result could have been accomplished without raising the question of misuse. The corporation could have purchased the interest of plaintiff and his wife in the business and placed them under reasonable restrictions as to competition. In a separate contract a license could have been granted under the patents which did not contain a restriction on competition. The rule in Wisconsin, *Journal Company v. Bundy,* 254 Wis. 390, 37 N. W. 2d 89, and the general rule elsewhere, is that in connection with the sale of a substantial interest in a business, the purchaser can lawfully bind the seller not to compete, provided that the restriction is reasonable with respect to time and territory, that the restriction is not any more broad than absolutely necessary to protect the purchaser in the "goodwill" of the business that he has purchased. In the October contract there is a provision that if any court held that the restrictions are too broad as to time or as to territory covered, the court might amend the contract so that it is reasonable in those respects. The October contract was to cover

a period of seven years, which has long since expired. No doubt the restriction covering the entire United States would be void as covering far too large a territory and seven years is a long time and might be questioned in that respect. This action was commenced July 13, 1953, a very short time before the expiration of the seven-year period. The court finds that the provisions in that contract, both as to territory and as to time, are unreasonable. An amendment now would not change the situation because the seven years had almost expired before the action was commenced.

[*Parties Misusing Patents*]

Coming to the other considerations involved in the alleged misuse of patents, at the time the October 1948 contract was entered into, the corporation owned the patents, not plaintiff. The corporation would be the principal gainer by eliminating competition. The only gain to plaintiff might be that by eliminating his competition, his royalties would be increased through the larger volume of business of the corporation. As against his gain in that respect, there would be his loss of freedom to take advantage of his knowledge of the business and of the market in selling competing, but non-infringing (assuming the validity of the patents) articles. There is no doubt that such provision was much more to the advantage of the corporation than it was to the advantage of plaintiff, if it was actually to plaintiff's advantage at all. Nevertheless, he entered into the agreement, and the testimony shows that he has, in fact, lived up to the agreement. If he was a party to an illegal contract, he has not purged the misuse. Neither has the misuse been purged by the corporation, it not having released plaintiff from that agreement and not having permitted him to compete. It is the finding of the court that the corporation was the moving party in misuse of the patents to eliminate competition and that plaintiff's part was much more passive than the part of the corporation.

[*Applicability of "Misuse of Patent" Doctrine*]

Plaintiff claims that the doctrine of the misuse of patents is not applicable against the licensee, and that while technically the corporation is the licensee, that was a colorable transaction and, in truth and in fact, the defendant stands in the position of licensor because prior to these contracts the defendant, not plaintiff, owned the patents. In the case of *McCullough v. Kammerer Corp.* [1948-1949 TRADE CASES ¶ 62,231], 166 F. 2d 759 (C. A. 9, 1948), the doctrine was applied against a licensee. An overwhelming majority of the cases that apply the doctrine apply it against the licensor. If the basic purpose of protecting the public is to be fulfilled, the court can see no logical reason why it should not be applied both ways.

Here, there is a question as to how equitable it would be to apply the doctrine against plaintiff when the corporation was the moving and urging party, the party to gain most by eliminating competition. There is no doubt that the contract provision was intended to eliminate competition and its purpose was to eliminate the competition of plaintiff who would have been a dangerous competitor.[1] The footnote indicates the present trend insofar as the Senate is concerned.

[*Defendant Actively Stifled Competition*]

For the reason that the court believes that it was the defendant rather than the plain-

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[1] There has been some criticism of the application of the doctrine of misuse of patents. Thus, in the report of the Study of the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, February 7, 1957, Study No. 1 states at page 23:

"The doctrine of misuse, which bars relief to the plaintiff in infringement suits, often connected with antitrust violation, has resulted in destruction of patents in cases where other action could be more beneficial to the patent system as a whole. We should have a sound patent system, and then the destruction of the patent grant should be earnestly avoided."

and Study No. 2 of the same Subcommittee, released in 1957, states at page 36:

"The misuse doctrine has a broad sweep and many facets. These cannot be treated in detail here. Consideration will accordingly be confined to the underlying conceptual considerations bearing on the subject and to the clash of theory that should be borne in mind in all applications of the doctrine.

"The fundamental misuse logic finds support in well-accepted judicial decisions. Carried too far, however, the logic departs from realty and effectively destroys the patent right. Virtually any practical use of a patent in some measure influences the sale of products outside the scope of the patent."

No action has yet been taken by Congress to narrow the doctrine and if such action were taken, it would, no doubt, not be retroactive and would not affect this litigation.

tiff who actively *used the patents* to stifle competition and that plaintiff was at most a passive party to that misuse of patents, the court believes that as an equitable proposition, the doctrine should not be applied in favor of the defendant and against the plaintiffs in these cases.

DEFENSE OF EVICTION

* * *

* * * it is the opinion of the court that there has, in fact, been an eviction and that the judgment in the *Thomas* case [113 F. Supp. 827], which became final through failure of an appeal, has deprived defendant of what it agreed to pay royalties for. If the court is in error in this view, then the defendant would be liable to pay the minimum royalty because it still has the license under the Faust patent.

* * *

[¶ 68,782] Renaire Corporation (Pennsylvania) et al. v. Federal Trade Commission.

In the United States Court of Appeals for the Third Circuit. No. 12,218. Dated May 8 and 9, 1957.

Petition to Review an Order of the Federal Trade Commission.

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Court Review—Commission Order Denying Appeal.—A Court of Appeals dismissed for want of jurisdiction a petition for review of a Federal Trade Commission order denying an appeal from a hearing examiner's order denying a motion to dismiss a Commission complaint against certain respondents, who claimed that they were not shown to be engaged in interstate commerce. The Commission had ruled that the hearing examiner's order was not a final decision and therefore not reviewable.

See Unfair Practices, Vol. 2, ¶ 5099.40; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.49, 8621.670.

For the appellant: Edwin P. Rome, Philadelphia, Pa.

For the appellee: Robert B. Dawkins, James E. Corkey, and Alvin L. Berman, Federal Trade Commission, Washington, D. C.

Dismissing a petition for review of a Federal Trade Commission order in Dkt. 6555.

Present: McLaughlin, Kalodner and Hastie, Circuit Judges.

Order of the day of May 8, 1957

McLaughlin, Circuit Judge [*In full text*]: The petition for review in this case is addressed to an interlocutory order of the Commission. It is clearly not reviewable. 15 U. S. C. Section 45(c) and 5(c). *Chamber of Commerce v. Federal Trade Commission,* 280 Fed. 45 (8 Cir. 1922): *Crown Zellerbach Corp. v. Federal Trade Commission* [1946-1947 Trade Cases ¶ 57,487], 156 F. 2d 927 (9 Cir. 1946).

Our order of April 4, 1957 staying all further proceedings before Respondent in its Docket No. 6555 is discharged and for nothing holden.

Order of the day of May 9, 1957

It is Ordered that the Petition for Review, in the above entitled case be, and hereby is dismissed for want of jurisdiction.

[¶ 68,783] Frank I. Gordon and Marion V. Gordon v. Loew's, Inc., Paramount Film Distributing Corporation, RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Warner Bros. Pictures Distributing Corporation, Columbia Pictures Corporation, Universal Film Exchanges, Inc., and United Artists Corporation.

John C. Gordon, Helen Gordon and Joseph Gordon v. Loew's, Incorporated, Paramount Film Distributing Corporation, RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Warner Bros. Pictures Distributing Corporation, Columbia Pictures Corporation, Universal Film Exchanges, Inc., and United Artists Corporation.

In the United States Court of Appeals for the Third Circuit. Nos. 12,214 and 12,215. Argued June 11, 1957. Filed July 31, 1957. Amended and petition for rehearing denied September 16, 1957, 1957 TRADE CASES ¶ 68,820.

Appeals from the United States District Court for the District of New Jersey. WORTENDYKE, District Judge.

Clayton Antitrust Act

Private Enforcement and Procedure—When Recovery Under Antitrust Laws May be Barred—Statutes of Limitation—Applicable Statute.—There being no federal statute of limitations applicable to suits under the antitrust laws at the time the suit was brought, the statutes of limitations of the state in which the suit was brought controlled. Plaintiffs' action for treble damages under the Clayton Act was regarded as an action brought for a forfeiture upon a penal statute within the meaning of a New Jersey statute of limitations, and, therefore, the plaintiffs' suit was barred by the two-year limitation imposed by this statute.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.05, 9010, 9010.100.

For the appellants: Richard Orlikoff, Chicago, Ill.

For the appellees: Willard G. Woelper, Newark, N. J.

Affirming judgments of the U. S. District Court, District of New Jersey, 1956 Trade Cases ¶ 68,573.

Before MARIS, STALEY and HASTIE, Circuit Judges.

Opinion of the Court

[*Question Raised*]

By MARIS, Circuit Judge [*In full text*]: These appeals from summary judgments entered by the District Court for the District of New Jersey in favor of the defendants raise the question whether the plaintiffs' actions for treble damages under section 4 of the Clayton Act [1] are barred by an applicable statute of limitations.

[*Parties to Actions*]

The complaints, one by Frank I. Gordon and Marion V. Gordon and the other by John C. Gordon, Helen Gordon and Joseph Gordon, were each filed in the district court on March 3, 1955 against the same defendants, Loew's Incorporated, a Delaware corporation, Paramount Film Distributing Corporation, a Delaware corporation, Paramount Pictures, Inc., a New York corporation, RKO Radio Pictures, Inc., a Delaware corporation, Twentieth Century-Fox Film Corporation, a New York corporation, Twentieth Century-Fox Film Corporation, a Delaware corporation, Warner Bros. Pictures Distributing Corporation, a New York corporation, Columbia Pictures Corporation, a New York corporation, Universal Film Exchanges, Inc., a Delaware corporation, and United Artists Corporation, a Delaware corporation, all of which were motion picture producers or distributors.

[*Assertions of Plaintiffs*]

Plaintiffs Frank and Marion Gordon asserted in their complaint that they were the sole stockholders of Northwest Theatre Company, an Illinois corporation which had been dissolved on February 16, 1950 and which had leased and operated the Wicker Park Theatre in Chicago from April 15, 1929 to May 14, 1949. Plaintiffs John, Helen and Joseph Gordon asserted in their complaint that they were the sole stockholders of Gordon Brothers Theatre Company, an Illinois corporation which had been dissolved on January 25, 1949 and which had operated the Chopin Theatre in Chicago from September 1, 1922 to January 1, 1947.

Each complaint asserted that the defendants had uniformly followed a system which violated the antitrust laws of releasing feature motion pictures for exhibition in Chicago to the injury of the theatre operated by the corporation of which the plaintiffs were surviving stockholders. Each complaint sought to recover treble damages for the alleged injury to the business and property of the corporation. All the plaintiffs claim the right to bring these suits as surviving stockholders of their respective corporations and, in addition, all of them

[1] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. A. § 15.

except Joseph Gordon claim the right to bring the suits as assignees from their respective corporations of the causes of action sued on.

[*Dismissals Appealed*]

By an earlier order with which we are not here concerned the district court dismissed the complaints as against defendants Paramount Pictures, Inc., and Twentieth Century-Fox Film Corporation, New York corporations, for improper venue. Thereafter, the remaining defendants filed motions for summary judgment, asserting that the causes of action had abated at the expiration of two years after the dissolution of the respective corporations by virtue of the provisions of section 94 of the Illinois Business Corporation Act or, in the alternative, that the actions were barred by the New Jersey statute of limitations. The district court decided that the causes of action had abated under the Illinois Business Corporation Act and accordingly entered judgment in each case dismissing the complaint. [1956 TRADE CASES ¶ 68,573] 147 F. Supp. 398. These appeals followed. Since substantially the same questions are involved in each case the appeals were consolidated and considered together in this court.

[*New Jersey Statute Applicable*]

At the time these suits were instituted there was no federal statute of limitations applicable to suits under the federal antitrust laws,[2] it being then settled that the statutes of limitations of the state in which the district court was sitting were to be applied by that court to federal antitrust litigation.[3] Accordingly, since these cases were brought in the District Court in New Jersey we must determine whether the statutes of that state operate to bar their prosecution.

At the outset we note that New Jersey has not enacted a so-called "borrowing statute," i. e. a law directing that the statute of limitations of the state in which a cause of action arose shall be applied to bar a suit on such cause of action if brought in New Jersey. New Jersey has thus not departed from the settled common law rule of conflict of laws that the forum applies only its own procedural statute of limitations and does not give effect to a statute of another state in which the cause of action arose unless that statute has been held by the state which enacted it to be substantive in nature, operating as a condition terminating the existence of the right instead of merely barring the remedy.[4] For this reason we do not need to take account of the limitation imposed by section 94 of the Illinois Business Corporation Act[5] to the extent that it is procedural in nature. And in view of our conclusion as to the applicability of the New Jersey statute we are not called upon to determine the question whether the Illinois statute can have the substantive effect of terminating at the expiration of two years after the dissolution of their respective corporations the causes of action which these plaintiffs as surviving stockholders assert have been given them by the federal antitrust laws.[6]

The sections of the New Jersey Revised Statutes having possible applicability here as statutes of limitations are as follows:

"2A:14-1. 6 years.

"Every action at law for trespass to real property, for any tortious injury to

[2] By the Act of July 7, 1955, 69 Stat. 283, section 4B was added to the Clayton Act specifically imposing a four-years limitation upon suits in such cases, effective January 7, 1956, 15 U. S. C. A. § 15b.

[3] 28 U. S. C. § 1652; *Chattanooga Foundry v. Atlanta*, 1906, 203 U. S. 390; *Bluefields S. S. Co. v. United Fruit Co.*, 3 Cir. 1917, 243 F. 1, 20, error dismissed 248 U. S. 595; *Williamson v. Columbia Gas & Electric Corporation*, 3 Cir. 1939 [1932-1939 TRADE CASES ¶ 55,255], 110 F. 2d 15, cert. den. 310 U. S. 639.

[4] Compare Restatement, Conflict of Laws, § 604, and *Jaqui v. Benjamin*, 1910, 80 N J. L. 10, 77 A. 468, with Restatement, Conflict of Laws, § 605, and *Abbott v. Vico*, 1952, 24 N. J. Super. 10, 93 A. 2d 417.

[5] "§ 94. Survival of remedy after dissolution. The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by the decree of a court of equity when the court has not liquidated the assets and business of the corporation, or (3) by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name." 5 Jones Illinois Statutes Annotated, 1934-1949 Cum. Supp., 32.096.

[6] See the discussion of this question by Judge Hartshorne in *Florida Wholesale Drug v. Ronson Art Metal Works*, D. C. N. J. 1953 [1953 TRADE CASES ¶ 67,483], 110 F. Supp. 573, 574-575.

real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued."

"2A:14-10. 2 years . . .; actions on penal statutes

"All actions at law brought for any forfeiture upon any penal statute made or to be made, shall be commenced within the periods of time herein prescribed:

. . .

"b. Within 2 years next after the offense committed or to be committed against the statute, or cause of action accrued, when the benefit of the forfeiture and the action therefor is or shall be limited or given to the party aggrieved;

. . .

"Where, however, by any statute made or to be made it is provided that any such action is to be brought within a shorter time than that prescribed by this section, such action shall be commenced within the time so provided by that statute." N. J. S. A. 2A:14-1, 10.

[*Application of Statutes to Actions*]

Upon examining these statutes we observe that the period of limitation applicable to the actions here in question is six years, as provided by section 2A:14-1 unless the plaintiffs' actions for treble damages under section 4 of the Clayton Act are to be regarded as actions brought for a forfeiture upon a penal statute within the meaning of section 2A:14-10, in which case the limitation of two years provided by that section is applicable.

In the action brought by John, Helen and Joseph Gordon it appears from the face of their complaint that the cause of action sued upon arose more than six years before the complaint was filed. For in that case it is alleged that their corporation ceased operating the theatre in question on January 1, 1947 and was dissolved on January 25, 1949, both dates being more than six years before the suit was instituted. It is therefore, perfectly clear that their suit is barred by section 2A:14-1[7] if not by section 2A:14-10. The district court accordingly did not err in dismissing it.

In the suit brought by Frank and Marion Gordon, however, it appears from their complaint that their corporation operated the theatre in question up to May 14, 1949 and was not dissolved until February 16, 1950, both dates being less than six years but more than two years prior to the date the suit was instituted. Their suit was, therefore, not barred by section 2A:14-1 but would be barred by section 2A:14-10 if it is applicable.

[*Addiss Case*]

This brings us to the question whether section 2A:14-10 of the Revised Statutes of New Jersey was applicable to bar Frank and Marion Gordon's suit for treble damages under section 4 of the Clayton Act. In determining that question we must, we believe, take that statute to have the meaning and scope which the New Jersey courts have given it in relation to state suits analogous to federal antitrust actions.[8] A recent decision of the Supreme Court of New Jersey, *Addiss v. Logan Corp.*, 1957, 23 N. J. 142, 128 A. 2d 426, sheds much light upon this question which was not available to the district court in this and prior cases.[9] The *Addiss* case involved the question whether section 2A:14-10 applied a bar to an action for treble damages brought by a tenant against his landlord under the State Rent Control Act. The Supreme Court of New Jersey held that section 2A:14-10 was applicable to such an action. Justice Burling who delivered the opinion of the court stated (pp. 148-149):

"Plaintiffs urge upon their cross-appeal that the trial court erroneously limited their recovery of treble damages to rental overcharges occurring within a two-year period prior to commencement of the action. The holding in this regard was based upon *N. J. S. 2A*: 14-10 which provides, *inter alia*:

[7] *H. J. Jaeger Research Laboratories v. Radio Corporation*, 3 Cir. 1937 [1932-1939 TRADE CASES ¶ 55,162], 90 F. 2d 826.

[8] See Fulda and Klemme, The Statute of Limitations in Antitrust Litigation, 1955, 16 Ohio St. L. J. 233, 239 et seq.

[9] *Florida Wholesale Drug v. Ronson Art Metal Works*, 1953 [1953 TRADE CASES ¶ 67,483], 110 F. Supp. 573; *Shelton Electric Co. v. Victor Talking Mach. Co.*, 1922, 277 F. 433.

"'All actions at law brought for any forfeiture upon any penal statute made or to be made, shall be commenced within the periods of time herein prescribed:

* * *

"'b. Within 2 years next after the offense committed or to be committed against the statute, or cause of action accrued, when the benefit of the forfeiture and the action therefor is or shall be limited or given to the party aggrieved; * * *' The argument is that the State Rent Control Act is not a penal statute, hence the limitation does not apply.

"The statutory penalty of *N. J. S. 2A*:42-38 is both remedial and penal, a factor inferentially recognized in *Friedman v. Podell, supra. Cf. Ryan v. Motor Credit Co., Inc.,* 130 *N. J. Eq.* 531 (*Ch.* 1941) affirmed 132 *N. J. Eq.* 398 (*E. & A.* 1942). The tenant recovers the measure of unlawful rental extracted and by statutory direction is the recipient of the punitive award. The total recovery is arbitrarily computed; it takes cognizance of the actual loss only as a base. According to the statutory direction the landlord 'forfeits' an amount three times that base. This operates as a sanction. True, it is largely a wrong to the individual but excessive rental charges also impugn the statutory purpose of stabilizing rentals in emergency areas and thus incidentally wrong the public. Compare *Cruickshanks v. Eak,* 33 N. J. Super. 285 (Law Div. 1954). A further point why the court below was correct in applying the limitation is the desire to prevent actions such as this, having penal characteristics, from being unlimited. See *Boswell v. Robinson,* 33 *N. J. L.* 273 (*Sup. Ct.* 1869); *Borough of Fair Lawn v. Fairlawn Transportation, Inc.,* 25 *N. J. Misc.* 331 (*Sup. Ct.* 1947). But *cf. Shelton Electric Co. v. Victor Talking Mach. Co., 277 F.* 433 (*D. C. N. J.* 1922). We concur in the conclusion that the two-year limitation of *N. J. S. 2A*:14-10(*b*) was applicable to the plaintiffs' causes of action."

[*Clayton Act Regarded as Penal*]

The action for treble damages given by section 4 of the Clayton Act is essentially similar in its pertinent characteristics to the action for treble damages which the New Jersey State Rent Control Act gave to a tenant. To paraphrase what Justice Burling said in the *Addiss* case with regard to the State Rent Control Act, the person injured by reason of action forbidden by the antitrust laws recovers the measure of the injury to his business or property and by statutory direction is the recipient of the punitive award. The total recovery is arbitrarily computed; it takes cognizance of the actual loss only as a base. According to the statutory direction the defendant must pay an amount three times that base. This operates as a sanction. True it is largely a wrong to the individual but violations of the antitrust laws also impugn the Congressional purpose of freeing interstate commerce from restraints and monopolies and thus incidentally wrong the public. Indeed the violation of those laws is not only subject to this sanction but is also made a misdemeanor, punishable by fine and imprisonment.[10] We think it is clear, in the light of the *Addiss* opinion, that for the purpose of the application of section 2A:14-10 of the New Jersey Revised Statutes, section 4 of the Clayton Act must be regarded as a penal statute within the purview of that section.

It is suggested that section 4 of the Clayton Act cannot thus be held to be a penal statute because the Supreme Court of the United States held in *Chattanooga Foundry v. Atlanta,* 1906, 203 U. S. 390, that the five years limitation upon suits "for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise" imposed by the predecessor of section 2462 of title 28, United States Code, was not applicable to such a suit. It must, of course, be conceded that such a suit is not for a penalty within the meaning of the federal statute of limitations now incorporated in section 2462. But it does not follow that the law which authorizes such a suit to be brought may not be a penal statute within the meaning of section 2A:14-10 of the New Jersey Revised Statutes. For "penal" and "penalty" are not words of art. On the contrary, as is the case with many other terms used in the law, their meaning varies with the circumstances in which they are used and takes on the meaning in each instant which the user intends. See *Huntington v. Attrill,* 1892, 146 U. S. 657. As an illustration we may point out that actions under the antitrust laws at other times and in other settings have been described by the federal courts

[10] Sections 1 and 2 of the Sherman Act, 15 U. S. C. A. §§ 1, 2.

as authorizing the recovery of a penalty.[11] And indeed the fact that the antitrust laws had been held to be penal in respect to the application of the statutes of limitations of some states but not of others was one of the reasons why Congress in 1955 enacted the uniform statute of limitations applicable to these cases.[12]

All we are called upon to decide and all we do decide is that section 4 of the Clayton Act is a penal statute within the meaning of that phrase as used in section 2A:14-10 of the Revised Statutes of New Jersey, and that, therefore, the suit brought by Frank and Marion Gordon is barred by the limitation imposed by that section.

[*Persuasive Circumstances*]

It is persuasive, although of course not controlling, that in similar cases in the federal district court in Illinois involving the application of the Illinois statute of limitations to suits for treble damages under the Clayton Act the Court of Appeals for the Seventh Circuit reached a conclusion similar to that to which we have come in this case.[13]

[*Dismissals Affirmed*]

The judgments of the district court will be affirmed.

[¶ 68,784] Sunbeam Corporation v. Ross-Simons, Inc.

In the Rhode Island Supreme Court. Equity No. 2558. Decided July 24, 1957.

Rhode Island Fair Trade Act

Fair Trade—Scope of Injunctive Relief—Contempt.—In an action for contempt for violation of an injunction which prohibited a retailer from making sales below the fair trade price "in its place of business," sales made in a customer's home and in the street outside the entrance to the retailer's place of business were held not to violate the injunction. Pleadings and proofs need not be interpreted to determine the scope and extent of an injunction.

See Fair Trade, Vol. 1, ¶ 3366.42, 3380.42.

For the complainant: James H. Donnelly, and John B. Kelaghan, both of Providence, R. I.

For the respondent: Sidney L. Rabinowitz, Providence, R. I.

Opinion

CONDON, Justice [*In full text*]: This is a bill in equity to enjoin the respondent from selling or offering for sale the complainant's products, specifically enumerated in the bill, in violation of the provisions of general laws 1938, chapter 393, otherwise known as the Fair Trade Act. On the

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[11] *Fleitmann v. Welsbach Co.*, 1916, 240 U. S. 27, 29; *Decorative Stone Co. v. Building Trades Council*, 2 Cir. 1928, 23 F. 2d 426, 427, cert. den. 277 U. S. 594; *H. J. Jaeger Research Laboratories v. Radio Corporation*, 3 Cir. 1937 [1932-1939 TRADE CASES ¶ 55,162], 90 F. 2d 826, 828; *Sun Theatre Corp. v. RKO Radio Pictures*, 7 Cir. 1954 [1954 TRADE CASES ¶ 67,722], 213 F. 2d 284, 287; *Paramount Film Distributing Corp. v. Applebaum*, 5 Cir. 1954 [1954 TRADE CASES ¶ 67,866], 217 F. 2d 101, 105, cert. den. 349 U. S. 961.

[12] See S. Rept. No. 619, accompanying H. R. 4954, 84th Cong. 1st Sess., which became the Act of July 7, 1955, in which it is stated at pages 4-5:

"It can therefore be seen that not only are the provisions of State law establishing time limitations upon actions to recover a statutory liability inconclusive insofar as ascertaining the correct period in which to bring suit is concerned, but they frequently create the additional problem of determining whether the statutory liability imposed under the antitrust laws is in the nature of a penalty or forfeiture, or otherwise.

"It is one of the primary purposes of this bill to put an end to the confusion and discrimination present under existing law where local statutes of limitations are made applicable to rights granted under our Federal laws. This will be accomplished by establishing a uniform statute of limitations applicable to all private treble damage actions as well as Government damage actions, of 4 years."

[13] *Hoskins Coal & Dock Corp. v. Truax Traer Coal Co.*, 1951 [1950-1951 TRADE CASES ¶ 62,925], 191 F. 2d 912, cert. den. 342 U. S. 947; *Schiffman Bros. v. Texas Co.*, 1952 [1952 TRADE CASES ¶ 67,270], 196 F. 2d 695; *Sun Theatre Corp. v. RKO Radio Pictures*, 1954 [1954 TRADE CASES ¶ 67,722], 213 F. 2d 284.

filing of the bill a temporary restraining order was entered and later, after a hearing, such order was continued in effect as a preliminary injunction pending a hearing of the cause on the merits. The form of the injunction was assented to by counsel for the respondent and was duly entered on May 1, 1956.

[*Bases for Appeal*]

Thereafter on June 22, 1956 complainant filed a motion to adjudge respondent in contempt for violating said injunction. After a hearing in the superior court, the trial justice found as a fact that respondent had violated the injunction and he adjudged it in contempt. A decree to that effect was duly entered and respondent was therein given an opportunity to purge itself of such contempt "by ceasing to make any sales in Rhode Island at less than the prices set forth in Supplement 54 (appended hereto as Appendix A) to Sunbeam Fair Trade Contracts in the State of Rhode Island, either on the respondent's premises or otherwise, including Cash on Delivery purchases." The cause is here on respondent's appeal from that decree.

The respondent has filed twelve separate reasons of appeal, some of which are repetitious. However, we need concern ourselves with only three of them, namely, (4) that the decree appealed from is vague, uncertain and indefinite; (8) that the restraining order of April 19, 1956 which was continued in effect on May 1, 1956 is vague, indefinite and uncertain and therefore the trial justice erred in holding respondent in contempt thereof; and (12) that he erred in allowing respondent to purge itself only "by ceasing to make any sales contrary to the fair trade provisions in the State of Rhode Island either on the premises or otherwise, including C. O. D. purchases."

[*Issue of Ambiguity*]

Those three reasons are basically predicated upon respondent's main contention that the restraining orders of April 19 and May 1 are ambiguous and therefore it cannot lawfully be adjudged in contempt thereof. The respondent also argues that the decree appealed from is erroneous for the same reason and for the further reason that it goes beyond the prayer of the bill and the terms of the restraining order of May 1 in requiring it to refrain from making sales "either on the premises or otherwise, including C. O. D. purchases."

In reply to those contentions complainant argues that they are in effect indirect attacks upon the validity of the restraining orders of April 19 and May 1 which respondent may not lawfully make because it formally assented thereto and did not appeal therefrom. There is no merit in that argument because its premise is faulty. The respondent is not attacking the validity of those restraining orders. It is maintaining merely that they are so indefinite and uncertain that they are not enforceable in the circumstances of this case by a judgment in contempt. The fact that respondent assented to them does not preclude it from claiming that such orders submit to an interpretation which leaves it free to act as it did in selling complainant's products. That such an interpretation is different from complainant's understanding of the force and effect of those orders only goes to show that they are lacking in precision. The respondent's interpretation need not be the more reasonable one. If it is reasonable then the restraining orders are ambiguous. In such a case respondent is unquestionably within its rights in raising that issue here in its defense to an adjudication for contempt.

[*Injunctive Prohibitions*]

Is the restraining order of May 1 ambiguous? The pertinent portion thereof reads that "this respondent be enjoined from advertising, offering for sale or selling, *in its place of business at 290 Westminster Street,* Providence, Rhode Island, any products bearing Sunbeam Corporation's name or trade-marks at less than the prices stipulated pursuant to Sunbeam Retailer Fair Trade Contracts in force and effect with other retailers in the State of Rhode Island; from making any allowance, gift, rebate or concession in connection with the advertising, offering for sale or selling, *in respondent's said place of business,* of any of said commodities at less than said prices." (italics ours)

[*Respondent's Contentions*]

The respondent contends that such injunction submits to two interpretations as follows: 1. That respondent is enjoined from advertising for sale in its place of business, offering for sale or selling in said place any of complainant's products at less than fair

trade prices. 2. That respondent is enjoined from advertising in its place of business. selling therein, or offering to sell therein whether the sale be made therein or elsewhere, as less than fair trade prices. It contends that the first interpretation is the proper one and that the entire context of the injunction was intended to prevent any sale in its place of business or any offer to make such sale therein. It further contends that it complied with its understanding of the terms of the injunction and did not sell or offer to sell therein any of complainant's products at less than the fair trade price, but it concedes that it did make two sales at less than such price outside of its place of business.

[*Alleged Injunction Violations*]

The undisputed evidence is that Mrs. Mary Dropot and Mrs. Mary A. Little each purchased from respondent an electric frying pan at less than the fair trade price. Each sale occurred in the following manner. Mrs. Dropot went to respondent's place of business and asked for a Sunbeam frying pan. The salesman told her they had one for sale but he could not sell it there but it could be delivered at her home and sold to here there for cash on delivery. The respondent accepted Mrs. Dropot's offer to purchase the frying pan by delivering it to her the next day at her home and receiving payment at that time.

Mrs. Little's purchase was consummated under somewhat different circumstances. She went to respondent's place of business seeking a Sunbeam frying pan and offered to pay for one on delivery at her home. However, when it did not arrive she inquired of respondent the reason therefor, and was told that there was trouble with the delivery truck but if she would come to the entrance of the store the deliveryman would deliver it to her there. She went to the store and tried to have respondent accept the money and deliver the pan to her in the store but respondent refused and told her that no sale could be made in the store and that she could get the pan only from the delivery boy who was outside at the entrance on Mathewson street. She then went there and obtained the pan from the boy after paying him the stipulated purchase price.

[*Court's Interpretation of Injunction*]

We are of the opinion that the terms of the injunction reasonably submit to more than one interpretation. We cannot say there was no basis for respondent's understanding that it was enjoined from doing the acts prohibited by the injunction only "in its place of business at 290 Westminster Street * * *." That may or may not be a less reasonable interpretation than complainant's understanding, but regardless of that fact the injunction cannot be deemed other than ambiguous.

[*Applicable Law Discussed*]

The law is well settled that an injunction to be enforceable by contempt proceedings should be clear and certain and its terms should be sufficient to enable one reading the writ or order to learn therefrom what he may or may not do thereunder. 43 C. J. S. Injunctions § 206(b)(c), pp. 932, 933, and § 259(b), p. 1008. The party enjoined should not be punished for disobedience of an order which is capable of a construction consistent with innocence. 17 C. J. S. Contempt § 12, p. 16.

The terms of the order should be specific, clear and precise so that one need not resort to inference or implications to ascertain his duty or obligation thereunder. *Franklin v. Franklin,* 26 N. J. Misc. 350, aff'd 2 N. J. 103. As the respondent must obey the order at his peril it should be clear, definite and explicit so that an unlearned man can understand its meaning. *Tierney, Inc. v. James,* 56 N. Y. S. 2d 8. This is a reasonable requirement, since contempt of the order may involve punishment by way of not only loss of property but also loss of liberty. *Ketchum v. Edwards,* 153 N. Y. 534. In line with that view the supreme court of New Jersey has held: "It is fundamental that the order imposing a restraint should be so clear, definite and certain in its terms that the person to whom it is directed may readily know what he is restrained from doing." *State ex rel. State Board of Milk Control v. Newark Milk Co.,* 118 N. J. Eq. 504, 524.

The complainant, however, argues that those requirements are met in the instant case if one reads the bill of complaint in connection with the order. In support of its claim that the pleadings and the order should be read together to remove any uncertainty, it cites *Starkweather v. Williams,*

31 R. I. 134. That case is clearly not an authority for such a proposition. Furthermore the respondent therein was not relying upon any ambiguity in the order and was not claiming that he had complied with his interpretation of it, but was actually contending "that he was not obliged to comply with the decree in question because the same ought not to have been entered in the cause * * *." The law with reference to this matter is, in our opinion, well settled. In *State ex rel. State Board of Milk Control v. Newark Milk Co., supra,* it was expressly stated at page 524: "Those commanded should not be remitted to the pleadings and proofs, and required to interpret them to determine the scope and extent of the injunction." See also *Richards v. West,* 3 N. J. Eq. 456, and *Tierney, Inc. v. James, supra.*

The complainant finally contends that in any event respondent is guilty of violating the injunction under its own interpretation of it, since the delivery of the frying pan to Mrs. Little outside the entrance to its store was in effect a sale upon respondent's premises. This contention fails to recognize that the injunction specifically enjoins respondent from making a sale or selling "in its place of business * * *." The respondent interprets the quoted words literally. A sale on the sidewalk outside its place of business is not in it. This may be a narrow construction of the injunction in its favor, but under the law as we understand it the respondent is entitled to rely on such a construction. Thus it has been held that a party should not be punished for disobedience of an order which is capable of a construction consistent with innocence. *North v. Foley,* 267 N. Y. S. 572; *National Labor Relations Board v. Express Publishing Co.,* 312 U. S. 426; *National Labor Relations Board v. Brashear Freight Lines, Inc.,* 127 F. 2d 198; *Budd Mfg. Co. v. National Labor Relations Board,* 142 F. 2d 922. For constructions by this court of the terms of injunctions consistent with such rule, see *Kennedy v. Frechette,* 45 R. I. 399, and *Jackson Furniture Co. v. Lieberman,* 65 R. I. 224.

[*Injunction Not Violated*]

In view of our conclusion that respondent has not violated the injunction of May 1, 1956, it is unnecessary for us to consider its other contention that the decree appealed from goes beyond the prayers of the bill and the terms of such injunction.

[*Cause Remanded*]

The respondent's appeal is sustained, the decree appealed from is reversed, and the cause is remanded to the superior court for further proceedings.

[¶ 68,785] United States v. Maryland and Virginia Milk Producers Assn., Inc.

In the United States District Court for the District of Columbia. Civil Action No. 4482-56. Filed June 24, 1957.

Case No. 1309 in the Antitrust Division of the Department of Justice.

Clayton and Sherman Antitrust Acts

Department of Justice Enforcement and Procedure—Civil Suits for Injunctive Relief—Discovery and Production of Records.—On a motion for discovery and production of documents dating back 27 years, the court ruled that where the claim of relief was an illegal conspiracy in restraint of trade or an attempt to monopolize under the Sherman Act, approximately 10 years was a sufficient period in which plaintiff might retrace its proof. However, where the charge was an illegal acquisition of stock in violation of the Clayton Act, the Government was entitled to a longer period of years in which to scrutinize the relationship between the parties for a number of years preceding the acquisition.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225.280.

For the plaintiff: Joseph J. Saunders, Edna Lingreen, and J. E. Waters; all of Washington, D. C.

For the defendant: Herbert A. Bergson, William J. Hughes, Jr., and Daniel H. Margolis; all of Washington, D. C.

Opinion

ALEXANDER HOLTZOFF, District Judge [*In full text*]: This case is before the court on a motion by the plaintiff for discovery and production of numerous documents, under Rule 34 of the Federal Rules of Civil Procedure.

[*Nature of Suit*]

The action is a civil suit brought by the Government for an injunction under the antitrust laws against the Maryland and Virginia Milk Producers Association, Inc., an agricultural cooperative association, composed of nearly two thousand milk producers, most of whom are located in the States of Maryland and Virginia. The defendant is charged with an attempt to monopolize interstate trade and commerce in milk, in violation of Section 2 of the Sherman Act (15 U. S. C. 2); with entering into contracts in restraint of trade in milk, in violation of Sections 1 and 3 of the Sherman Act (15 U. S. C. 1 and 3); and with purchasing and acquiring in 1954 substantially all of the assets of Embassy Dairy Company, an independent producer, the effect of this transaction being to restrain competition or to create a monopoly, in violation of Section 7 of the Clayton Act (15 U. S. C. 18). The relief sought is an adjudication that the acts complained of are unlawful and an injunction against a continuation of the illegal activities. By the present motion, the plaintiff seeks the production of numerous documents, including contracts, correspondence, records and similar papers, dating back to 1930. The defendant objects to such a discovery as too broad, unreasonable and burdensome.

[*Discovery Provisions*]

The discovery provisions of the Federal Rules of Civil Procedure must be liberally construed, *Hickman v. Taylor*, 329 U. S. 495. Broad discovery is one of the outstanding, progressive innovations introduced by modern practice. It is a potent weapon in the attainment of justice. The court will take no step to abridge or detract from its beneficent effects. Nevertheless, discovery must be subject to the reasonable control of the court, since counsel in their zeal may at times unintentionally and unwittingly impose unnecessary and unduly onerous burdens on opposing parties. That this possibility was contemplated by the framers of the Rules appears by Rule 30, which reposes in the court a residual control over the taking of depositions, and from the very fact that discovery of documents under Rule 34 may be had only on motion for good cause shown. This rule necessarily implies that the extent of the discovery of documents is not to be unlimited and unbridled, but is to be subject to the sound discretion of the court.

[*Reasonability of Period Covered*]

In this instance in order to establish two of its three claims for relief, it is necessary for the Government to prove the existence of restraints of trade and attempts to monopolize, or threats to do so, as of the time of the trial. To be sure, it would be unreasonable and might even defeat the ends of justice to confine the Government in its proof to evidence of acts done on any particular day. The Government must be free to retrace the defendant's activities for a considerable period, if it deems it necessary to do so, in order to establish the background and the setting in which the acts complained of were being committed. This is true of any case involving a continuing conspiracy. There is a serious question, however, whether it is reasonable to go as far back as 1930,—a period of twenty-seven years. No reason is stated and none appears discernible why this arbitrary date was selected by counsel.

[*Cut-Off Dates Fixed by Court*]

The question whether evidence is too remote is in all cases to be determined by the court. The decision depends in large part on the issues. It is the function and the duty of the court of its own motion to exclude evidence that it deems too remote, even though possibly it may have some nebulous logical distant relevancy to the issues. In this respect there is no distinction between an antitrust case and any other case. Consequently, it is entirely proper and even desirable for the court to fix a so-called "cut-off" date, or a series of "cut-off" dates.

In due course the court will determine how long a period the plaintiff may retrace in its proof. The period need not necessarily be the same as to all transactions involved in this action. The court feels that under the circumstances, the appropriate time to make this ruling will be at the pretrial hearing, which has been set for October 1. Tentatively, for the purpose of the

present motion, only, the court is of the opinion that approximately a ten-year period more or less should be generally sufficient as to the first two claims for relief. As to the third claim, a much longer time is suitable. The court will dispose of the pending motion on this basis, without prejudice to a renewal in the event that at the pretrial hearing the court determines to extend the period.

It is true, as stated in the memoranda submitted by the Government in connection with this motion, that in the past in some antitrust cases the Government introduced evidence concerning a much longer period. Counsel cite three such cases in which a period of forty years was covered in this manner. The inordinate length of trials in antitrust litigation, however, caused largely by voluminous evidence reaching back many years that at times eventually has proven unnecessary, has created serious difficulties for the Federal courts throughout the country. The problem has grown to such magnitude that the Judicial Conference of the United States has taken cognizance of it, and has created a Committee to devise means to shorten these proceedings. One device is to reduce the period to be covered by the evidence to a reasonable length, bearing in mind that the ultimate question in a civil suit for an injunction is whether at the time of the trial acts are being committed or threatened that should be enjoined for the future. Injunctions look to the future and not to the past, and the past is important only as throwing light on the present and on future intentions.

[*Excessive Length of Trials*]

Excessive length of trials is closely related to the problem of congestion in the courts. There are two principal causes of congestion. One is increase of business. This cannot be regulated, since no one should be impeded in access to the courts. The other basic cause of congestion is that individual trials on the average take too long a time. If the duration of trials could be reduced to a point where three cases would be tried in the same length of time that is now consumed by two, congestion would before long become a thing of the past. The court feels that it has a duty to do what is reasonably necessary and proper to shorten what otherwise might be an inordinately long trial, to the extent to which this may be done without detriment to the rights of any party. Federal judges are clothed with common law powers to control trials, and, naturally should exercise them in the light of reason.

[*duPont Case Distinguished*]

Among the cases relied on by counsel for the Government is the recent decision of the Supreme Court in *United States v. E. I. duPont de Nemours Co.* [1957 TRADE CASES ¶ 68,723], (June 3, 1957). There evidence was introduced concerning matters that had transpired fifty years previously. That case, however, involved a different principle and is not apposite as to two of the claims for relief in the case at bar. The action was brought under the provision of law that under certain circumstances prohibits a corporation engaged in commerce to acquire stock of another corporation. The transaction attacked in that suit was a single acquisition of stock that took place in 1917. The Government was in a position to challenge it, because the statute of limitations does not run against the United States. Naturally, in an action to set aside a transaction that took place forty years ago, it is reasonable to introduce evidence of acts that transpired during the ten-year period preceding that date. In the case at bar, however, there is charged a continuing conspiracy in restraint of trade and an attempt to monopolize. As to these charges the rights of the parties must be adjudicated as of the date of the trial and not as of the date of a specified transaction that took place in the past. A different principle governs the charge that stock of Embassy Dairy Company was illegally acquired. That purchase took place in 1954, and the Government is entitled to scrutinize the relations between the defendant and Embassy Dairy for a number of years preceding 1954.

[*Ruling on Motion*]

In accordance with the foregoing discussion, the pending motion will be disposed of as follows. The motion is granted to the extent of directing the defendant to produce for inspection and an opportunity to copy, all papers and documents listed in the following paragraphs of the motion:

Paragraph I, sub-paragraphs 1(c) and 4.

Paragraph II.

Paragraph III, sub-paragraphs 4 and 5.

Paragraph III, sub-paragraph 6, limited, however, to the period from March 1, 1955 to February 7, 1957.

Paragraph IV.

In other respects, the motion is denied, without prejudice to a renewal after the pretrial hearing, if as a result of pretrial further discovery appears necessary or desirable.

[¶ 68,786] Sperry Rand Corporation v. Nassau Research and Development Associates, Inc., and John C. McGregor.

In the United States District Court for the Eastern District of New York. Civil Action No. 16151. Filed July 9, 1957.

Robinson-Patman Price Discrimination Act

Price Discrimination—Charging Unreasonably Low Prices Under Section 3 of the Robinson-Patman Act—Sales to the Government.—A decision upholding an allegation of a counterclaim charging that plaintiff corporation violated Section 3 of the Robinson-Patman Act by submitting "below cost" bids to the Signal Corps was not intended to imply that sales to the Government were subject to the Robinson-Patman Act.

See Price Discrimination, Vol. 1, ¶ 3551; Private Enforcement and Procedure, Vol. 2, ¶ 9011.710.

For the plaintiff: Brumbaugh, Free, Graves & Donohue (Walter H. Free of counsel).

For the defendants: Delavan Smith.

Denial of reargument of decision of the U. S. District Court, Eastern Division of New York, 1957 Trade Cases ¶ 68,737. For a prior opinion of the Court, see 1957 Trade Cases ¶ 68,658.

[*Motion For Reargument*]

MORTIMER W. BYERS, District Judge [*In full text*]: This is a motion for reargument of the decision filed June 6, 1957 [1957 TRADE CASES ¶ 68,737] in this case, and is addressed to so much thereof as dealt with the counterclaims asserted in Paragraphs *Thirty-third* and *Thirty-fifth* of the Second Amended Answer.

[*Plaintiff a Purchaser from Peerless*]

The plaintiff properly criticizes the opinion in that as to the Peerless Instrument Co. the court assumed that it was a purchaser of the plaintiff's products. That assumption was based on the allegation that it and another "were substantial suppliers and subcontractors of the plaintiff."

The error lay in thinking that the foregoing quotation meant that Peerless, being a sub-contractor of the plaintiff, probably in performing its sub-contracts, was a purchaser from the plaintiff.

It now appears that the contrary is the fact, and that the plaintiff was a purchaser from Peerless.

[*Threat To Withdraw Purchases*]

It is not seen that this changes the aspect of the characterized pleading, since a threat to withdraw purchases in order to induce Peerless not to do business with this defendant, would be no better in the legal sense, than a threat to discontinue sales to Peerless for the same reason.

On such a motion, it must be obvious that the court cannot undertake to decide whether the allegation is true or false, although the affidavits submitted on behalf of this motion are addressed to that proposition.

[*Government Not Subject to Robinson-Patman Act*]

If the opinion of June 6 [1957 TRADE CASES ¶ 68,737] can be construed to suggest that sales to the Government can be thought to be subject to the provisions of the Robinson-Patman Act, a full disclaimer of any such intention is hereby made.

All that this court intended to suggest was that in ruling upon a motion to dismiss a given pleading, the court was not in a position to say that the motion should be granted on the ground that the counterclaim, in all human probability could not be established.

[*Motion for Reargument Denied*]

Motion for reargument denied. Settle order.

[¶ 68,787] United States v. Consolidated Laundries Corporation, et al. (including Modern Silver Linen Supply Co., Inc., a New York corporation, and Louis Gordon).

In the United States District Court for the Southern District of New York. No. C 152-79. Filed July 12, 1957.

Case No. 1316 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Double Jeopardy.—Dismissal of an indictment which charged a conspiracy commencing "in or about the year 1943," on the ground that the conspiracy charged overlapped one to which defendants pleaded *nolo contendere* in 1943, was denied without prejudice to appropriate consideration at the trial, since the overlapping could not be determined from the indictment alone.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8029.010.

For the plaintiff: Morris F. Klein, Richard Owen, Paul D. Sapienza, Richard B. O'Donnell, and John D. Swartz: all of New York, N. Y.

For the defendant: Halperin, Natanson, Shivitz, Scholer, & Steingut (Harry J. Halperin, Samuel L. Scholer, and Theodore P. Halperin, of counsel), for Modern Silver Linen Supply Co., Inc., and Louis Gordon; Arnold Bauman, for Central Coat, Apron & Linen Service, Inc., General Linen Supply & Laundry Co., Inc., Fred S. Radnitz and Sam Spatt; LaPorte & Meyers, for Standard Coat Apron & Linen Service, Inc.; Jacob Landau, for Consolidated Laundries Corp.; all of New York, N. Y.

Memorandum

SIDNEY SUGARMAN, District Judge [*In full text*]: The indictment herein, charging a conspiracy commencing "in or about the year 1943, the exact date being to the Grand Jurors unknown" must be accorded its plain meaning, viz.: that between January 1, 1943 and December 31, 1943 the conspiracy was born.

[*Nolo Contendere*]

If it was hatched on or before May 28, 1943, when the informations to which movants pleaded *nolo contendere* were filed, there is an overlapping of time. If it was hatched after May 28, 1943 there is not.

Obviously the alleged overlapping cannot be determined from the face of the indictment alone.

[*Alleged "Admissions" of Government*]

Movants point to two alleged "admissions" by the government as extraneous proof of overlapping. These occurred in connection with a motion made by the government to make certain subpoenas for the production of documents "for the years 1943 through December 31, 1956," served by it, on the defendants, effective.

One is a statement in an affidavit of May 14, 1957 that

> "the period of time covered by the subpoenas is not excessive since it is no broader than the conspiratorial period charged."

The other is a statement in the government's brief on that motion that

> "the conspiracy charged extends back 14 years. Evidence from the time of the formation of the conspiracy is relevant to the charges and should be produced."

These statements no more "establish" that the conspiracy now charged overlaps that to which the movants pleaded *nolo contendere* in 1943 than do the statements in the affidavit and brief submitted by the government in opposition to this motion establish the contrary.

[*Opposing Affidavits*]

Here it is said in the opposing affidavit that

> "the government unequivocally states that the conspiracies charged in the 1957 indictment began on or after May 29, 1943"

and in the brief that

> "the government can and will file a bill of particulars stating the commencement date of the conspiracies in the 1957 case to be on or after May 29, 1943."

[*Motion to Dismiss Denied*]

Accordingly, the motions to dismiss the indictment herein upon the ground of former jeopardy are at this time denied but without prejudice to appropriate consideration thereof, if warranted on the proof, at

the trial. *Cf. Short v. United States,* 91 F. 2d 614 (4th Cir. 1937).

In view of the foregoing, no opinion is expressed as to the alleged identity of the industry, area and terms of the conspiracies charged here and in 1943.

It is so ordered.

[¶ 68,788] United States v. Radio Corporation of America and National Broadcasting Company, Inc.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 21743. Filed July 17, 1957.

Case No. 1311 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Civil Suits—Discovery—Production of Records.—A motion by defendants for the production of grand jury minutes containing information to be used in preparing their case was denied on the ground that no showing of good cause had been made since there would seem to be no difficulty in interviewing the witnesses or taking their depositions.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225.280.

For the plaintiff: Harold K. Wood, Philadelphia, Pa., and Bernard M. Hollander, Raymond M. Carlson, Victor R. Hansen, and Victor H. Kramer; all of Washington, D. C.

For the defendant: Bernard Segal, Philadelphia, Pa.

Sur Motion for Production of Documents

WILLIAM H. KIRKPATRICK, Chief Judge [*In full text*]: The general policy against disclosure of proceedings before a grand jury has been invoked by the Government in the course of the argument, but the scope of that policy need not be considered here, because the defendants' motion for the production of the grand jury minutes must be denied upon entirely different grounds.

[*Other Cases Distinguished*]

The defendants contend that *Jencks v. United States,* 353 U. S. 657, and *United States v. Joel Rosenberg,* Court of Appeals, Third Circuit, June 26, 1957, are controlling, but neither of those decisions goes any further than to hold that disclosure of prior statements of a person, made either to a government agent or before a grand jury, may be compelled for the purpose of impeaching him when called as a witness in the course of a criminal proceeding. In the present case the discovery is asked for not for impeachment but for the purpose of obtaining information to be used by the defendants in the preparation of their case. It may be that some of the witnesses who appeared before the grand jury will be called at the trial, but, before the applicability of the *Jencks* and *Rosenberg* decisions can be considered, the witness must be actually called or, at least, the prospect of his being called must be definite and immediate.

[*No Showing of Good Cause*]

The question, therefore, before me at the present time is simply whether good cause, under Rule 34, has been shown for the request for the production of a document or documents. On this point, the Court of Appeals for this circuit has indicated pretty definitely that, if a party has the names of the witnesses whose statements he wants and can interview them or take their depositions without undue burden or delay, he would be "unable to show such special circumstances . . . as would justify production of the statements in question." *Alltmont v. U. S.,* 177 F. 2d 971, 979. There would seem to be no difficulty in the present case about interviewing the witnesses or taking their depositions. I do not think that a showing of good cause has been made.

[*Motion Denied*]

The defendants' motion is denied.

[¶ 68,789] Charles Rubenstein, Inc., and Rubenstein & Kaplan, a partnership of Abraham A. Kaplan, Charles Rubenstein, and Anna Rubenstein; and Charles Rubenstein and Anna Rubenstein as Trustees for Arnold Rubenstein and Sheldon Rubenstein, d/b/a Hollywood Theatre v. Columbia Pictures Corporation, Loew's Incorporated, Minnesota Amusement Company, Paramount Film Distributing Corporation, RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Warner Bros. Pictures Distributing Corporation.

In the United States District Court for the District of Minnesota, Fourth Division. No. 4332 Civil. Dated July 2, 1957.

Clayton and Sherman Antitrust Acts

Private Enforcement and Procedure—When Recovery Under Antitrust Laws May be Barred—Statute of Limitations—Tolling the Period of Limitations.—A motion by defendant to limit damages to those accruing within six years prior to the commencement of a private antitrust suit was granted. The court ruled that the tolling statute suspending the running of the statute of limitations applied only to the named defendants in the government litigation and, therefore, did not operate against the defendant, a wholly owned subsidiary of another defendant, since the defendant subsidiary was not a party to the prior government suit against the parent company. Further, imputation to one conspirator of the onus of the acts of his fellow conspirators did not abrogate the particular statute of limitations which may be available to any one of the conspirators.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.275.

For the plaintiff: Lee Loevinger and Larson, Loevinger, Lindquist, Freeman and Fraser, all of Minneapolis, Minnesota.

For the defendant: Mandt Torrison and Bundlie, Kelley and Maun, all of St. Paul, Minnesota.

For a prior opinion of the United States District Court for the District of Minnesota, Fourth Division, see 1953 Trade Cases ¶ 67,546.

[*Motion*]

NORDBYE, GUNNAR H., Judge [*In full text*]: In substance it may be stated that defendant's motion is that, as to it, damages herein be limited to those accruing within two years prior to the commencement of this action, or, in the alternative, that the limitation period be set at six years. In view of this Court's decision in *Homewood Theater v. Loew's, Inc.,* 1951, 101 F. Supp. 76, that the six-year statute of limitations is applicable to antitrust suits brought upon claims arising in Minnesota, it follows that only the alternative motion of the defendant need be considered.

[*Complaint*]

This action was brought on November 6, 1952, against eight motion picture distributors and this moving defendant to recover treble damages for the violation of the Sherman Act, 15 U. S. C. A. § 1, et seq., and the Clayton Act, 15 U. S. C. A. § 12, et seq. MAC was incorporated in 1932 and was a wholly owned subsidiary of one of the defendants in this action. For the purposes of this motion, it must be deemed to have entered into the conspiracy alleged in the complaint in violation of the antitrust laws, at least as early as 1936. Furthermore, it appears from the allegations of the complaint that MAC was one of the instruments, so to speak, by which the parent corporation named as a defendant herein benefited from the conspiracy. It is conceded that the parent corporation, as well as the other distributor defendants, are subject to the tolling of the statute of limitations which was suspended when the Government brought an antitrust action against the parent company of MAC and the seven other defendants herein on June 20, 1938. The government suit now has been terminated as to all of these distributor defendants, but the suit was terminated at different times as to each defendant. The question presented to this Court is whether or not the tolling statute operates against MAC, which was not a party to the Government's suit. If it does, then the damages can be sought from MAC for a period prior to six years from the date of the commencement of this action, that is, prior to November 6, 1946. The tolling statute, 15 U. S. C. A. § 16, reads as follows,

[*Tolling Statute*]

"Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent,

restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under such laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

It is plaintiff's contention that this statute tells the period of limitation on all suits arising out of any matter complained of in the government litigation. But obviously the "matter complained of" pertains to the matters which were in issue between the Government and the named defendants. It would be a surprising theory of construction if the tolling of the statute applies to one who is not a party to the government litigation. It must be remembered that one of the primary purposes of this statute was to give private litigants the benefit of decrees in the government litigation. No decree has been entered as to MAC. The conclusion that the tolling statute applies only to the named defendants in the government litigation is in harmony with the views indicated by the courts which have considered this question. *Sun Theatre Corp. v. RKO Radio Pictures* [1954 TRADE CASES ¶ 67,722], 7 Cir., 1954, 213 F. 2d 284, 292; *Electric Theater Co. v. Twentieth Century-Fox Film Corp.* [1954 TRADE CASES ¶ 67,777], W. D. Mo., 1953, 113 F. Supp. 937, 945; *Christensen v. Paramount Pictures* [1950-1951 TRADE CASES ¶ 62,751], D. C. Utah, 1950, 95 F. Supp. 446, 455.

[*Conspiracy Law*]

But plaintiffs argue that if the above construction of the tolling statute is sound, it does not follow that the six-year limitation statute is available to MAC because it was sued within the applicable six-year period of the statute and is responsible, according to plaintiffs' contention, for the total damage sustained by the plaintiffs, although such damages began to accrue as early as 1936. Plaintiffs rely upon the well-known principle of conspiracy law as enunciated in 11 Am. Jur. 580, Conspiracy, § 48,

> "The connection between the parties having been established, whatever was done in pursuance of the conspiracy by one of the conspirators is considered as the act of all the conspirators; all are equally liable therefor as joint tortfeasors, regardless of whether they were original parties to the conspiracy and irrespective of either the fact that they did not actively participate therein or the extent to which they benefited thereby."

Plaintiffs recognize that if MAC terminated its participation in the conspiracy more than six years prior to the filing of the complaint, this action as to it would be barred, but they assert the argument that, having been sued within the six-year period and because the acts and deeds of the conspirators are evidentiary admissible as to all conspirators who may have entered into the conspiracy later, the damages which accrued during the entire impact of the conspiracy is likewise a burden which MAC must assume. In this regard, it must be remembered that the conspiracy itself is not actionable. The statute of limitations does not begin to run from the date of the inception of the conspiracy. Rather, it begins from the date when an overt act of the conspirators produces damages. A continuing conspiracy as such is not actionable. It is the impact of the conspiracy which gives rise to a claim for damages, and it is the date of such impact of the wrong engendered by the conspiracy from which this statute of limitations begins to run. Imputing to a fellow conspirator the deeds and acts of his co-conspirators may perchance continue over a period of many years, but the wrong caused by the conspiracy sets in motion the applicable statute of limitations. Deeds and acts of fellow conspirators which are not followed by an overt act causing injury are not affected by the statute of limitations. One may be responsible for the acts and deeds of one conspirator if a co-conspirator, with knowledge of the purposes and objects thereof, enters into and upon the unlawful scheme, but to sustain an action for damages against such co-conspirator, it must be enforced by the commencement of an action within the statutory period after the damage complained of has occurred. Assume, for instance, that there are three conspirators and the conspiracy continues over a period which exceeds the applicable statute of limitations. However, two of the conspirators are not amenable to suit because of their absence from the jurisdiction of the Court and the statute of limitations by a state enactment is tolled as to them. The resident conspirator is not deprived of the applicable limitation statute merely because the statute has been tolled as to his fellow conspirators, although the acts and conduct of each of the conspirators extends

over a period in excess of the six-year statute and may be proven in establishing the inception and continuing nature of the conspiracy. In absence of the tolling of the statute of limitations as to MAC by reason of Section 16, Title 15, U. S. C. A., there is no rational basis for the assumption that the imputation of the acts of the conspirators to a co-conspirator also embraces the tolling of the statute which may apply to one or more of the co-conspirators. Imputation to one conspirator of the onus of the acts of his fellow conspirators does not abrogate the particular statute of limitation which may be available to any one of the conspirators. This principle seems so patent and evident, and plaintiffs have cited no case to the contrary. Reference is made, however, to certain language found in *Walder v. Paramount Publix Corp.* [1955 TRADE CASES ¶ 68,097], 1955, S. D. N. Y., 132 F. Supp. 920. Two of the defendants in that case, Paramount Pictures Corporation and American Broadcasting-Paramount, maintained that the complaint should be dismissed as to them because they were not formed until 1949 and could not be held for acts committed by other conspirators before they came into existence. In rejecting this contention, the court stated,

> "* * * This contention overlooks the fact that these defendants are charged with having joined a conspiracy continuing from 1928 to the filing of the complaint. Under well established principles of conspiracy law, they may be held as fully liable as the original or earlier participants in the conspiracy."

It should be noted, however, that in view of the factual situation therein, the import of the paragraph is not to the effect that general conspiracy law abrogates the effect of the statute of limitations. The court held that general conspiracy law imposes upon a latecomer to the conspiracy liability for prior acts of damage inflicted by other conspirators, but the case does not hold that this principle deprives the latecomer of the defense afforded him by the statute of limitations. The paragraph cited was written to answer the defendants' contention that liability could not be imposed upon them for acts done before they joined the conspiracy; it was not written to abolish the statute of limitations as to defendants who were latecomers to the conspiracy.

[*Damages Limited to Six-Year Period*]

It follows from the foregoing that defendant Minnesota Amusement Company is entitled to a partial summary judgment limiting damages which may be assessable against it to a period of six years prior to the commencement of this action. Judgment may be entered accordingly. It is so ordered.

An exception is allowed.

[¶ 68,790] **United States v. R. P. Oldham Company; Winter Wolff & Co., Inc.; Thos. D. Stevenson & Sons, Inc.; Balfour, Guthrie & Co., Limited; John P. Herber & Company, Inc.; Kinoshita and Co., Ltd., U. S. A.; R. P. Oldham, Jr.; Al Perrish; and William L. McGee.**

In the United States District Court for the Northern District of California, Southern Division. No. 35567. Filed June 11, 1957.

Case No. 1330 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act and Wilson Tariff Act

Combinations and Conspiracies—Construction of Sherman Act and Wilson Tariff Act—Foreign Commerce—Import Trade.—In an action charging a conspiracy to restrain the importation of Japanese wire nails in violation of Section 1 of the Sherman Act and Section 73 of the Wilson Tariff Act, a motion to dismiss the Sherman Act charge on the ground that Section 73 of the Wilson Tariff Act applies the prohibitions of the Sherman Act to import trade and therefore, being the more specific statute, supersedes the Sherman Act with regard to import trade was denied. Both acts can be applied to restraints on import trade.

See Combinations and Conspiracies, Vol. 1, ¶ 2035.350.

Combinations and Conspiracies—Construction of Sherman Act and Wilson Tariff Act—Foreign Commerce—Applicability of Foreign Law and Effect of Treaty.—In an action charging that American importers and an American subsidiary of a Japanese corporation

conspired to restrain the importation of Japanese wire nails in violation of the Sherman Act and the Wilson Tariff Act, the defendants' contention that the principles of international law and comity of nations put the charges of the action within the exclusive jurisdiction of the Japanese courts or require that Japanese law be applied was rejected. Only American corporations and American nationals were named as defendants, and the only commerce sought to be regulated was the importation and sale of such nails in the United States. Even assuming that the alleged conspiracy had its situs in Japan and that most of the acts in furtherance of the alleged conspiracy had been done in Japan, a United States court was not deprived of jurisdiction since the conspiracy was alleged to have operated as a direct and substantial restraint on commerce of the United States. The fact that the conspiracy might be lawful in Japan was irrelevant. Also, a motion to dismiss the action on the basis of the Treaty of Friendship, Commerce and Navigation between the United States and Japan was denied. Even if the Treaty were held to provide an exclusive remedy for antitrust violations, the defendants would have no standing to invoke it, since they were American corporations and subject to their country's own laws.

See Combinations and Conspiracies, Vol. 1, ¶ 2035.350.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Indictment—Motion to Strike Allegations as Surplusage.—A motion to strike as surplusage allegations of an indictment which related to the activities of foreign co-conspirators was denied on the ground that the allegations contained relevant facts pertaining to the formation of the alleged conspiracy, the acts done pursuant to the alleged conspiracy, and the effects of the conspiracy in the United States. Such a motion should not be granted unless it is clear that the allegations are not relevant and are prejudicial or inflammatory.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.700.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Indictment—Bill of Particulars.—A motion for a bill of particulars was granted to enable certain defendants properly to prepare their case and avoid surprise at trial because of the complexities of the action and the generality of the allegations of the indictment. However, another motion for a bill of particulars was denied in part because it would have required too great a disclosure of evidence on the Government's part.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.800.

For the plaintiff: Lloyd H. Burke, United States Attorney, San Francisco, Cal.; Victor R. Hansen, Assistant Attorney General, and Baddia J. Rashid, Attorney, Department of Justice, Washington, D. C.; and Lyle L. Jones, Marquis L. Smith, and Gerald F. McLaughlin, Attorneys, Department of Justice, San Francisco, Cal.

For the defendants: Carl Schuck, Los Angeles, Cal., for R. P. Oldham & Co. and R. P. Oldham, Jr.; Macklin Fleming, Los Angeles, Cal., for Winter Wolff & Co., Inc., and Al Perrish; Frank McCarthy, San Francisco, Cal., for Thos. D. Stevenson & Sons, Inc., and William L. McGee; Walter Lowry, San Francisco, Cal., for Balfour, Guthrie & Co., Ltd.; Joseph L. Alioto, San Francisco, Cal., for John P. Herber & Co., Inc.; and H. William Tanaka, Washington, D. C., and Salvatore Fusco, San Francisco, Cal., for Kinoshita and Co., Ltd., U. S. A.

[*Indictment*]

EDWARD P. MURPHY, District Judge [*In full text*]: This is a criminal action charging a conspiracy in restraint of interstate and foreign commerce in Japanese wire nails, in violation of Section 1 of the Sherman Act [1] and Section 73 of the Wilson Tariff Act.[2] Brought together as defendants are five United States corporations which import Japanese wire nails for resale on the West Coast of the United States, three officers of these corporations, and an American subsidiary of a Japanese corporation which exports wire nails to the United States. In addition, a number of Japanese firms are named as co-conspirators but not joined as defendants.

Briefly, the facts alleged in the indictment are these. Although there are over 200 Japanese nail makers, the wire rod used in the manufacture of these nails is made by only five Japanese rod makers. With

[1] 15 U. S. C., Sec. 1.
[2] 15 U. S. C., Sec. 8.

respect to wire nails to be sold on the West Coast of the United States, the defendant importers have engaged in a conspiracy with the five Japanese rod makers and certain Japanese exporters whereby the rod makers have furnished wire rod to nail makers only for the manufacture of nails to be sold and shipped through the co-conspirator exporters and to the defendant importers; the defendant importers in turn have purchased a designated amount of nails and have resold them in allocated sales territories at designated prices. The results of the conspiracy are that the defendant importers have acquired complete control of the Japanese wire nail market on the West Coast, all other importers, as well as direct purchasers, have been excluded from this market, competition in the sale of wire nails on the West Coast has been eliminated, and prices at which the nails are sold on the West Coast have been stabilized.

[*Motions*]

Various motions are before this court, and there are many duplications. For purposes of discussion, each motion will be deemed to have been made by all defendants unless otherwise noted.

I. Relationship of the Sherman Act and the Wilson Tariff Act

It is contended that Count One of the indictment, charging a violation of Section 1 of the Sherman Act, must be dismissed in view of Count Two, which charges a violation of Section 73 of the Wilson Tariff Act. The ground urged for this dismissal is that Section 73 of the Wilson Tariff Act applies the prohibitions of the Sherman Act to import trade and therefore, being the more specific statute, it must be held to have superseded the Sherman Act with regard to import trade.

This motion merits no discussion. It is well settled that both acts can be applied to restraints on import trade. *United States v. General Electric Co., et al.* [1948-1949 Trade Cases ¶ 62,318], 80 F. Supp. 989, 1016-17 (S. D. N. Y. 1948); *United States v. General Dyestuff Corp., et al.* [1944-1945 Trade Cases ¶ 57,303], 57 F. Supp. 642, 648 (S. D. N. Y. 1944); *cf. United States v. Sisal Sales Corp., et al.*, 274 U. S. 268 (1927). Accordingly, the motion to dismiss Count One of the indictment is denied. The alternative motion to require election between the two counts of the indictment is also denied.

II. Jurisdiction

Relying mainly on *American Banana Co. v. United Fruit Co.*, 213 U. S. 347 (1909), the defendants strongly urge that the indictment reaches too far, that all or part of the alleged conspiracy and acts in furtherance of the conspiracy are beyond this court's jurisdiction, or at least that Japanese law controls in determining the legality of these activities.

At the outset, it should be made clear that there is no attempt here to regulate Japanese commerce as such, or to indict Japanese firms or Japanese nationals.[3] Only American corporations and American nationals are named as defendants. The only commerce sought to be regulated is the importation and sale of wire nails on the West Coast of the United States. Surely this is within the jurisdiction of United States courts. Japanese firms and activities in Japan are considered only in so far as they relate to the precise charge, against American defendants, of a conspiracy in restraint of trade in the importation and sale of wire nails on the West Coast of the United States. Under these circumstances, it is absurd to say that principles of international law and comity of nations put the charges of this indictment within the exclusive jurisdiction of the Japanese courts, or require that Japanese law be applied.

There seems to be some disagreement as to where the alleged conspiracy was formed. But assuming, arguendo, that the conspiracy at least "has its situs" in Japan and that most acts in furtherance of the conspiracy have been done in Japan, this does not deprive the court of jurisdiction where, as here, the conspiracy is alleged to operate as a direct and substantial restraint on interstate and foreign commerce of the United States. *United States v. Aluminum Co. of America, et al.* [1944-1945 Trade Cases ¶ 57,342], 148 F. 2d 416 (2d Cir. 1945); *United States v. Timken Roller Bearing Co.*

[3] Even if the Japanese co-conspirators had been joined as defendants, this would not in itself be cause for dismissal of the indictment. *United States v. Aluminum Co. of America, et al.* [1944-1945 TRADE CASES ¶ 57,342], 148 F. 2d 416 (2d Cir. 1945): *United States v. American Tobacco Co., et al.*, 221 U. S. 106 (1911): *United States v. Pacific & Arctic Railway & Navigation Co., et al.*, 228 U. S. 87 (1913).

[1948-1949 TRADE CASES ¶ 62,380], 83 F. Supp. 284 (N. D. Ohio 1949), *modified and aff'd* [1950-1951 TRADE CASES ¶ 62,837], 341 U. S. 593 (1951).

Nor does the fact that the agreement may be lawful in Japan serve to make it lawful in this country. *United States v. American Tobacco Co., et al.,* 221 U. S. 106 (1911). Defendants also press the point that if the situation were reversed—i.e., if the agreement concerned exportation of American products to Japan—the agreement would be under the aegis of the Webb-Pomerene Act.[4] Suffice it to say that the situation is not reversed.

Much is made of the fact that this is a criminal action. A criminal statute of course must be construed more strictly than a civil statute. But it requires no stretching of the Sherman Act to apply it to the facts of this case. The Supreme Court had no difficulty in similarly applying the Sherman Act in *United States v. American Tobacco Co., et al., supra,* and *United States v. Pacific & Arctic Railway & Navigation Co., et al.,* 228 U. S. 87 (1913), both criminal actions.

As to *American Banana Co. v. United Fruit Co., supra,* to the extent that the case still has vigor in anti-trust actions, the facts in the instant action are far closer to those in *United States v. Sisal Sales Corp., et al., supra,* where it was held that the *American Banana* case did not apply.

One further point raised by the defendants in support of their motion goes to the evidentiary problems which will come up at trial because of the inclusion of these foreign elements in the indictment. But evidentiary difficulties do not divest a court of jurisdiction. As to the argument that the defendants should not be put to an explanation of the acts of their foreign co-conspirators, it should not be forgotten that the government will have the burden of proof in this action.

For the foregoing reasons, the motion to dismiss the indictment for lack of jurisdiction is denied.

III. Effect of the Treaty

In 1953 the United States and Japan entered into a Treaty of Friendship, Commerce and Navigation. The effect of the Treaty is to accord "national treatment" and "most favored nation treatment" by one party to nationals of the other party (I use the term "nationals" to include companies as well as individuals.) In other words, nationals of one party are not to be discriminated against by the other party.

Article XVIII of the Treaty states:

> 1. The two Parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories. Accordingly, each Party agrees upon the request of the other Party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects.
>
> 2. * * *

It is contended by the defendants that Article XVIII provides the exclusive remedy available to the government in reaching the conspiracy charged in the indictment.

I cannot agree that Article XVIII was intended to provide any such exclusive remedy. The language of this Article is permissive rather than mandatory. If it had been intended that the Article should operate as a pro tanto revocation of the anti-trust laws, the Article could easily have been so worded. The tenor of the entire Treaty is *equal* treatment to nationals of the other party, not *better* treatment. In view of these considerations, I conclude that Article XVIII was intended to supplement the anti-trust laws, not replace them.

Even if Article XVIII were held to provide an exclusive remedy for anti-trust violations, the defendant importers would have no standing to invoke this Article. All are American corporations. Certainly the Treaty was not intended to exempt nationals from the sanctions of their own country's laws. *Cf. Skiriotes v. State of Florida,* 313 U. S. 69 (1941).

Nor do I think Kinoshita & Co., Ltd., U. S. A., would have any standing to invoke Article XVIII. Though wholly owned by a Japanese corporation, the defendant Kinoshita is an American corporation organized under the laws of California. Article XXII of the Treaty is the only article

[4] 15 U. S. C., Secs. 61-65.

devoted to definition of terms used in the Treaty. After defining "national treatment" and "most favored nation treatment" in paragraphs 1 and 2, respectively, Article XXII goes on in paragraph 3 to define "companies", and then states:

> * * * Companies constituted under the applicable laws and regulations within the territories of either Party *shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party. (emphasis added)
>
> 4. * * *

Thus by the terms of the Treaty itself, as well as by established principles of law, a corporation organized under the laws of a given jurisdiction is a creature of that jurisdiction, with no greater rights, privileges or immunities than any other corporation of that jurisdiction.[5]

If co-conspirator Kinoshita & Co., Ltd., Tokyo had wished to retain its status as a Japanese corporation while doing business in this country, it could easily have operated through a branch. Having chosen instead to gain privileges accorded American corporations by operating through an American subsidiary, it has for most purposes surrendered its Japanese identity with respect to the activities of this subsidiary.

Article VII of the Treaty in no way weakens the above conclusion.[6] Although it equates domestic subsidiaries with their foreign parents, it does so only for purposes of that Article, which has the effect of according nationals of one party engaging in business within the territory of the other party the same treatment accorded nationals of the other party. For example, an American subsidiary of a Japanese parent is to have the same rights as any domestically owned American corporation. The Article nowhere attempts to give greater rights to such subsidiaries.

The motion to dismiss the indictment on the basis of the Treaty of Friendship, Commerce and Navigation between the United States and Japan is therefore denied.

IV. Motion to Strike

As an alternative to dismissing the indictment for lack of jurisdiction, there is a motion pursuant to Rule 7(d) of the Federal Rules of Criminal Procedure to strike as surplusage those allegations in the indictment which relate to the activities of the Japanese co-conspirators. A motion to strike allegations of an indictment as surplusage should not be granted unless it is clear that the allegations are not relevant and are prejudicial or inflammatory. *United States v. Klein, et al.*, 124 F. Supp. 476, 479-80 (S. D. N. Y. 1954). Here the allegations which the defendants ask this court to strike are relevant facts relating to the formation of the conspiracy, acts done pursuant to the conspiracy, and the effects of the conspiracy in the United States. Accordingly, the motion to strike is denied.

V. Balfour, Guthrie & Co., Ltd.

In addition to concurring in most of the above motions, defendant Balfour, Guthrie & Co., Ltd., has moved for dismissal on the ground that it did not sign a proposed agreement for distribution of Japanese wire nails in the United States and on the further ground, as stated in a supporting affidavit, that its purchase of Japanese wire nails has been on an order-by-order basis and that it has "shopped around" for the best price. This position may be well taken. But without any evidence before it, without any elaboration of the government's general and broad indictment, at best it would be premature for this court to say that Balfour, Guthrie & Co., should be dropped as a defendant. Therefore, this motion is denied, without prejudice to renew the motion at a later stage of the proceedings.

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[5] But of course, the rights of an alien owned corporation may be *less* than those of domestically owned corporations. See *Clark v. Uebersee Finanz-Korporation, A. G.*, 332 U. S. 480 (1947); *Daimler Co. v. Continental Tyre & Rubber Co.*, (1916) A. C. 307 (H. L.)

[6] The pertinent provisions of Article VII read: "1. Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party."

VI. Bill of Particulars

Essentially, there are two motions for bills of particulars. The motions of the following defendants are identical and will be considered as one motion: R. P. Oldham Co., Winter Wolff & Co., Inc.; R. P. Oldham, Jr.; Al Perrish; Thos. D. Stevenson & Sons, Inc.; and William L. McGee. The motion of Kinoshita & Co., Ltd., U.S.A. will be considered separately.

Because of the complexities of this case —particularly in its foreign aspect—and the generality of the allegations in the indictment, I feel that a bill of particulars is necessary here to enable the defedants properly to prepare their case and avoid surprise at trial.

Motions of R. P. Oldham Co., et al. The section numbers referred to here will be those used in the collective motion of Defendants R. P. Oldham Co., Winter Wolff & Co., Inc., R. P. Oldham, Jr., and Al Perrish. The corresponding section numbers used in the joint motion of defendants Thos. D. Stevenson & Sons, Inc., and William L. McGee shall be deemed ruled on in the same manner.

The following requests seek to ascertain the precise nature of the charges against the defendants, and are granted: Paragraphs I-IV, inclusive; V(a); VI-X, inclusive.

The remaining requests—Paragraph V(b), (c) and (d)—would require too great a disclosure of evidence on the government's part, and the defendants will be adequately apprised of the specific charges against them by the granting of the other requests. Accordingly, they are denied.

Motion of Kinoshita & Co., Ltd., U.S.A. The following requests, or portions thereof, relate to the theory of the government's case with respect to defendant Kinoshita & Co., Ltd., U.S.A., particularly the extent to which the government claims this defendant is responsible for, or in identity with, co-conspirators Kinoshita & Co., Ltd., Tokyo and Shigeru Kinoshita: Paragraphs I-III, inclusive; IV, with the exception of "and by what means" in each of subparagraphs (a), (b) and (c); V and VI; VII, with the exception of "and by what means" in each of subparagraphs (a), (b) and (c). These requests are granted.

Those portions of the requests which have not been granted above are denied. These particular portions relate too heavily to the government's evidence, and their denial will not substantially impair defendant Kinoshita in preparation of its case nor result in surprise at trial.

Order

All motions to dismiss and strike are denied. The motions for bills of particulars are granted to the extent stated in Section VI, *supra,* and are otherwise denied.

It is so ordered.

[¶ 68,791] John M. Milton, Plaintiff and Appellant v. Hudson Sales Corporation et al., Defendants and Appellants; Donald C. Reath, Respondent.

In the California District Court of Appeals, First District, Division One. Civil No. 16833. Dated July 15, 1957.

Appeal from judgments of the Superior Court of Alameda County and from an order granting a new trial. S. VICTOR WAGLER, Judge. Judgments affirmed and reversed; order modified and affirmed.

California Cartwright Act

Combinations and Conspiracies Under State Laws—Practices—Refusal to Renew Franchise—Agreement—Legality.—A damage judgment in favor of an automobile dealer, who alleged that a sales subsidiary of an automobile manufacturer refused to renew his dealer franchise pursuant to an agreement with a competitive automobile dealer to eliminate the plaintiff as a dealer, was reversed on the ground that the nonrenewal of the plaintiff's franchise did not constitute an unreasonable restraint of trade in violation of the California Cartwright Act. Evidence established that the defendants agreed to eliminate the plaintiff as a dealer with the intent to do away with his competition in the competitive area. But the mere fact that the defendants placed some literal restraint on competition does not, *per se,* establish a breach of the Cartwright Act. The antitrust laws are concerned only with unreasonable restraints. The reversal was based on two decisions under the Federal

antitrust laws (*Schwing Motor Co. Inc. v. Hudson Sales Corp., et al.*, 1956 TRADE CASES ¶ 68,292, 68,564, and *Packard Motor Car Co., et al. v. Webster Motor Car Co.*, 1957 TRADE CASES ¶ 68,682).

See Combinations and Conspiracies, Vol. 1, ¶ 2337.

For the plaintiff-appellant: Stanley E. Sparrowe and Stark & Champlin.

For the defendants-appellants: Pillsbury, Madison & Sutro, Eugene M. Prince, and John B. Bates.

For the respondent: Fernhoff & Wolfe, and Cameron W. Wolfe.

Action for damages for breach of contract and for violation of the Cartwright Act. Judgment for plaintiff on first cause of action, affirmed; judgment for plaintiff on second cause of action, reversed; judgment for defendant Reath on second cause of action, affirmed.

[*Causes of Action*]

PETERS, Presiding Justice [*In full text except for omissions indicated by asterisks*]: In 1949 John Milton, a former Hudson automobile dealer in East Oakland, filed the complaint that ultimately resulted in the judgments and orders from which the appeals here involved have been taken. The fourth amended complaint, upon which the cause proceeded to trial, alleges two causes of action, the first for breach of contract, and the second for damages for a violation of the Cartwright Act. (Bus. & Prof. Code, §§ 16700-16758.)

The first cause of action names Hudson Sales Corporation, a wholly owned subsidiary of the corporation that manufactures Hudsons, as the sole defendant. It charges that from September 15, 1948, to September 30, 1949, Hudson, in bad faith, failed to supply Milton with his reasonable requirements of new cars in violation of the terms of the contract between them.

The second cause of action is a double damage claim under the Cartwright Act, alleging a conspiracy to restrain trade by not continuing Milton as a Hudson dealer after his contract expired in 1949. It names as defendants Hudson; two of its employees —Young and VanDerzee; a former employee—Lawson; the Walter W. Anderson Company—another Hudson dealer in East Oakland; Walter W. Anderson—the former manager and chief owner of that company; and Donald C. Reath, a former employee of Anderson.

Prior to trial Anderson and his company secured a dismissal of the action against them for lack of prosecution. The jury awarded Milton $35,750 against Hudson on the first cause of action. Hudson appeals from the judgment entered on that verdict. On the second cause of action the jury's verdict was in favor of defendant Reath, and Milton appeals from the judgment on that verdict. As to the other four defendants, Hudson, Lawson, Young and Van Derzee, the jury found a conspiracy to restrain trade, and fixed Milton's damages as $50,000 (which, doubled, means an award of $100,000). Judgment was entered on these verdicts. Thereafter, the trial court, as to the second cause of action, granted the four defendants a new trial. Milton appeals from the order granting the new trial. The four defendants against whom judgment had been entered on the second cause of action, appeal from that judgment. Thus, there are four appeals before us. The reporter's transcript totals nearly 2,500 pages, while the briefs exceed 300 pages.

THE CONTRACT ACTION

* * *

For the foregoing reasons the judgment on the contract action should be affirmed.

THE RESTRAINT OF TRADE ACTION

[*Allegations*]

In this cause of action Milton alleged, in substance, that, because of his successful operation and ability to attract customers who might otherwise buy from competing Hudson dealers, certain of such dealers and Hudson desired and planned to eliminate him as a dealer; that pursuant to such plan, Lawson, Hudson's zone manager, and defendant Anderson, another Hudson dealer, agreed that, in return for Anderson improving his selling facilities, Lawson would cause Hudson not to renew Milton's franchise; that defendant Reath was made a party to the agreement; that in exchange for the participation of Reath and Lawson they were both to receive a financial interest in the Anderson Company, a corporation

subsequently to be formed; that defendants Young and VanDerzee became parties to this agreement to eliminate Milton as a competitor; that Lawson furthered the object of the agreement by refusing to sell Milton his needs and requirements for automobiles; that Milton's franchise was not renewed because of the efforts of defendants. It may be assumed that the facts amply support these allegations.

The question is whether such allegations and proof state or prove a cause of action under the Cartwright Act. We think not.

[*Cartwright Act*]

The parties agree that the relevant provisions of the Cartwright Act are sections 16720, 16726 and 16750 of the Business and Professions Code. Section 16720 reads, in part:

"A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

"(a) To create or carry out restrictions in trade or commerce. . . .

"(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity."

Section 16726 provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."

Section 16750 permits, in a civil action under the act, the recovery of double the damage sustained by any "person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter."

[*Federal Law*]

There have been relatively few California cases construing the Cartwright Act. As a result the parties quite properly refer principally to the federal law. There is little doubt that cases decided under the Sherman Act and the common law policy against restraint of trade are applicable to problems arising under the Cartwright Act. (*People v. Building Maintenance etc. Assn.* [1954 TRADE CASES ¶ 67,651], 41 Cal. 2d 719 [264 P. 2d 31]; *Speegle v. Board of Fire Underwriters* [1946-1947 TRADE CASES ¶ 57,493], 29 Cal. 2d 34 [172 P. 2d 867].) But the same does not apply to all of the cases decided under the Clayton Act. As was pointed out by Mr. Justice Dooling in *Rolley, Inc. v. Merle Norman Cosmetics, Inc.* [1955 TRADE CASES ¶ 67,937], 129 Cal. App. 2d 844, 851 [278 P. 2d 63, 282 P. 2d 991], the Clayton Act is broader in its prohibitions than the Sherman Act, and, in the same respects, is broader than the Cartwright Act, so "that cases based on the Clayton Act are inapplicable here."

[*The Appeals*]

Before discussing the case law applicable to the problem presented some mention should be made about the order in which the various appeals here involved will be considered by this court. As already pointed out, the jury returned a $50,000 verdict (doubled, $100,000) against Hudson, Young, VanDerzee and Lawson. These four have appealed from the judgment entered on that verdict. Subsequently, the trial court granted a new trial to these four defendants on this cause of action. On their appeal from the judgment it is the contention of Hudson, et al., that they are entitled to a directed judgment in their favor because there is no proof of public injury, as distinguished from injury to Milton individually, and that such is required by the Cartwright Act.

Of course, normally where there are such double appeals the appeal from the order granting the new trial is first considered, and, if affirmed, the appeal from the judgment is dismissed. (3 Witkin, California Procedure, p. 2299.) But such procedure indicates that a new trial should be had. If, as Hudson, et al., contend, the allegations and proof, as a matter of law, are legally insufficient to state or prove a cause of action, it would be futile to permit a new trial. In that event, judgment should be entered for Hudson, et al. For that reason, since we have concluded that Milton has not alleged or proved a case under the Cartwright Act, we will first consider the appeal from the judgment by Hudson, et al.

[*Rule of Reason*]

There is no doubt, under the allegations and proof, that Hudson, et al., agreed to eliminate Milton as a dealer with the intent to do away with his competition in the Alameda County area. But the mere fact that Hudson, et al., placed some literal restraint on competition among East Bay dealers in Hudson automobiles by their agreement, does not, as claimed by Milton, *per se,* establish a breach of the Cartwright

Act. This is so, because nearly every business contract eliminates competition in the sense that it prevents other parties from coming into the transaction. It has been recognized for many years that antitrust laws are concerned only with unreasonable restraints. In *Chicago Board of Trade v. United States,* 246 U. S. 231, 238 [38 P. 2d 242, 62 L. Ed. 683], the Supreme Court pointed out:

> "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."

In *Lawson v. Woodmere, Inc.* [1954 Trade Cases ¶ 67,904], 217 F. 2d 148, p. 151, it was said:

> "In the classic cases of *Standard Oil Co. of New Jersey, v. United States,* [221 U. S. 1 (31 S. Ct. 502, 55 L. Ed. 619)] . . . and *United States v. American Tobacco Co.,* [221 U. S. 106 (31 S. Ct. 632, 55 L. Ed. 663)] . . . the Supreme Court established the celebrated 'rule of reason' by holding that not all restraints of interstate commerce are within the ambit of the Sherman Anti-Trust Act, but only those restraints which are undue or unreasonable. The Act does not cover restraints that are merely incidental, casual and immaterial."

The California Supreme Court has written (*People v. Building Maintenance etc. Assn.* [1954 Trade Cases ¶ 67,651], 41 Cal. 2d 719, 727 [264 P. 2d 31]):

> "[I]t may be assumed that the broad prohibitions of the Cartwright Act are subject to an implied exception similar to the one that validates reasonable restraints of trade under the federal Sherman Antitrust Act. [Citing the *Standard Oil Co.* case.]"

[*Issue*]

Thus, the real question involved is whether the nonrenewal of a dealer's contract under the circumstances here involved constituted an unreasonable restraint of trade. Milton, of course, contends that it did. In support he cites and discusses many cases, several decided under the Clayton Act. Hudson, et al., also cite many cases and arrive at the contrary conclusion. It is not necessary to discuss these cases because we think two recent federal cases are decisive of the controversy.

[*Controlling Decisions*]

The first of these is *Schwing Motor Co. v. Hudson Sales Corp.* [1956 Trade Cases ¶ 68,292], 138 F. Supp. 899; affirmed and District Court opinion adopted as opinion of the Court of Appeals—[1956 Trade Cases ¶ 68,564] 239 F. 2d 176. There, the respective courts decided on the pleadings that the plaintiff had failed to allege any cause of action under either the Sherman or Clayton Acts. The case there alleged was much stronger than the one here involved, in that as a result of the claimed illegal agreement between Hudson and another dealer only one Hudson dealer would have been left in the city of Baltimore. In the instant case there were many Hudson dealers left in Alameda County.

In the *Schwing* case the court stated the problem as follows (138 F. Supp. at p. 900):

> "The principal question . . . is whether an agreement between an automobile manufacturer and a retail dealer, pursuant to which the manufacturer refuses to renew expiring agreements with two other dealers, and gives the dealer a 'virtual monopoly' of the sale of one make of automobile in one city, is a combination or conspiracy to monopolize trade or commerce, . . . in violation of the Sherman Act and of the Clayton Act."

The amended complaints charged a conspiracy between Hudson and another dealer almost identical to the one here charged, with the results that, as here, plaintiff's dealership of some six years' standing was cancelled.

The court, citing many cases, pointed out that every manufacturer has a natural and complete monopoly of his product sold under his brand name. He may decide to sell his product to the public through dealers, and, if he does so, he may exercise his own independent discretion as to the parties with whom he will deal.

> "This is a common law right which the anti-trust laws have not destroyed." (P. 902.) "A refusal to deal becomes illegal only when it produces an unreasonable restraint of trade or a monopoly forbidden by the anti-trust laws." (P. 903.)

The court then pointed out that even an exclusive dealership is not *per se* invalid, particularly where the article to be sold is in direct competition with the products of other manufacturers. The court laid down the governing principles in the following language (p. 903):

"The main purpose of the anti-trust laws is to protect the public from monopolies and restraints of trade, and the individual right of action for treble damages is incidental and subordinate to that main purpose. [Citing cases.] Public injury alone justifies the threefold increase in damages. It is essential, therefore, that the complaint allege facts from which it can be determined that the conduct charged to be in violation of the anti-trust laws was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce. [Citing many cases.]"

The court then analyzed the allegations of the complaint—allegations quite similar, and, in some respects, stronger than those here involved. It is pointed out that there is no allegation that the alleged conspiracy caused a dearth of automobiles in general in the area or of Hudson automobiles in particular, nor is there an allegation that any member of the public who desired to do so was prevented from purchasing a Hudson by the agreement. Even if fewer Hudsons were sold because of the charged agreement, which was alleged in the *Schwing* case, "it does not follow that the public was injured or that there was any such restraint of trade as is forbidden by the anti-trust laws." (P. 904.) The court referred to *Apex Hosiery Co. v. Leader* [1940-1943 TRADE CASES ¶ 56,039], 310 U. S. 469 [60 S. Ct. 982, 84 L. Ed. 1311, 128 A. L. R. 1044], where it had been held that the public was not injured by the fact that because of the conspiracy 1,000 pairs of Apex stockings failed to move in interstate commerce, for the reason that the conspiracy did not affect the general market in hosiery and did not give the conspiring group the power to fix prices, restrict production or lessen quality with impunity. The general hosiery market remained in its normal competitive state:

"So, in the case at bar, the public was not injured by the alleged fact that 357 Hudson automobiles failed to move in interstate commerce, since the market in the general commodity, automobiles in all price ranges, remained in its normal competitive state. The *Apex* case emphasized market control as a prerequisite for violation of the Sherman Act. [Citing other cases.]" (P. 904.)

The court pointed out that neither Hudson nor the dealer with whom it conspired controlled the automobile market in Baltimore, Hudson selling, in the year in question, but about two per cent of all automobiles sold in the United States. It quoted from several cases holding that, without a restraint producing an effect upon the market in a commodity generally, there is no illegal restraint, and that a restraint which merely affects a relatively minor part of the highly competitive market of the general commodity is not illegal. The court held that the complaint was fatally defective because no

"horizontal conspiracy between competitors, no effort to extend the manufacturer's natural monopoly of its own product, no effort to establish market dominance and drive out the products of competitors, is alleged. . . . The question, of course, is what agreements tend 'unreasonably' to restrain interstate commerce, and whether the 'monopoly' is a true monopoly of a commodity, or merely the natural and proper monopoly which every manufacturer has of his own product in a highly competitive market." (Pp. 905-906.)

The court then stated that the right of a manufacturer to his "natural" monopoly

"is not to be lost simply because the manufacturer and the dealers discuss the matter before the expiring agency or dealership agreements terminate and are not renewed. . . .

"If the plaintiffs' contention were correct, it is hard to see how Hudson could ever reduce the number of its dealers in any given area after discussing the matter with the dealers involved, since the remaining dealers, whether one or two or three, would have a 'virtual monopoly' of the sale of new Hudson automobiles in the area." (P. 907.)

The court concluded "that the amended complaints do not show any unreasonable restraint of interstate commerce nor any monopoly forbidden by the anti-trust laws nor any injury to the public sufficient to support an action for treble damages." (P. 907.)

On appeal to the Court of Appeals the decision of the District Court was "adopted as the opinion of this court" for the reason that "we agree . . . that no violation of the Sherman or Clayton Acts . . . is alleged for reasons adequately stated in . . . [the] opinion." (*Schwing Motor Co. v. Hudson Sales Corp.* [1956 TRADE CASES ¶ 68,564], 239 F. 2d 176.)

The *Schwing* case is on all fours with the instant one. Except for changes of

names, the opinion, in most respects, could be adopted *in toto* as the opinion on this phase of the instant case. If it states good law, and we think that it does, it is decisive of the present appeal.

In his briefs on this appeal Milton placed his greatest reliance on the case of *Webster Motor Car Co. v. Packard Motor Car Co.* [1955 Trade Cases ¶ 68,171], 135 F. Supp. 4. That case, too, is on all fours with the instant one, and undoubtedly the District Court decision relied upon supports the position taken by Milton. The *Webster* case was discussed in the *Schwing* case, and the Court of Appeals refused to follow it, holding it to have been erroneously decided. The *Webster* case was appealed. After the briefs were written in the instant case, the Court of Appeals for the District of Columbia Circuit reversed the District Court. (*Packard Motor Car Co. v. Webster Motor Car Co.* [1957 Trade Cases ¶ 68,682], 243 F. 2d 418—decided April 18, 1957. Certiorari has been filed with the United States Supreme Court but has not yet been acted upon.

In the *Webster* case the action was based on alleged conspiracy between the Packard manufacturer and the plaintiff's rival car dealer to eliminate plaintiff as a Packard dealer and to install the rival dealer as the exclusive Packard seller in the Baltimore area. The case was submitted to the jury and a large verdict returned. This the Court of Appeals reversed, holding that, as a matter of law, no cause of action has been stated.

The Court of Appeals held that "[w]e think the defendants were entitled to judgment. We agree substantially with *Schwing Motor Co. v. Hudson Sales Co.* . . ." (P. 420.)

The court held that, under the facts alleged and proved, there was no monopoly or conspiracy to monopolize within the meaning of the Sherman Act. The court referred to and quoted from the so-called "cellophane" case decided by the Supreme Court of the United States after the *Webster* case had been decided by the District Court —*United States v. E. I. du Pont de Nemours & Co.* [1956 Trade Cases ¶ 68,369], 351 U. S. 377 [76 S. Ct. 994, 100 L. Ed. 1264]. There the court had held that an agreement tending to create a monopoly had to be appraised in the terms of a competitive market for the product, and that where commodities are reasonably interchangeable by consumers for the same purposes, agreements restraining trade as to a portion of the general product are not illegal. Thus, although Du Pont produced 75 per cent of all cellophane in the country, there was no illegal monopoly. The Court of Appeals in the *Webster* case then held:

> "Since there are other cars 'reasonably interchangeable by consumers for the same purposes' as Packard cars and therefore in competition with Packards, an exclusive contract for marketing Packards does not create a monopoly. And there is no evidence of any attempt or conspiracy to create a monopoly, since there is no evidence of any attempt to get control of the relevant market." (P. 420.)

The court went on to hold that there was no illegal contract or conspiracy in restraint of trade, because only "unreasonable" restraints are prohibited. The court then held that if competition in the general product at both buyer and seller levels still exists, the challenged agreement that results in an exclusive dealership is not illegal. The court stated (p. 421):

> "The short of it is that a relatively small manufacturer, competing with large manufacturers, thought it advantageous to retain its largest dealer in Baltimore, and could not do so without agreeing to drop its other Baltimore dealers. To penalize the small manufacturer for competing in this way not only fails to promote the policy of the anti-trust laws but defeats it.
>
> ". . . That Packard had agreed with Zell [the competing dealer with whom Packard was alleged to have conspired] not to renew Webster's contract . . . is immaterial, not only because the agreement was legal, but also because it inflicted no damage."

One judge dissented in the *Webster* case. This judge not only agreed with the District Court in the case, but expressly refused to follow the *Schwing* case, holding that any restraint, a product of an agreement to restrain, is unreasonable and illegal. This conclusion is contrary to the decided cases.

[*Rulings of Court*]

Further discussion is unnecessary. These two cases are on all fours, and controlling. The judgment against Hudson, et al., must be reversed and the trial court directed to enter judgment in their favor. This dis-

position of this appeal necessarily disposes of all the other appeals.

It is therefore ordered:

1. The judgment on the first cause of action from which Hudson Sales Corporation appeals is affirmed;

2. The judgment against Hudson Sales Corporation, W. E. Young, N. K. VanDerzee and Frank J. Lawson on the second cause of action under the Cartwright Act is reversed, and the trial court directed to enter its judgment in their favor.

3. The appeal by John M. Milton from the order granting the new trial on the second cause of action is modified to provide that judgment should be entered for all the defendants, and, as so modified, is affirmed. Respondents to recover costs on this appeal.

4. The judgment entered in favor of Donald C. Reath on the second cause of action is affirmed.

BRAY, J., and WOOD (FRED B.), J., concurred.

[¶ 68,792] Technical Tape Corporation v. Minnesota Mining and Manufacturing Company.

In the United States Court of Appeals for the Second Circuit. No. 337—October Term, 1956. Docket No. 24207. Argued April 12, 1957. Decided August 2, 1957.

Appeal from a judgment of the District Court, Southern District of New York, after a trial before BICKS, J., dismissing plaintiff's complaint, amended complaint and supplemental complaint, which sought a declaratory judgment that defendant's Drew Patent No. 2,177,627 was invalid, not infringed, and unenforceable; and sustaining the defendant's counterclaim for patent infringement, and adjudging the patent valid and infringed by plaintiff, and awarding the defendant an injunction and damages, and an accounting to ascertain the damages. Affirmed.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Exclusive Dealing—Tying Arrangements—Sufficiency of Evidence—Misuse of Patents as Defense To Infringement Claim.—An alleged infringer of a patent for a transparent adhesive tape did not establish that the patentee misused its patent by selling its transparent adhesive tape on the condition that the purchaser thereof buy other products of the patentee not covered by its patent or by selling its patented transparent adhesive tape on the condition that the purchaser thereof refrain from buying other adhesive tape products, not covered by its patent, from any other manufacturer. Therefore, the patentee was not barred from asserting patent infringement claims against the alleged infringer. A manufacturer has the right to stop dealing with a distributor who is acting unfairly towards his product or is trying to undermine his trade. It was not established in the instant case that the patentee's refusal to sell to certain distributors was done in bad faith and had as its purpose to substantially lessen competition, or had a tendency to create a monopoly. Also, there was no showing that competition had been foreclosed in a substantial share of the line of commerce affected. This was not a case where a manufacturer imposed a uniform exclusive dealing contract on its distributors.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.500; Exclusive Dealing, Vol. 1, ¶ 4009.100, 4009.580; Private Enforcement and Procedure, Vol. 2, ¶ 9041.155.

For the plaintiff-appellant: Daniel L. Morris, and Curtis, Morris and Safford (Simon H. Rifkind, Samuel J. Silverman, Edward N. Costikyan, Emanuel E. Sternfield, Robert D. Spille, and John A. Mitchell, of counsel), New York, N. Y.

For the appellee: H. H. Hamilton (Harold J. Kinney and Robert I. Coulter, St. Paul, Minn.; M. K. Hobbs, Plateville, Wis.; and Edward A. Haight and J. W. Hofeldt, Chicago, Ill., of counsel), New York, N. Y.

Affirming a decision of the U. S. District Court, Southern District of New York, 1956 Trade Cases ¶ 68,427.

Before: MEDINA and WATERMAN, Circuit Judges, and LEIBELL, District Judge.

[*Prior Proceedings*]

LEIBELL, District Judge [*In full text except for omissions indicated by asterisks*]: Plaintiff instituted this action on November 17, 1951, under the Declaratory Judgment Act (28 U. S. C. § 2201) to have the defendant's patent #2,177,627, issued to Richard Drew October 31, 1939[1] declared invalid, or, if valid, then not infringed. On a motion in the District Court the complaint was dismissed on the grounds that no justiciable controversy was stated upon which a claim for relief could be founded and that the court lacked jurisdiction. On appeal, this court (200 F. 2d 876) reversed and held that an amendment to the complaint in the interest of clarity, should be allowed. Then followed various procedural steps, resulting in an amended complaint, a supplemental complaint, the defendant's answer and plaintiff's reply. In its answer Minnesota set up a counterclaim for an injunction against further infringement of its patent by plaintiff, and for damages. Plaintiff's reply charged a misuse by defendant of its patent, in that defendant allegedly attempted to extend its patent monopoly to cover unpatented products, that defendant illegally restrained competition, and for those reasons a court of equity should not grant defendant any relief on its counterclaim.

The trial of this case before Judge Bicks took five weeks. On July 18, 1956, he filed his opinion [1956 TRADE CASES ¶ 68,427] (143 F. Supp. 429) and on July 26th signed a judgment. The judgment declared that (a) all of the sixteen claims of the Drew patent are valid "except claim 9 as to which no adjudication of validity is made, no infringement of said claim having been found"; that (b) the plaintiff had infringed all the claims of the patent (except claim 9); that (c) defendant had not been guilty of inequitable conduct and was not barred from enforcing the patent; that (d) an injunction should issue enjoining and restraining the plaintiff from making or selling any transparent or colored non-fibrous, film-backed pressure-sensitive tape or sheeting embodying the invention of Letters Patent No. 2,177,627; that (e) defendant recover of the plaintiff the damages which defendant had sustained by reason of the aforesaid infringement; and that (f) plaintiff's complaint, amended complaint and supplemental complaint be dismissed with costs.

The patent expired October 31, 1956. Plaintiff-appellant has filed a substantial bond for any damages ultimately awarded.

[*Appeal*]

On this appeal Technical Tape contends (1) that there was no "invention" in what Drew did (Drew II patent, #2,177,627); (2) that there was no novelty in what Drew did because other patents anticipated Drew; (3) that plaintiff, Technical Tape, did not infringe the Drew II patent; (4) that Minnesota has abused whatever patent rights it may have had and is entitled to no relief.

[*Validity of Patent*]

Every judge before whom the validity of the Drew II patent (#2,177,627) was litigated in the District Court (Judges Barnes and Campbell in the Northern District of Illinois and Judge Bicks in the Southern District of New York) has held the Drew II patent valid. Judge Sparks and Judge Minton of the United States Court of Appeals (7th Cir.) and Judge Baltzell, a District Judge who sat with them and heard the appeals from the judgments entered on the decisions of Judge Barnes, upheld the validity of the Drew II patent (159 F. 2d 554). We have considered the evidence in this case on the issue of validity and we are convinced that Judge Bicks' finding of invention and validity should be sustained.

[*Infringement*]

Plaintiff's infringement of defendant's patent was deliberate. When he was seeking a license from Minnesota the plaintiff's president declared he would make a pressure-sensitive adhesive tape whether or not he got the license. He read the Drew II patent a hundred times. He persuaded

[1] The opening paragraph of Drew's patent #2,177,627 states:

"This invention relates to adhesive sheets having a backing with a non-fibrous surface (such as normal or waterproofed films of regenerated cellulose) and a coating of normally tacky and pressure-sensitive adhesive united thereto. While not limited thereto, the invention relates especially to transparent adhesive sheets, to adhesive sheets in the form of adhesive tapes which may be sold in stacked or coiled form, and to adhesive sheets or tapes which are well adapted to the sealing or securing of wrappers composed of non-fibrous lustrous cellulosic films and the like."

The adhesive tape made by defendant under the Drew patent is familiarly known as "Scotch" cellophane tape.

* * *

Beyer, an employee of Minnesota's, a quality control man who had access to and understood Minnesota's "standard books" which were in code, to enter plaintiff's employ in May 1951 and to head plaintiff's quality control department; and he advised Beyer to keep from his employer (Minnesota) the fact that he was to enter plaintiff's employ. He hired an expert, Shalita, who had made an infringing tape for Cofax Corporation. That was the tape involved in Minnesota's suit against Freydberg, and its suit against Bulkley, heard by Judge Barnes who held that the Cofax tape infringed Minnesota's tape. The judgments were affirmed in 159 F. 2d 554. Shalita had made tapes from the Drew patent examples. With that group around him, the president of the plaintiff-appellant herein, finally made a tape which was so similar to Minnesota's in every respect that at the trial even he could not tell the one from the other, without an identifying name on the core. The Technical Tape Corporation was a willful infringer. *Colgate-Palmolive v. Carter,* 230 F. 2d 855.

Defendant's Alleged "Misuse" of the Drew II Patent

As a special defense to defendant's counterclaim for patent infringement, plaintiff charges that the defendant has "misused" [6] the Drew II patent (#2,177,627), and does not come into court with clean hands; and therefore asks that defendant be denied any relief on its counterclaim. Plaintiff contends that 3M abused its patent monopoly on transparent adhesive tape (Drew II patent) in two ways: (1) by selling its transparent adhesive tape on the condition that the purchaser thereof buy other 3M tape not covered by the patent in suit (citing *Morton Salt Co. v. Suppiger Co.* [1940-1943 Trade Cases ¶ 56,176], 314 U. S. 488); and (2) by selling its patented transparent adhesive tape on the condition that the purchaser thereof refrain from buying other adhesive tape products, not covered by the patent in suit, from any other manufacturer (citing *F. C. Russell Company v. Consumers Insulation Company* [1955 Trade Cases ¶ 68,177], 226 F. 2d 373).

[*Depositions*]

To support the charge of "misuse" plaintiff took the depositions of six distributors, and at the trial produced oral testimony of a seventh distributor, and his wife.

The seven distributors are: Lloyd's Office Supply of Pawtucket, Rhode Island (an Industrial Tape Division account); Edwards Paper Company of Roxbury, Massachusetts (an Industrial Tape Division account); Southern Stamp and Stationery Company of Richmond, Virginia (an Industrial Tape Division account); Cammack Office Supply of Burlington, North Carolina (a Wholesale-Retail Tape Division account); Anchor Office Supply Company of Cleveland, Ohio (a Wholesale-Retail Tape Division account); Crown Office Supply Company of Chicago, Illinois (a Wholesale-Retail Tape Division account); and Aviation Service Supply Company of Denver, Colorado (an Automotive Tape Division account). Plaintiff also examined before trial Al Drew, defendant's New England District Sales Director of its Industrial Sales Division. Both sides read parts of Drew's deposition into the record of the trial. All the depositions were received as exhibits.

The defendant rebutted the charge of misuse, by the cross-examination of the distributors whose depositions were taken, [7]

[6] The charge of "misuse" is contained in the last paragraph of plaintiff's "Reply" as follows: "defendant sells its patented adhesive tape in commerce among the several states on the condition that the purchaser thereof shall buy adhesive tape, not covered by the patent in suit, from defendant, or its licensees; and that the purchaser shall refrain from buying adhesive tape not covered by the patent in suit from anyone other than defendant, or its licensees; whereby defendant unlawfully extends the monopoly, if any, of said patent to cover products not covered by any valid claim thereof."

[7] C. L. Arnold and his wife, Elizabeth, owners of the *Lloyd's Office Supply Co.* of Pawtucket, R. I., testified for the plaintiff, in part as follows:

The Lloyd Company's customers were mostly mills, factories, offices and governmental institutions. When Lloyd commenced business in 1949 it sold only the 3M line of tapes. In 1951 Lloyd took on Tech Tape products, which sold at a lower price. In September 1953 a 3M sales representative called on Mr. Arnold and told him that if he wished to continue selling 3M tape he would have to stop selling Tech Tape. Al Drew told Arnold that that was the defendant's policy. At the time there was an unfilled order for a customer named Glasscraft, a corporation in which Mr. Arnold had a stock interest. Later when Tech Tape came out with a new tape meeting Glasscraft's requirement Arnold sold Glasscraft some of that tape. Lloyd sells both "Technical" and "Industrial" tape products. About 81% of Lloyd's purchases of 3M tape from defendant, were on behalf of Glasscraft, to which defendant would ship direct.

Mr. Smith testified that he had no personal knowledge of the Lloyd company matter. Lloyd failed to meet defendant's requirements that

by the cross-examination of the Arnolds, by using parts of the deposition of Al Drew, by testimony of Charles C. Smith, General Manager of the defendant's Cellophane Tape Division for the Wholesale-Retail trade, and by testimony of John J. Bennison, the Eastern Regional Sales Manager for the Industrial Trade Division of defendant.

[*Trial Court Ruling*]

Concerning the seven distributors, the trial judge stated in his opinion:

"The situation with respect to each of these seven distributors has been considered and the Court is satisfied that the conduct of 3M (the defendant) in each instance was motivated solely by honest business considerations in no wise related to an attempt to extend the monopoly of the Drew Patent."

[*Jobbers*]

A jobber who resorted to the disparagement of defendant's products in order to substitute other and cheaper brands of tape, including infringing brands of tape, where the customer wanted defendant's tapes; a jobber who did not deal fairly with defendant's products in displaying and selling them; a jobber who was more interested in

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the bulk of a distributor's buying should go to more than one customer, a policy that was in effect for a long time. Al Drew testified that the defendant did not have any policy under which defendant would refuse to sell any jobber unless he sold only 3M's tapes, and that he never offered Lloyd's any exclusive sales agreement. Bennison testified that the defendant had no exclusive dealing policy and no tie-in sales arrangement with any of its jobbers.

Mr. Trachtenberg of *Edwards Paper Company* of Roxbury, Mass., stated in his deposition taken by plaintiff in part as follows: That his company had been in business selling industrial customers since 1945, and that from 1947 to 1952 he had bought his tapes from the plaintiff (Technical Tape); that in 1952 he began to stock defendant's tapes. A salesman of defendant told him there was no reason why he could not handle defendant's tapes even though he was selling plaintiff's products. Early in 1953 defendant's agent cut him off, saying that it was pursuant to a new policy of exclusive handling, that if he handled any other tape he could not handle defendant's; and that an order he gave for 3M tape was refused by defendant in March 1953. On cross-examination it developed that in 1952 Edwards Paper Company made only five purchases of defendant's products, totalling $407.18 and two orders in January and February 1953 for $272.37; and that all of the purchases (except $40) were made for the benefit of a single customer (Ware Shoe Co.) whose requirements called for 3M tape No. 880 and who had purchased 3M tape before becoming a customer of Edwards. The Edwards Company had also sold about $100.00 worth of 3M masking tape (the Drew I patent) in 1952 and 1953.

Al Drew testified that he instructed a salesman, Mr. Burhoe, to notify the Edwards Company that it was no longer considered a distributor. One of the requirements for defendant's distributors was that the bulk of their sales should be to more than one customer. The Edwards Company's sales were practically all to one customer.

Mr. Smith had no personal knowledge of the Edwards Company matter, but he had heard about it. It was not in his subdivision. Mr. Bennison, who was Mr. Drew's superior, testified that the defendant had no exclusive dealing agreement or any tie-in sales arrangement with any of defendant's jobbers.

The deposition of Mr. Rosendorf, a partner in *Southern Stamp and Stationery Co.* of Richmond, Virginia, taken by plaintiff, was in part as follows: The Company sells a line of stationery supplies, office furniture and equipment and is one of the largest in Richmond. It purchased 3M products from 1942 to 1952, averaging about $40,000 a year. In 1953 it sold $25,000 of 3M products, mostly drop shipments and its principal customer was Reynolds Metals Co. In late 1952 Southern opened an account with Tech Tape as a distributor. In November 1953 two representatives of 3M called on Southern and complained that other makes of tape were being used in 3M dispensers. Southern was selling Tech tapes to the Reynolds Co., which was using it in 3M dispensers, acquired when Reynolds used 3M tape. The representatives of 3M said they would recommend that Southern be not allowed to sell 3M tape. In December 1953 Rosendorf was again visited by representatives who said Southern's orders for 3M tape would not be filled, that Southern could have them filled by "the other fellow," Tech Tape. Southern's orders for 1953 were mostly drop shipments to manufacturing customers. For the last nine months of 1953 Southern's total purchases of 3M tapes for store customers was only $194.96. In five of those nine months Southern made no such purchases. Southern was pushing Tech tape in preference to 3M's, even when the customer asked for 3M's tape, because Tech tape was cheaper and afforded Southern a larger profit. Only if the customer insisted on 3M tape did Southern sell him 3M. It was Southern's policy to do that. Mr. Smith testified that he did not know the details of the Southern Company matter.

Plaintiff took the deposition of Mr. Cammack, the owner of *Cammack Office Supply* of Burlington, North Carolina, who testified in part as follows: He had handled 3M products and those of Industrial Tape Corp. (a licensee of 3M) beginning 1946 or 1947; and some time later took on the Tech Tape line. In October 1953 he was visited by a salesman and a representative of 3M, who saw Tech Tape products on his shelves. They told him of the pending patent infringement suit. He said that he was going to continue selling Tech tape. He was again visited by 3M's salesman in January or February 1954, looking for an order. Although he was short on 3M products he limited his order to 3M dispensers and small sizes of

pushing the sales of competitors' products to the detriment of defendant's products; a jobber with only a few customers, who made no effort to sell defendant's product; a jobber who faked so called "drop shipment" orders to mislead the defendant and thus gain a larger discount; a jobber who was habitually delinquent in paying his bills —jobbers who did any of those things were not desirable distributors of defendant's products and defendant was not required to continue them as distributors.

[*"Drop Shipment"*]

A "drop shipment" order called for direct shipment of 3M's products to the jobber's customer. The jobber would receive a trade discount on such orders, because as a rule they were large and saved 3M warehousing expense. Some jobbers submitted fictitious orders and thereafter picked up the goods themselves to be utilized as stock inventory, thereby receiving a trade discount which was not given on purchases by jobbers for their own stock inventory.

Scotch tape. Next day he was told his order would not be filled. Between October 1953 and February 1954 he had made no effort to replenish his stock of 3M tape. He was selling Tech tape instead, and was displaying Tech cellophane tape in defendant's Scotch tape dispensers, which bore defendant's name. Mr. Smith of 3M testified that Cammack was not cut off and that he was still carried on the records of 3M's Atlanta Branch as an active customer.

Plaintiff took the deposition of *Anchor Office Supply Co.* of Cleveland, Ohio, through its president, Mr. Rosenblatt, who testified in part, as follows: The company was organized in June 1950 and handled office supplies and equipment and sold various types of tapes, including masking tape and cellophane tape. At first it handled 3M tape. It sold about $12,000 a year of 3M's cellophane tape and masking tape. In 1952 Anchor began handling Tech tape. In April 1954 when the City of Cleveland asked for bids on "Scotch" tape, Rosenblatt inquired if the City would accept a tape equally as good and he was the successful bidder and supplied Tech tape. Shortly thereafter two of 3M's salesmen came to see him about the bid and he was told that if he continued to sell Tech tape, 3M would be forced to take its line away from him. Rosenblatt stated that he then called the Department of Justice office in Cleveland to inquire if they could do that to him, and shortly thereafter (April 7th) received a letter from the Department saying that an investigator of the Department, an Agent of the F. B. I., would call upon him. Rosenblatt contended that the letter was in response to the telephone call. But the letter was from New York, not from Cleveland, and at that time an investigation of all the stationers in Cleveland was in progress, in connection with an indictment handed down against a local group of stationers early in 1954. Mr. Rosenblatt had been informed prior to his conversation with the two 3M representatives that there was a patent suit pending between 3M and Tech Tape. Since the conversation Anchor has purchased mainly one line of tape, 3M, but it has also purchased Tech tape to fill certain contracts on which Anchor submitted bids. There was some testimony that Anchor had sent a drop shipment order for 1152 rolls of 3M's tape for a small restaurant next door to Anchor's place of business (the inference being that the order was actually for Anchor itself), on which Anchor got an additional 7½% discount. Mr. Smith testified that the discussion with Rosenblatt and the differences between them had to do with the matter of Anchor's substituting Tech tape on orders for 3M tape, and also using fake drop shipments, all of which Anchor agreed to stop; and that 3M has never refused to sell Anchor.

Three representatives of the *Crown Office Supply Company*, of Chicago, Illinois, Mr. Avery, President, Mr. Ackerman, Vice-President, and Mr. Schultz, a purchasing officer, testified by deposition, in part as follows: The company first sold 3M's Scotch tape in the early 1930s. In 1939 or 1940 they sold defendant's "masking" tape. They ceased making purchases from defendant in December 1952. After the Tech line of products was taken on by Crown, 3M's products were no longer advertised in Crown's circulars but Tech Tape's were. Crown's twelve salesmen at the same time were instructed to tell their customers that Tech's line was a good line, comparable to what Crown had been selling (3M's), but sold at a lower price. When a customer asked for "Scotch" tape, defendant's product, Crown's salesmen would try to sell him the Tech tape product. Money-wise it was to Crown's advantage to push Tech tape. Crown had theretofore purchased an average of $30,000 to $40,000 of 3M tapes a year.

In December 1952 two representatives of defendant called upon Crown with a Crown trade circular. Crown's business with 3M had fallen off in the last few months. Crown's circular was pushing Technical Tape's products and did not mention 3M's. Crown allegedly was told that if it continued selling Tech tape the defendant would not sell Crown any more. Orders sent 3M were refused.

Mr. Smith, for defendant, testified that Crown was substituting Tech tape on customers' orders for Scotch tape, and that Crown was told that unless it stopped that practice, defendant did not want to do business with it. Crown also, according to Mr. Smith, had submitted false drop-delivery orders to 3M, in order to gain an additional discount. Crown had put out the trade booklet above mentioned. Mr. Smith sent a representative to protest against these unfair and discriminatory practices.

Plaintiff also took the deposition of Mr. Christensen, Treasurer and Chairman of *Aviation Service Supply Company* of Denver, Colorado. At one time the company carried the tape products of Industrial Tape Corp., 3M and Tech Tape Corp. It is no longer an authorized distributor of 3M products. Aviation tried to become a distributor for 3M, but defendant was unable to meet the requirements of its current jobbers. Aviation then became a distributor

["*Select Distributorship Policy*"]

The so-called "select distributorship policy" concerning which Al Drew was examined, was developed by the Industrial Tape Division about mid-summer of 1953. It did not apply to any other tape division of the 3M organization. Two of the five distributors (Aviation and Crown), alleged to have been cut-off because of their refusal to agree to the select distributorship policy, were not industrial jobbers within the jurisdiction of 3M's Industrial Tape Division.

As to the three remaining, Southern was cut-off from 3M's tape products in December of 1953 for reasons stated herein in footnote 7. There is nothing in the testimony to support plaintiff's contention that Southern was cut-off because it refused to accept the so-called "select distributorship policy." Likewise there was no connection between Edwards being cut-off as a 3M distributor and the select distributorship policy of the 3M Industrial Tape Division. Edwards was cut-off for other reasons, as indicated in footnote 7, some four or five months prior to the time the "select distributorship policy" was proposed by 3M's Industrial Tape Division.

The testimony of Arnold and his wife *(Lloyd's Office Supply Co.)* that in September of 1953 he was informed that 3M had a new company policy and that under such policy Lloyd, if it wished to continue selling 3M tape would have to agree to stop selling Technical Tape, and that when he refused he was cut-off, was inconsistent with the testimony of Al Drew, who denied that any proposal of select distributorship was made to Lloyd's Office Supply Company, and was inconsistent with the testimony of Bennison and Smith, witnesses at the trial, who testified that 3M does not have a sales policy requiring a jobber or distributor to sell only 3M tape and to refrain from selling other competitive brands. Apparently the trial judge accepted the testimony of Messrs. Bennison and Smith, which he had a right to do. He saw and heard the witnesses in question.

As stated in *International Bureau v. Bethlehem Steel Co.*, 2 Cir., 192 F. 2d 304, 306:

> "It is a familiar principle that on appeal in cases tried by the court without a jury findings of fact will be given effect unless shown to be clearly erroneous. [citing cases]. And, indeed, that principle, together with the correlative one that due regard be given to the opportunity of a trial judge in a non-jury case to determine the credibility of witnesses who appear and testify before him, is firmly embodied in Rule 52(a) F. R. C. P., 28 U. S. C. A."

The trial judge did not specifically discuss Al Drew's testimony [8] in his opinion,

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for Industrial Tape and sold as much as $7,000 a month of its products. Late in September 1953, Aviation agreed, at the request of several customers, to become a distributor of 3M products. An arrangement was made, expressed in correspondence.

In the Spring of 1954 a representative of 3M called on Christensen concerning a bid in which Aviation had quoted and specified Tech tape. Christensen testified that further visits were made and that he was informed that because of Aviation's activities with competing lines, 3M felt it could not properly represent and promote 3M's products and that it was no longer an authorized distributor and could return 3M merchandise for credit. There was some correspondence between the two companies.

On Christensen's cross-examination it was developed that at times Aviation's salesmen would attempt to sell Tech tape to customers who had specified 3M tape; that Aviation permitted its office facilities to be utilized by Tech Tape sales representatives as a base of operations, and that Aviation had been tardy in paying its bills to 3M. When Aviation and 3M came to a parting of the ways in March 1954, Mr. Christensen wrote 3M: "We wish to thank you for past favors you have rendered our company and wish to express our regrets for the circumstances which had made this necessary." On the same day Mr. Christensen wrote Tech Tape a letter condemning defendant and enclosing copies of Aviation's correspondence with defendant, for plaintiff's use. Mr. Smith knew none of the details of the Aviation Company matter.

[8] The witness, Albert Drew (a brother of the inventor) whose deposition was taken by plaintiff, stated in the first part of his deposition, that he had submitted to a number of jobbers in New England the proposal that they handle only 3M's pressure-sensitive adhesive tape.

He was asked by plaintiff's counsel whether he had made any "gentlemen's understandings or agreements" with any jobbers or distributors to handle 3M tape exclusively. Drew answered: "In this respect: That we have proposed certain things and they have or have not accepted them." When asked what things he had proposed, Drew answered: "We have proposed to certain distributors that we think are qualified that we furnish them with all the product knowledge we have as salesmen; the facilities of our laboratory; the facilities of our customer engineering group, our merchandising group, and our sales force, and to teach them as much as we can of what we know about the application of pressure-sensitive tapes; where the customers may be found or where they are likely to be found, according to application; to make them as good salesmen for our tapes as we think we ourselves are."

but he did state (as a finding of fact based on the evidence) that defendant distributes its products through upwards of 30,000 outlets, including 6,000 paper wholesalers and 4,000 commercial stationers; that many thousands of defendant's distributors and jobbers handle competitive tapes and that "3M" (Minnesota) has never required either that they handle its tapes exclusively; or that as a condition of buying one type of 3M tape, that they should also buy another.[9]

The trial record on the issue of the so-called "select distributorship policy" proposal, shows that the proposal was made only to certain jobbers or distributors, who were thought to be qualified and not to all the jobbers served by 3M's Industrial Tape Division; that the proposal was not made on any either-or basis, i. e. that if rejected the distributor would be cut off from 3M products; that the acceptance was purely voluntary on the part of the jobber; that

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Al Drew testified that these suggestions or proposals were made to jobbers or distributors in the industrial tape division; and that he first made such proposals in the middle of the summer of 1953. Prior to that time 3M provided technical service and assistance to its industrial jobbers and distributors, but in a limited way. Under the new proposal the amount of technical assistance available would be increased. Drew testified that his action in offering such proposals to certain qualified jobbers was reported to his superiors and that they did not disapprove of it.

Of the 25 or 30 who accepted the proposal, all but five or six of the jobbers had always done business with 3M and sold only 3M tape. Five or six, who agreed to give the proposal a trial, had carried pressure-sensitive tapes made by 3M competitors.

Al Drew testified that 3M's general policy with regard to industrial distributors and jobbers, handling or about to handle pressure-sensitive adhesive tape, was that the jobber or distributor have an office and a warehouse; that he have a sales force of at least one, other than the owner; that he have a good credit record; that he have contact with manufacturers who would be 3M customers; that he agree to maintain an adequate stock of 3M tape items so as to properly take care of the immediate needs of its customers; that he have more than one customer using 3M products; and that the bulk of his buying or purchases should be resold to more than one customer. Mr. Drew further testified that this policy was in effect in 1950 and applies with equal force today. Drew defined an industrial distributor or jobber as one whose customers are manufacturing plants, mills and factories. He also testified that defendant did not have any policy of refusing to sell a distributor or jobber because he handled competitive tapes.

[9] Mr. Smith, general manager of the Cellophane Tape Division of 3M, and Mr. Bennison, Eastern Regional Sales Manager of the Industrial Tape Division, testified before the trial judge as witnesses for the defendant 3M.

Mr. Bennison's testimony was short and he was not cross-examined. He testified that he was employed by 3M for over eighteen years and supervised the industrial tape sales for the Eastern Seaboard. His salesmen would call on manufacturing concerns and distributors who serviced that class of trade. He stated that sales to industrial distributors were not made on any condition that the distributor deal only in 3M tape; that the distributors who purchased 3M tape also purchased tape from others; that 3M made no tie-in sale arrangement with its distributors; that no jobber was required to handle any one type of tape in order to purchase another; and that the customers of the jobbers pretty well determined what the jobber would buy.

Mr. Smith described the managerial set up of 3M. He testified that 3M has three tape divisions, each one headed by a general manager; that he had been general manager of the 3M Cellophane Tape Division for a number of years; that one of the other two divisions dealt with insulation tape; and the third with all other types of tape; that each division had regional sales managers who in turn had district sales managers. Mr. Smith also testified that the Cellophane Tape Division had two subdivisions, the Industrial subdivision and the Wholesale and Retail subdivision; that each of the subdivisions had its own general manager; that the Wholesale-Retail subdivisions serviced the retail trade through jobbers, and sold principally cellophane tape; that the Industrial division sold to manufacturers through jobbers or distributors, whose sales are mainly of tapes other than cellophane, although they may also sell cellophane tape to industrial users; and that Al Drew was a district sales manager for the Industrial Tape Division.

Mr. Smith also testified that 3M did not require its distributors or jobbers to handle 3M tape exclusively; that many thousands of them carried competing brands; that no jobber is required to buy any other type of 3M tape in order to buy a particular type; that some jobbers handled only one type of 3M tape; that the jobber himself decides what he wants to buy, based on his customers' needs. Mr. Smith also testified that 3M never had any policy of exclusive distributorship for a given territory; that any jobber or distributor may purchase 3M tape, if he can qualify as such.

Smith further testified that while district sales managers possessed a discretion as to how they would handle their own accounts, they were supposed to conform to established policies; that prior to December 1953 it was the policy to leave the matter of distribution and distributors to the field managers, i.e., the regional managers of 3M; that he had heard that the Industrial Tape Division was operating under what they called a select distributorship policy, but that it did not apply to his Wholesale-Retail Division, although some distributors were in both divisions. The select distributorship policy involved a closer cooperation with the distributor in terms of direct selling, engineering services, technical assistance and the like; the select distributors did not carry 3M tapes exclusively.

the proposal was rejected by some distributors; that those who rejected the proposal were not cut off from 3M products; and that those who accepted the proposals received increased technical service and assistance while those who rejected the proposals, together with other jobbers or distributors who did not qualify, continued to receive 3M products and the technical service and assistance theretofore given them. This fact situation in the case at bar is in no way comparable to that before the Third Circuit in *F. C. Russell Company v. Consumers Insulating Company, supra.*

The trial judge also found that a large percentage of distributors identified by the President of Technical Tape as 3M distributors in the New York area are, according to his testimony, also distributors of Technical Tape's products; and that many Technical Tape jobbers or distributors also handle 3M products.

[*No Antitrust Violations*]

The trial court's opinion refers to the practices condemned by the doctrine of the *Morton Salt Co. v. G. S. Suppiger Co.* [1940-1943 Trade Cases ¶ 56,176], 314 U. S. 488 (which declared that a court of equity will not lend its aid to protect a patent monopoly when the patentee is using the patent as an effective means of restraining competition with the sale of its unpatented articles) the trial court stated: "There has been a complete failure of proof that the sales policy of 3M falls within the interdicted conduct." And there is no proof that defendant violated Section 3 of the Clayton Act (15 U. S. C. § 14).[10] In fact the proof is to the contrary. The defense of "misuse" by defendant of its Drew II patent, appears to be something that plaintiff sought in vain to construct, in order to escape the consequences of its own deliberate and profitable infringement.

A manufacturer has the right to stop dealing with a distributor or jobber who is acting unfairly towards his product or is trying to undermine his trade. That seems to be a proper corollary of *Eastern States Lumber Ass'n v. United States,* 234 U. S. 600 at page 614, where it was held that:

> "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade."

Ordinarily a manufacturer may refuse to deal with a distributor or jobber for reasons sufficient to himself. *United States v. Colgate & Co.,* 250 U. S. 300, 307; *United States v. Schrader's Son, Inc.,* 252 U. S. 85, 97; and *Brosious v. Pepsi-Cola Co.,* 3 Cir. [1946-1947 Trade Cases ¶ 57,459], 155 F. 2d 99, 101-102. Of course, this right of a manufacturer must be exercised in good faith, and within the restrictions of the Clayton Act, and may not be exercised in such a manner so as to "substantially lessen competition" or "tend to create a monopoly" in any line of commerce.

The record in the case does not establish that 3M's refusal to sell to five of the abovenamed distributors was done in bad faith, and had as its purpose to substantially lessen competition, or had a tendency to create a monopoly. Further, the Clayton Act was not intended to reach every remote lessening of competition. *Standard Fashion Co. v. Magrane-Houston Co.,* 258 U. S. 346, 356-357.

There has been no showing here that "competition has been foreclosed in a substantial share of the line of commerce affected," by the so-called select distributorship policy. *Standard Oil Co. v. United States* [1948-1949 Trade Cases ¶ 62,432], 337 U. S. 293; *Dictograph Products v. Federal Trade Commission,* 2 Cir. [1955 Trade Cases ¶ 67,932], 217 F. 2d 821, 825. This is not a case where the manufacturer imposed a uniform exclusive dealing contract on its jobbers and distributors, such as was the situation in the *Dictograph* and *Russell* cases, hereinbefore cited, on which plaintiff relies.

[*Affirmed*]

The judgment of the District Court is in all respects affirmed.

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[10] "§ 14. Sales, etc. on Agreement Not to Use Goods of Competitor.

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731."

[¶ 68,793] Harmar Drive-In Theatre, Inc., Appellee v. Warner Bros. Pictures, Inc. (In Dissolution), et al., Defendants, and Paramount Film Distributing Corp., et al., Appellants.

Colonial Drive-In Theatre, Inc., Appellee v. Warner Bros. Pictures, Inc. (In Dissolution), et al., Defendants, and Paramount Film Distributing Corp., et al., Appellants.

In the United States Court of Appeals for the Second Circuit. Nos. 38, 39—October Term, 1956. Docket Nos. 24014, 24015. Petition filed January 12, 1957. Decided March 27, 1957.

On Petition for Rehearing.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Disqualification of Attorneys.—A petition for rehearing of a ruling that an attorney was disqualified from representing certain plaintiffs in their treble damage actions was denied.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.519, 9015.

For the plaintiffs-appellees, petitioners: Warren A. Seavey, Cambridge, Mass.

For the defendants-appellants: Bruce Bromley (John Logan O'Donnell and Leo P. Arnaboldi, Jr., New York, N. Y., of counsel), New York, N. Y.

Denying a petition for rehearing of a decision of the U. S. Court of Appeals, Second Circuit, 1956 Trade Cases ¶ 68,577. For prior opinions of the U. S. District Court, Southern District of New York, see 1956 Trade Cases ¶ 68,441, 68,431.

Before CLARK, Chief Judge, and HAND and SWAN, Circuit Judges.

PER CURIAM [*In full text*]: Petition for rehearing denied.

Chief Judge CLARK dissents in separate opinion.

[Dissenting Opinion]

CLARK, Chief Judge (dissenting): In view of the consideration which has been given to the suggestion for a hearing *in banc,* I deem a short note as to the present state of "second circuit law" hereon desirable, notwithstanding the extensive statements in our former opinions now published as 2 Cir. [1956 TRADE CASES ¶ 68,577], 239 F. 2d 555.

Since one judge has died and another is disqualified, only four judges were available to vote on a hearing *in banc;* as the votes were equally divided, the majority required by 28 U. S. C. § 46(c) for such hearing is lacking. While decision is thus afforded for the present case, it is obvious that precedents for the future must remain uncertain. The majority herein cite and purport to follow the *Laskey-Austin* decision, 2 Cir. [1955 TRADE CASES ¶ 68,103], 224 F. 2d 824 certiorari denied 350 U. S. 932; and hence it is to be taken as law, even though I feel convinced that my brothers have quite departed from its wording and purpose. And the difficulty is not lessened because, as seems clear to me, careful scholars and judges have interpreted the former decision (for whose apparent ambiguities I have to accept responsibility) as do I. See *United States v. Standard Oil Co. (N. J.).* D. C. S. D. N. Y., 136 F. Supp. 345, 363, 364; Note, 69 Harv. L. Rev. 1339, 1341; Note, 3 U. C. L. A. L. Rev. 105; Kaufman, *The Former Government Attorney and the Canons of Professional Ethics,* 70 Harv. L. Rev. 657. This tangled situation must therefore await future development.

I do deem it proper to point out that appellees' brief on the petition for rehearing affords convincing support for my conclusion that the only similarity between the issues to be tried in the present two cases and the issues in the cases Isacson started while in partnership with Malkan is the *Paramount* decree, which is of course public property. The real issues at trial—competitive conditions in the neighborhood of the present theatres, linking the neighborhood with the national conspiracy, proof of damages—are entirely different in the different cases. Appellees underline this by seeking support for the disqualification by reason of Malkan's unethical solicitation of clients. But only recently we explained with some precision why that should not be a means by which one party can deprive an opponent of his counsel. *Fisher Studio v. Loew's Incorporated,* 2 Cir. [1956 TRADE CASES ¶ 68,305], 232 F. 2d 199, 204, certiorari denied 352 U. S. 836.

[¶ 68,794] **Del Rio Coat & Suit Co., Inc. v. A. D. Juilliard & Co., Inc.**

In the New York Supreme Court, New York County, Special Term, Part I. 138 N. Y. L. J., No. 15, page 2. Dated July 22, 1957.

Wool Products Labeling Act

Wool Labeling—Enforcement of Wool Products Labeling Act—Right of Private Party to Maintain Damage Action.—A complaint by a private party seeking damages for an alleged violation of the Wool Products Labeling Act was dismissed on the ground that the Act affords no relief to private persons. The Federal Trade Commission has the sole authority under the Wool Products Labeling Act to enforce its provisions.

See Wool Labeling, Vol. 2, ¶ 6535.

[*Dismissal of Complaint*]

FINE, Justice [*In full text*]: Motion to dismiss complaint for insufficiency is granted. The complaint sets forth two causes of action based upon defendant's violation of the provisions of the Wool Product Labeling Act (15 U. S. C. A., sec. 68-68j.) in mislabeling the contents of woolen goods purchased by plaintiff from the defendant which the latter warranted were properly labeled in conformity with the act. Under that act any violation of its provisions with respect to a mislabeling constitutes an unfair method of competition and an unfair and deceptive act or practice in commerce. Since the Federal Trade Commission has the sole authority under the act to enforce its provisions and the act affords no relief to private persons, plaintiff may not institute the present action to recover damages for any violation thereof. If the plaintiff sees fit to plead a cause of action for breach of warranty under section 130 of the Personal Property Law, or on some other legal basis, leave is granted to serve an amended complaint accordingly within twenty days after service of a copy of this order.

[¶ 68,795] **Revel Oliver, etc., Appellee v. All-States Freight, Inc., et al. and A.C.E. Transportation Co., Inc. et al., Appellees, and Local 24 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, etc., et al., Appellants.**

In the Ohio Court of Appeals, Summit County, Ninth Judicial District. No. 4679. Argued May 16, 1957. Decided August 7, 1957.

Appeal on Questions of Law and Fact.

Ohio Antitrust (Valentine) Act

Combinations and Conspiracies Under State Antitrust Laws—Price Fixing—Labor Union and Common Carriers—Applicability of Federal Antitrust Laws and National Labor Relations Act.—A provision of a contract between a teamsters' union and a group of motor carriers which largely superseded and nullified the terms of an agreement under which an owner of trucks and trailers leased his equipment to the motor carriers, and which fixed the prices to be paid for the use of trucks and trailers owned by persons who leased such equipment to the motor carriers, violated the Ohio antitrust laws and therefore was void and unenforceable. An Ohio court had jurisdiction to declare the contract provision illegal under the state antitrust laws. The Federal Government does not retain exclusively to itself the right to remedy the evils resulting from contracts between interstate carriers and unions found to be in restraint of trade. The Federal antitrust laws do not occupy the entire field to the exclusion of state laws. Also, there was no labor dispute within the exclusive jurisdiction of the National Labor Relations Board, and there was no remedy available to the owner under the Federal labor laws.

See Combinations and Conspiracies, Vol. 1, ¶ 2335.37, 2401, 2441, 2457.

For the appellees: Stanley Denlinger, Akron, Ohio, for Revel Oliver; and Brouse, McDowell, May, Bierce & Wortman, Akron, Ohio, for A.C.E. Transportation Co., Inc., and Interstate Truck Service, Inc.

For the appellants: David Previant, Milwaukee, Wis.; Robert C. Knee, Dayton, Ohio; and Bruce Laybourne, Akron, Ohio.

Opinion

[*Nature of Suit*]

DOYLE, Judge [*In full text*]: This is an action brought by Revel Oliver, the owner of tractors and trailers, each of which is under a lease agreement with one or the other of the two appellee companies — A. C. E. Transportation Co., Inc., and Interstate Truck Service, Inc.—which are common carriers engaged in transporting freight for hire by motor equipment on the highways of this and other states under certificates of convenience and necessity issued by the Interstate Commerce Commission and the Public Utilities Commission of Ohio; the other original defendants, with the exception of the appellants in this Court, having been dismissed by plaintiff in the trial court.

The purpose of the action is to restrain the appellee carriers, the appellant Union (Local 24 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America), and the appellant Kenneth Burke, as president and business agent of said Local 24, from enforcement of a contract entered into by them, which it is claimed would supersede the owner-operator and carriers' existing lease agreement, and would restrict trade and create a monopoly in the business of leasing equipment, in violation of Sec. 1331.01, R. C., *et seq.* (Valentine Act).

[*Contentions*]

The defendant Union asserts that the sole jurisdiction is in the National Labor Relations Board; that if any violation of law exists, it is a violation of the Federal Antitrust Laws, rather than the state laws; and that the matter is one falling within the field of collective bargaining and other legitimate fields of agreement between employer and employee.

The plaintiff states that:

"* * * we are not here concerned with a labor dispute. Nor do we seek an interpretation of, nor attempt an assault upon, the agreement as it deals with the wages and conditions of employees of the carriers, nor the right of the union and carriers to negotiate and execute a collective bargaining contract covering the subject matter which is within their field to negotiate.

"Our problem here is, may the carriers and Union fix by agreement the price to be charged for the use of and the supervision of the trucks and trailers used in the trucking business, owned by individuals who lease the equipment to the carriers. This and nothing else is here involved."

[*Contract Provisions*]

The subject of the controversy is Article 32 of the contract between the Union and the carriers, which became effective during the life of leases between the owner-operator and the carriers. The provisions are:

"Owner-Operators.

"Section 1. Owner-operators (See Note), other than certificated or permitted carriers, shall not be covered by this Agreement, unless affiliated by lease with a certificated or permitted carrier which is required to operate in full compliance with all the provisions of this Agreement and holding proper ICC and state certificates and permits. Such owner-operators shall operate exclusively in such service and for no other interests.

"(Note: Whenever 'owner-operator' is used in this article, it means 'owner-driver' only, and nothing in this article shall apply to any equipment leased except where owner is also employed as a driver.)

"Section 2. This type of operator's compensation for wages and working conditions shall be in full accordance with all the provisions of this Agreement. The owner-operator shall have seniority as a driver only.

"Section 3. Certificate and title to the equipment must be in the name of the actual owner.

"Section 4. In all cases, hired or leased equipment shall be operated by an employee of the certificated or permitted carrier. The employer expressly reserves the right to control the manner, means and details of, and by which, the owner-operator performs his services, as well as the ends to be accomplished.

"Section 5. Certificated or permitted carriers shall use their own available equipment, together with all leased equipment under minimum thirty-day bona fide lease arrangements, on a rotating board, before hiring any extra equipment.

"Section 6. Separate checks shall be issued by the certificated or permitted carriers for driver's wages and equipment rental. At no time shall the equipment check be for less than actual miles operated. Separate checks for drivers shall not be deducted from the minimum truck rental revenue. The driver shall turn in time direct to the certificated or permitted carrier. All monies due the owner-operator may be held no longer than two weeks, except where the lease of equipment agreement is terminated and in such cases all monies due the operator may be held no longer than thirty (30) days from the date of the termination of the operation of the equipment.

"Section 7. Payment for equipment service shall be handled by the issuance of a check for the full mileage operated, tonnage or percentage, less any agreed advances. A statement of any charges by the certificated or permitted carrier shall be issued at the same time, but shall not be deducted in advance.

"Section 8. The owner-operator shall have complete freedom to purchase gasoline, oil, grease, tires, tubes, etc., including repair work, at any place where efficient service and satisfactory products can be obtained at the most favorable prices.

"Section 9. There shall be no deduction pertaining to equipment operation for any reason whatsoever.

"Section 10. The employer or certificated or permitted carrier hereby agrees to pay road or mile tax, social security tax, compensation insurance, public liability and property damage insurance, bridge tolls, fees for certificates, permits and travel orders, fines and penalties for inadequate certificates, license fees, weight tax and wheel tax, and for loss of driving time due to waiting at state lines, and also cargo insurance. It is expressly understood that the owner-driver shall pay the license fees in the state in which title is registered.

"All tolls, no matter how computed, must be paid by the Employer regardless of any agreement to the contrary.

"All taxes or additional charges imposed by law relating to actual truck operation and use of highways, no matter how computed or named, shall be paid by the Carrier, excepting only vehicle licensing as such, in the state where title is registered.

"Section 11. There shall be no interest, or handling charge on earned money advanced prior to the regular pay day.

"Section 12. (a) All certificated or permitted carriers hiring or leasing equipment owned and driven by the owner-driver shall file a true copy of the lease agreement covering the owner-driven equipment with the Joint State Committees. The terms of the lease shall cover only the equipment owned and driven by the owner-driver and shall be in complete accord with the minimum rates and conditions provided herein, plus the full wage rate and supplementary allowances for drivers as embodied elsewhere in this Agreement.

"(b) The minimum rate for leased equipment owned and driven by the owner-driver shall be:

	Per mile
Single axle, tractor only....	9½¢
Tandem axle, tractor only ..	10¢
Single axle, trailer only....	3¢
Tandem axle, trailer only..	4¢

75% of the above rates to apply for deadheading, if and when ordered, provided, however, that the 75% rate will apply only on first empty dispatch away from the home terminal; thereafter the full equipment rental rate to apply until driver is redispatched from home terminal; the above rates to be based on 23,000-pound load limit. On load limits over 23,000 pounds, there shall be one-half (½) cent additional per mile for each 1,000 pounds or fraction thereof in excess of 23,000 pounds. There shall be a minimum guarantee of 24,000 pounds for leased equipment owned and driven by the owner-driver. Nothing herein shall apply to leased equipment not owned by a driver.

"The minimum rates set forth above result from the joint determination of the parties that such rates represent only the actual cost of operating such equipment. The parties have not attempted to negotiate a profit for the owner-driver.

"Section 13. Driver-owner mileage scale does not include use of equipment for pickup or delivery at point of origin terminal or at point of destination terminal, but shall be subject to negotiations between the Local Union and Company. Failure to agree shall be submitted to the grievance procedure.

"Section 14. There shall be no reductions where the present basis of payment is higher than the minimum established herein for this type of operation. Where owner-operator is paid on a percentage or tonnage basis and the operating company reduces its tariff, the percentage or tonnage basis of payment shall be automatically adjusted so that the owner-

operator suffers no reduction in equipment rental or wages, or both.

"Section 15. It is further understood and agreed that any arrangements which have heretofore been entered into between members of this Union, either among themselves or with the employer or with the aid of the Employer, applicable to owner-driver equipment contrary to the terms hereof, shall be dissolved or modified within thirty (30) days after the signing of this Agreement so that such arrangements shall apply only to equipment of the owner-driver while being driven by such owner-driver. In the event that the parties cannot agree on a method of dissolution or modification of such arrangement to make the same conform to this Agreement, the question of dissolution or modification shall be submitted to arbitration, each party to select one member of the arbitration board, and the two so selected to choose a third member of said board. If the two cannot agree upon the third within five (5) days, he shall be appointed by the Joint State Committee. The decision of said board to be final and binding.

"Section 16. It is further agreed that the intent of this clause and this entire Agreement is to assure the payment of the Union scale of wages as provided in this Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wage scales provided in this Agreement. This clause is intended to prevent the continuation of or formation of combinations or corporations or so-called lease of fleet arrangements whereby the driver is required to and does periodically pay losses sustained by the corporation or fleet arrangement, or is required to accept less than the actual cost of the running of his equipment, thus, in fact, reducing his scale of pay.

"Section 17. It is further agreed that if the Employer or certificated or permitted carrier requires that the 'driver-owner-operator' sell his equipment to the Employer or certificated or permitted carrier, directly or indirectly, the 'driver-owner-operator' shall be paid the fair true value of such equipment. Copies of the instruments of sale shall be filed with the Union and unless objected to within ten (10) days shall be deemed satisfactory. If any question is raised by the Union as to such value, the same shall be submitted to arbitration, as above set forth, for determination. The decision of the arbitration board shall be final and binding.

"Section 18. It is further agreed that the Employer or certificated or permitted carrier will not devise or put into operation any scheme, whether herein enumerated or not, to defeat the terms of this Agreement, wherein the provisions as to compensation for services on and for use of equipment owned by owner-driver shall be lessened, nor shall any owner-driver lease be cancelled for the purpose of depriving Union employees of employment, and any such complaint that should arise pertaining to such cancellation of lease or violation under this section shall be subject to Article X.

"Section 19. (a) The use of individual owner-operators shall be permitted by all certificated or permitted carriers who will agree to submit all grievances pertaining to owner-operators to joint Employer-Union grievance committees in each respective state. It is understood and agreed that all such grievances will be promptly heard and decided with the specific purpose in mind of

"(1) protecting provisions of the Union contract;

"(2) prohibiting any and all violations directly or indirectly of contract provisions relating to the proper use of individual owners;

"(3) prohibiting any attempts by any certificated or permitted carrier in changing his operation which will affect the rights of drivers under the terms of the contract, and generally the certificated or permitted carriers agree to assume responsibility in policing and doing everything within their power to eliminate all alleged abuses in the use of owner-drivers which resulted in the insertion of Section 19 (Article XXXIII) in the original 1945-47 Over-the-Road contract;

"(4) owner-driver operations to be terminal to terminal, except where no local employees to make such deliveries or otherwise agreed to in this contract;

"(5) the certificated or permitted carriers agree that they will, with a joint meeting of the Unions, set up uniform rules and practices under which all such cases will be heard;

"(6) it shall be considered a violation of the contract should any operator deduct from rental of equipment the increases provided for by the 1955 Amendments or put into effect any means of evasion to circumvent actual payment of increases agreed upon effective for the period starting February 1, 1955, and ending January 31, 1961.

"(b) No owner-operator shall be permitted to drive or hold seniority where he owns three or more pieces of leased

equipment. This provision shall not apply to present owner-operators having three or more pieces of equipment under lease agreement, but such owner-operator shall not be permitted to put additional equipment in service so long as he engages in work covered by this Agreement or holds seniority. Where owner-operator drives, he can hold seniority where he works sixty (60) per cent or more of time."

[*Extent of Coverage*]

This contract, of which Article 32, set forth above, is a part, is known as the Central States Area Over-the-Road Motor Freight Agreement, with Ohio Rider. It has generally been adopted by common carriers and locals of the parent Union throughout twelve central states. It contracts for 3,000 to 3,500 carriers and 40,000 to 50,000 employees. In Ohio it covers approximately 500 carriers and 6,000 employees. Approximately 5 to 10 percent of these employees are owner-operators.

[*Jurisdiction of State Court*]

A principal question raised by the Union is whether this state court has jurisdiction to enjoin the enforcement of the contract, or whether its jurisdiction has been preempted by authority granted the National Labor Relations Board.

The Court of Common Pleas of Summit County found that such jurisdiction was vested in the state courts, and enjoined, pursuant to trial, the enforcement of the contract, on the theory that it violated the state statutes governing monopolies and restraints of trade. This Court, now entertaining an appeal for trial *de novo* from the judgment there entered, must determine the issues there adjudicated.

From the record, we find that the controversial agreement was entered into following a strike, called to induce the carriers to contract with the Union, and that the contract so executed infringed upon and superseded many of the provisions of an existing contract between the plaintiff and the carriers.

It is not the purpose of this Court to write at length on the legal questions presented, as would perhaps be our duty if we were hearing the case on questions of law, thereby examining the record for error of the trial court. In this appeal, this Court is a trial court, and we are called upon to determine questions of fact.

It is also necessary to examine, with diligence, the law necessarily involved, and to apply it to the facts found to exist. The hundred and more cases cited and analyzed by counsel are well known to the lawyers in the case. We will not repeat them here.

In determining the jurisdiction of this Court, we first observe that the subject matter of the litigation falls within the powers of the state courts, unless federal statutes enacted pursuant to the commerce clause of the Constitution of the United States intend to supersede or suspend the exercise of the reserved powers of the states. *Illinois Central Rd. Co. v. State Public Utilities Comm. of Illinois,* 245 U. S. 493, at p. 510, 62 L. Ed. 425.

[*Federal Antitrust Laws*]

We find no federal statute ordering, nor in fact any federal case which holds, that the federal government retains exclusively to itself the right to remedy the evils resulting from contracts and agreements between interstate carriers and Unions found to be in restraint of trade. Federal legislation does not occupy the entire field, to the exclusion of state laws. We further do not find that we are met with a labor dispute, unfair labor practice, right to collective bargaining, or any other right arising under the labor laws of the federal government, of which the right of adjudication has been exclusively retained by the federal government acting through any of its agencies.

On the question of jurisdiction, we find and hold that, if it be found that the contract before us, in connection with the established facts, is counter to this state's public policy as pronounced in its antitrust laws, this Court has jurisdiction to restrain such conduct, because it falls within a field open to state regulation, even though its effect falls upon litigants involved in interstate commerce.

[*National Labor Relations Act*]

Upon the basis of the allegations in the pleadings and the proof adduced, we find that the petitioner, an independent contractor, to the extent that he leases motor vehicles to carriers, rather than an employee under the federal statutes, could not have presented his grievances to the National Labor Relations Board. There is nothing in the National Labor Relations Act, as

amended by the Labor Management Relations Act (Taft-Hartley Act), which would give the petitioner herein such right.

As is indicated above, this Court rejects the claim of lack of jurisdiction of this Court to adjudicate the issues; and, after so ruling, we now proceed to examine the right of the petitioner to injunctive relief, because, as heretofore stated, the subject matter of the litigation falls within the powers of the state courts.

[*State Antitrust Laws*]

The public policy of this state in respect to monopoly and restraints of trade is set forth in Sec. 1331.01, R. C., *et seq.* The first-named statute, in so far as here applicable, is:

> "As used in Sections 1331.01 to 1331.14, inclusive, of the Revised Code:
>
> * * *
>
> "(B) 'Trust' is a combination of capital, skill, or acts by two or more persons for any of the following purposes:
>
> "(1) To create or carry out restrictions in trade or commerce;
>
> "(2) To limit or reduce the production, or increase or reduce the price of merchandise or a commodity;
>
> "(3) To prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or a commodity;
>
> "(4) To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce, or commerce intended for sale, barter, use, or consumption in this state;
>
> "(5) To make, enter into, execute or carry out contracts, obligations, or agreements of any kind by which they bind or have bound themselves not to sell, dispose of, or transport an article or commodity, or an article of trade, use, merchandise, commerce, or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity, or transportation between them or themselves and others, so as directly to preclude a free and unrestricted competition among themselves, purchasers, or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine, or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected.
>
> "A trust as defined in division (B) of this Section is unlawful and void."

It has been heretofore observed that the appellee Oliver has his equipment under lease to the carriers. It was a lease entered into through a voluntary agreement between the carriers and him. That the contract between the carrier and the Union would supersede and nullify many of the items of his contract is not open to dispute.

The carrier-Union contract may be succinctly said to be one which fixes the price to be charged for the use and supervision of the trucks and trailers used in the trucking business, owned by individual persons who lease their equipment to the carriers.

It is the judgment of this Court that such an agreement, and the consequences inevitably following therefrom, if the contract were allowed to stand, is squarely in conflict with the public policy of this state as reflected in Sec. 1331.01, R. C., *et seq.*

We have been favored with a careful analysis of this case made by Judge Colopy, the trial judge in the court below. We accept his reasoning as sound, and, by reference, make his opinion a part of this one. We further note the similarity of basic principles between the instant case and *State, ex rel. Cullitan v. Greater Cleveland Livery Owners Assn., et al.* [1946-1947 TRADE CASES ¶ 57,614], 74 N. E. 2d 104.

Judge McNamee, in the *Cullitan* case, has with rare ability discussed the principles of law involved in this case. We make especial reference to the opinion there rendered.

[*Rulings*]

In conclusion we summarize:

1. This Court has jurisdiction of both the parties and the subject matter.

2. Article 32 of the contract, here the subject matter of the litigation, is in violation of Sec. 1331.01, R. C., *et seq.*, and, by virtue of Sec. 1331.06, R. C., is void and unenforcible.

3. A permanent injunction will be entered of like character to that entered in the Court of Common Pleas.

HUNSICKER, P. J., and STEVENS, J., concur.

[¶ 68,796] Victor N. Alexander v. The Texas Company.

Connie G. Sheffield v. The Texas Company.

In the United States District Court for the Western District of Louisiana, Shreveport Division. Civil Action Nos. 5432 and 5458, respectively. Filed August 7, 1957.

Robinson-Patman Price Discrimination and Sherman Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Sufficiency of Complaint—Motion for More Definite Statement—Interrogatories.—Although amended complaints in two private antitrust actions were deemed insufficient, the court deferred ruling upon the defendant's motions to dismiss the amended complaints and for summary judgment to afford the plaintiffs another opportunity to state causes of action. The court granted the defendant's motion for a more definite statement and directed the defendant's counsel to serve upon the plaintiffs' counsel detailed written interrogatories on the facts and requests for admissions of fact.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.355, 2005.785; Monopolies, Vol. 1, ¶ 2610.720; Price Discrimination, Vol. 1, ¶ 3505.365, 3505.390; Private Enforcement and Procedure, Vol. 2, ¶ 9009.170, 9009.275, 9009.475, 9011.200, 9011.640.

For the plaintiffs: Malcolm E. Lafargue, Shreveport, La.

For the defendant: John T. Guyton, of Hargrove, Guyton, Van Hook and Hargrove, Shreveport, La.; Jack D. Childers, Houston, Tex.; and A. B. Steed, New York, N. Y.

For a prior opinion of the U. S. District Court, Western District of Louisiana, Shreveport Division, in the *Alexander* case, see 1957 Trade Cases ¶ 68,643, and for a prior opinion of the Court in the *Sheffield* case, see 1957 Trade Cases ¶ 68,657.

Rulings on Pending Motions

BEN C. DAWKINS, JR., Chief Judge [*In full text*]: When the records in these cases were delivered to us by the Clerk, on July 11, 1957, we were engaged in a trial term which was not completed until August 2, 1957. Consequently, we were unable to begin study of these records until August 5, 1957. Since then we have read the amended complaints and the respective briefs, having arrived at the following conclusions:

[*Sufficiency of Complaint*]

Defendant's counsel have submitted a careful, comprehensive analysis of the original and amended complaints. They have cited numerous impressive authorities to support their position that, notwithstanding this Court's specific observations and rulings in its opinion of March 1, 1957, plaintiffs still have failed to allege what they must allege, if the facts actually exist, in order to state claims upon which relief can be granted.

Plaintiffs' brief, on the other hand, to be frank about it, amounts to little more than fulmination. No serious effort has been made to distinguish the authorities defendant relies on, to cite others in support of their position, or to meet and overcome the logic of defendant's position as to each and every claim for damages. Moreover, plaintiffs seem to place as much blame on the other major oil companies as they do upon defendant, although those companies are not parties to the suits.

[*Rulings*]

Because of this, and since the amended complaint, like the original, is a "mere gossamer web of conclusion or inference," we think we would be thoroughly justified, and above criticism, if we were to grant defendant's motions to dismiss, and for summary judgment, at this time. Nevertheless, lest it be hereafter speciously urged that we were guilty of having wrongly denied plaintiffs their day in Court, and in order to determine finally whether they can allege and prove valid causes of action, we shall defer ruling upon all of defendant's motions except those for a more definite statement, which are hereby granted. Moreover, for the same purpose, and to be sure that plaintiffs have disgorged *all* of the ultimate facts at their disposal, we direct that defendant's counsel, within thirty days, shall serve upon plaintiffs' counsel detailed written interrogatories on the facts, and requests for admissions of fact, under Rules 33 and 36. Plaintiffs are allowed sixty days from this date to

respond to the order for a more definite statement, and to the interrogatories and requests for admissions. Thereafter, upon renewal of defendant's motions, with supplemental arguments and briefs, we then will be in position to decide whether plaintiffs are entitled to trial or that the suits are without merit and should be dismissed.

[¶ 68,797] United Cigar-Whelan Stores Corporation v. Philip Morris, Inc.

In the United States District Court for the Southern District of New York. Civ. 121-398. Filed August 9, 1957.

Robinson-Patman Price Discrimination Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Interrogatories.—In a drug store chain's treble damage action charging that a manufacturer of tobacco products discriminated against it in violation of Sections 2(a) and 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, the court sustained the manufacturer's objections to the chain's interrogatories requesting (1) a complete schedule of sales made by the manufacturer to the drug chain, (2) details of discounts, rebates, and the lowest unit price of the manufacturer on sales to all other retailers, and (3) the manufacturer's total amount of sales and amounts expended by the manufacturer for advertising. However, the manufacturer's general objection to the chain's interrogatories because they requested information covering periods of time subsequent to the filing of the complaint was overruled.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.875.

For the plaintiff: Aranow, Brodsky, Bohlinger, Einhorn & Dann, New York, N. Y.

For the defendant: Conboy, Hewitt, O'Brien & Boardman, New York, N. Y.

Memorandum

[*Causes of Action*]

CASHIN, JOHN M., District Judge [*In full text*]: This is an action by the owner of a chain of retail drug stores wherein treble damages are sought from a manufacturer and distributor of tobacco products under Sections 2a and 2d of the Clayton Act as amended by the Robinson-Patman Act. (15 U. S. C. A. §§ 13(a) and 13(d)). Three causes of action are alleged in the complaint. Each cause of action alleges discrimination between plaintiff and other purchasers of defendant's products generally during the years 1953, 1954, 1955, 1956 and 1957. However, the specific allegations of all of the causes of action refer only to discrimination between plaintiff and Liggett Drug Co., the owner of another chain of retail drug stores operating in the same areas as plaintiff and in competition with plaintiff. The first cause of action is based on discrimination by price discounts and rebates. (15 U. S. C. A. 13 (a).) The second cause of action is based on allowances for advertising not available on proportionally equal terms to plaintiff (15 U. S. C. A. 13(d)). The third cause of action alleges special damages because plaintiff purchased some of defendant's products from jobbers at a higher price than it would have purchased them from defendant had the discrimination not been in effect, as complained of in the first two causes of action.

[*Interrogatories*]

In interrogatory No. 6, plaintiff asks defendant to supply a complete schedule of sales by defendant to plaintiff with full details as to items sold, quantities, unit prices, total price of each sale, rebates and discounts, method of computation thereof and shipping addresses. Defendant objects to answering the interrogatory on the grounds that the information requested is equally available to plaintiff from its own records and to require defendant to compile the information would, because of defendant's method of record keeping, be extremely time consuming and expensive and thus, under the circumstances, unduly burdensome. Plaintiff does not deny that the information sought to be obtained by the

interrogatory is equally available to it, but contends that it is nevertheless entitled to have the answers so that the issues on the trial may be narrowed. While interrogatories may certainly on many occasions effect the salutary purpose contended for by plaintiff, I do not believe that discovery proceedings should be utilized to cast upon a defendant the burden of establishing the plaintiff's case when the plaintiff can at least as readily establish the requested facts. See *Leonia Amusement Corporation v. Loew's Incorporated* (SDNY 1955) [1955 Trade Cases ¶ 68,134], 18 F. R. D. 503. The objection to interrogatory No. 6 is, therefore, sustained.

Interrogatories Nos. 3, 4, 7 and 8 seek to obtain information from defendant as to the lowest unit price all defendant's products were sold for to any retailer; what discounts or rebates were given to any other such purchaser; the method of computation of said rebates or discounts and "all other details". Similar information is requested by interrogatory No. 25 with regard to advertising allowances. I believe that the objections to these interrogatories must be sustained, at least so long as the interrogatories remain in their present form. In the present posture of the pleadings, only the Liggett Drug Co. is alleged to be a competitor of plaintiff who was favored by either discriminatory prices or advertising allowances. Even under the liberal "notice" function of a complaint under the Federal Rules of Civil Procedure, I do not believe that the issues of the case presently encompass any discrimination except between plaintiff and Liggett Drug Co. Under these circumstances the interrogatories need not be answered and the objections are, therefore, sustained.

The subject matter of interrogatories Nos. 11 and 12 appear to be completely irrelevant to the issues of the lawsuit. The total amount of sales by defendant (Interrogatory No. 11) and the amounts expended by defendant in various forms of advertising (Interrogatory No. 12) can have no bearing on whether plaintiff was discriminated against in the forms complained of, or on any other conceivable issue in the action. The objections are sustained.

Defendant also objects to the interrogatories generally insofar as they request information subsequent to the institution of the action on the ground that such information is irrelevant to the issues, since only periods prior to the institution of action are covered by the complaint. I find the position of defendant untenable. The disclosure of otherwise relevant information for times subsequent to the institution of the action may lead to evidence. In addition, plaintiff may amend its complaint to include subsequent periods. If defendant were allowed to refuse to answer the present inquiries, all that could be accomplished would be a series of motions for leave to amend the complaint followed by a series of interrogatories seeking the same type of information for each successive time period covered. Defendant's general objection is overruled.

[*Extension of Time*]

In view of the difficulty which defendant must necessarily encounter in compiling the data required, its application for an extension of time within which to answer the interrogatories is granted. The interrogatories remaining must be answered by September 15, 1957.

Settle order.

[¶ 68,798] **Sunbeam Corporation v. Sebastian J. Schiros, individually and doing business as J & S Appliance.**

In the United States District Court for the Eastern District of Michigan, Southern Division. Civil Action No. 14608. Filed April 1, 1957.

Sherman Antitrust Act and Michigan Antitrust Laws

Fair Trade—Legality of Fair Trade Contracts—Federal Antitrust Laws and Michigan Antitrust Laws.—In a fair trader's action charging that a nonsigner of fair trade contracts tortiously interfered with its rights under its fair trade contracts, the nonsigner's counterclaim that the fair trader's contracts violate the Sherman and Clayton Antitrust Acts as well as the antitrust laws of Michigan was held to be without merit.

See Fair Trade, Vol. 1, ¶ 3040.40, 3075.

For the plaintiff: Herman T. Van Mell, Chicago, Ill., and Hill, Lewis, Andrews, Grance & Adams, Detroit, Mich.

For the defendant: Aldrich Baxter and Mayer Morganroth, Detroit, Mich.

Memorandum Opinion

[*Nature of Suit*]

THOMAS P. THORNTON, District Judge [*In full text*]: The Court has before it a motion by plaintiff for determination of defendant's counterclaim. The action commenced by plaintiff was one grounded on tortious interference with plaintiff's contract rights with certain of plaintiff's dealers. The contract rights were those arising out of fair trade agreements. At the time the suit was commenced this Court granted plaintiff's request for injunction enjoining defendant from doing acts constituting the tort for which the action was brought. At that time the Michigan Supreme Court had ruled in the *Shakespeare* Case[1] that the Michigan Fair Trade Act was unconstitutional insofar as it applied to nonsigners. The action brought by plaintiff herein against defendant, a nonsigner, was not brought on the theory of breach of fair trade contract. It was not brought on any contractual theory. It was brought on a tort liability theory.

[*Counterclaim*]

The theory of defendant's counterclaim herein attacked by plaintiff is that the fair trade contracts of plaintiff with its dealers violate the Sherman Anti-Trust Act and the Clayton Act, as well as the anti-trust laws of the State of Michigan. It is also defendant's theory that the injunction was wrongfully issued.

[*No Antitrust Violation*]

In view of the vast amount of litigation in this country during the past few years, and the conclusion reached again and again by the courts, of the non-violative character of State Fair Trade legislation in relation to Federal Anti-Trust Acts, we deem it unnecessary to deal with this point of defendant's argument other than to say that it is without merit.[2] As to any violation of the anti-trust laws of the State of Michigan, it is our view that the courts of this State have had the opportunity to declare the fair trade legislation to be so violative, and have not seen fit to do so. The decisions of the Michigan Supreme Court carry the implication that fair trade agreements in Michigan are valid and not in violation of constitutional or legislative provisions. See the *Shakespeare* Case and the *Argus Cameras* Case.[3]

[*Damages*]

We now reach the theory of defendant that he is entitled to damages because of the alleged wrongful injunction. It is defendant's contention that the plaintiff sought this injunction maliciously and with full knowledge that it had no right to do so. This contention is made by way of argument. The Court finds no allegation of malice in defendant's counterclaim and, as to defendant's argument that plaintiff knew it had no right to do this, the perfect foil is the dissenting opinion of Justice Butzel in the *Argus Cameras* Case, *supra,* in which Justices Boyles and Kelly concur, holding that the action of the lower court in granting a preliminary injunction (in the same situation as was present in the instant action) should be affirmed.

It is the opinion of this Court that defendant's counterclaim is devoid of merit.

An appropriate order may be presented.

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[1] *Shakespeare Company v. Lippman's Tool Shop Sporting Goods Co.* [1952 TRADE CASES ¶ 67,303], 334 Mich. 109.

[2] *Sunbeam Corp. v. Payless Drug Stores et al.* [1953 TRADE CASES ¶ 67,492], 113 F. Supp. 31, *Sunbeam Corp. v. MacMillan et al.* [1953 TRADE CASES ¶ 67,451], 110 F. Supp. 836.

[3] *Shakespeare Company v. Lippman's Tool Shop Sporting Goods Co.* [1952 TRADE CASES ¶ 67,303], 334 Mich. 109. *Argus Cameras, Inc. v. Hall of Distributors, Inc.* [1955 TRADE CASES ¶ 68,151], 343 Mich. 54.

[¶ 68,799] Congress Building Corporation v. Loew's, Incorporated, et al.

In the United States Court of Appeals for the Seventh Circuit. September Term, 1956; April Session, 1957. No. 11941. Dated July 29, 1957.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. KNOCH, District Judge.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Who May Bring Suit—Non-Operating Landlord of Motion Picture Theatre—Applicable Statute of Limitations—Necessity of Demand to Cease Illegal Practices.—A United States Court of Appeals, on a petition for rehearing, adhered to its rulings that a non-operating landlord of a motion picture theatre, which was entitled to a fixed minimum rental plus a percentage of the lessee's gross receipts, could maintain a treble damage action alleging that the lessee and others engaged in a conspiracy which had the effect of relegating the theatre to an inferior playing position; and that the action was governed by an Illinois two-year statute of limitations. In ruling on the petition, the court held that the non-operating landlord was not required, as a condition precedent to the maintenance of its suit, to make a demand upon the defendants to refrain from their alleged illegal practices. A demand to discontinue illegal practices is not a condition precedent to the maintenance of a private antitrust suit. The instant case did not involve a refusal to deal.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.55, 9009, 9010, 9010.100, 9010.200.

For the plaintiff-appellant: Thomas C. McConnell, W. Donald McSweeney, Francis J. McConnell, Harry D. Lavery, and Benjamin Wham.

For the defendants-appellees: John F. Caskey, Robert W. Bergstrom, Samuel W. Block, Wesley G. Hall, David Levinson, John J. Faissler, and Harold D. Shapiro.

Denying a petition for rehearing of a decision of the U. S. Court of Appeals, Seventh Circuit, 1957 Trade Cases ¶ 68,725, reversing and remanding a decision of the U. S. District Court, Northern District of Illinois, Eastern Division, 1956 Trade Cases ¶ 68,513.

Before FINNEGAN, LINDLEY and SWAIM, Circuit Judges.

On Petition for Rehearing

[*Necessity of Demand*]

SWAIM, Circuit Judge [*In full text*]: Our holding in the instant case that a demand is not a condition precedent to the maintenance of a suit of this character and the seemingly contrary holding by this court in *Milwaukee Towne Corp. v. Loew's, Inc.*, 7 Cir. [1950-1951 TRADE CASES ¶ 62,891], 190 F. 2d 561, certiorari denied 342 U. S. 909, may be a source of future confusion in this area of the law and we have thought it advisable to elaborate on this aspect of the case. We have already noted that *Milwaukee Towne* was tried on the theory of a refusal to deal and that the court held that without a demand or request to deal there could be no refusal to deal. The defendants insist that this is a mere exercise in semantics and that the cases are not distinguishable on that basis. They seize upon the following passage from *Milwaukee Towne* as supporting their position that a demand is a condition precedent to the maintenance of a private antitrust suit:

> "We know of no principle of law which authorizes a person aggrieved by the deprivation of a right either statutory or constitutional to recover for such deprivation in the absence of a demand or request for its exercise. With this thought in mind, we have carefully examined all the reported cases where damages have been sought in actions of the instant character against members of the motion picture industry and in other cases where the antitrust laws were relied upon, and in all such cases it appears that the plaintiff sought in some manner to exercise the right of which it allegedly was deprived by the alleged conspiracy." 190 F. 2d, at 568.

The holding there, however, is much narrower in application, for the court continued, recognizing the very "semantic difference" which we are accused of utilizing:

"Furthermore, the instant case was tried on the theory that it was the refusal of plaintiff's request or demand for first run pictures which gave rise to its damages. In the complaint it was alleged that the plaintiff 'is legally entitled to negotiate for and obtain from defendant distributors the license of pictures suitable for first run exhibition in the City of Milwaukee, but plaintiff has been and is now prevented from so negotiating or obtaining such pictures for exhibition,' and that as a 'direct and proximate cause of the operation of said unlawful monopoly, conspiracy and agreement against plaintiff's business plaintiff has been subjected to loss and damage.' *We are of the view that it cannot be held that defendants' conspiracy was the direct and proximate cause of plaintiff's damage because it was prevented from negotiating and obtaining first run pictures in the absence of a demand or request.*" (Emphasis added.) 190 F. 2d, at 568.

[*Facts in Instant Case*]

The plaintiff in the instant case is not proceeding on this theory and under the facts of this case it obviously could not do so. By the terms of its leasing arrangement with the defendant B & K the plaintiff entrusted the operation of its theater to the discretion of the lessee. Plaintiff is therefore not in a position to assert and does not assert that it "is legally entitled to negotiate for and obtain from defendant distributors the license of pictures suitable for first run exhibition in the City of [Chicago]." If the plaintiff tried to assert or exercise such a right it would probably be in breach of the terms of the lease. The plaintiff does complain however that it was injured in its property by reason of activities forbidden by the antitrust laws and the defendants concede that "[w]here the injury results directly 'by reason of' failure of the defendant to obey the law, whether it is a traffic law or an antitrust law, a demand or request that the defendant 'obey the law' is obviously not a prerequisite to a cause of action." Under the admitted allegations of the complaint the defendants conspired to monopolize film exhibition in the City of Chicago and to divert patronage from the plaintiff's theater. The antitrust laws protect the plaintiff from such activities in much the same manner that the law protects its property from intentional physical damage. In neither instance must the plaintiff assert its right prior to suit by demand as the law makes the demand of the wrongdoer.

Although the Supreme Court has not had occasion to pass on this question, the following excerpt from *Radovich v. National Football League* [1957 TRADE CASES ¶ 68,628], 352 U. S. 445, 453-454, is particularly appropriate here:

"Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. * * * *In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.*" (Emphasis added.)

Furthermore, the issue of demand in *Milwaukee Towne* had an additional significance not present here. The plaintiff's theater had been exhibiting second run motion pictures and the plaintiff claimed that it was entitled to a first run exhibiting position. The question arose as to whether its theater was suitable as a first run house. Along with other evidence the absence of a demand for the "first damage period" was considered indicative of the fact that the plaintiff's theater was not suitable for that purpose. The court therefore concluded that even if competitive conditions had prevailed the plaintiff's theater would have still been a second run house, with the result that the plaintiff was not damaged by the trade practices complained of. In other words, the plaintiff failed to demand or request first run pictures because it recognized that its theater was not suitable for their exhibition, and even if a demand or request had been made, the unsuitability of the plaintiff's theater would have precluded it from recovering damages. The significance of demand in this context related to the proof of damages upon the trial, and not to the prerequisites to a cause of action under the antitrust laws. Thus, the court said:

"Obviously, no damages were claimed for that period [the period when the plaintiff's theater was closed for remodeling] because plaintiff was not in a position to use first run pictures, and we think by the same token it was not entitled to recover damages for the preceding period because not only did it fail to make a demand or request for first run pictures but recognized that its theatre was not suitable for that purpose." 190 F. 2d, at 568-569.

[*Effect of Ruling*]

The defendants contend that the effect of our decision will cause every film distributor to deal with the theater operator at its peril unless each film contract is countersigned by the lessor. And protesting their innocence, the distributor defendants insist that they relied and had a right to rely upon the requests for pictures received from the plaintiff's tenant. Throughout this matter the defendants have found it convenient to ignore the allegations of the complaint which for present purposes are admitted as true. The complaint alleges that the distributor defendants and others conspired with the lessee to divert patronage from the plaintiff's theater. We do not have a situation where the film distributors merely supplied the plaintiff's theater with the run of pictures requested by the lessee; we have a situation where the run of pictures was determined by the dictates of a conspiracy between the lessee and the film distributors. The only peril to which our decision will expose the film distributors is the peril to which they have been subjected by Congress, and this is a peril which they can avoid by the simple expedient of refraining from activities forbidden by the antitrust laws.

Defendants concede that they had a duty to refrain from illegal trade practices, but complain that they had no way of knowing that the plaintiff considered their acts injurious in the absence of a demand or request. It is of note that the defendants do not assert that they did not know their acts to be injurious, but rather that they did not know whether the plaintiff would complain about them. But the plaintiff has complained and any lack of diligence in this record will be penalized by the statute of limitations.

[*Petition for Rehearing Denied*]

We adhere to the views previously expressed on the other issues presented by this appeal and accordingly the petition for rehearing is denied.

FINNEGAN, Circuit Judge. I adhere to my previous concurrence in the result reached in the first opinion of this court.

[¶ 68,800] H. & A. Selmer, Inc. v. Musical Instrument Exchange, Inc.

In the United States District Court for the Southern District of New York. Civil No. 119-63. Filed August 12, 1957.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—When Recovery May Be Barred—Participation in Same Illegal Activity as Charged in Counterclaim.—In an action by a manufacturer to recover an alleged balance due on the purchase price of goods sold to the defendant, the defendant filed a counterclaim charging that the plaintiff entered into contracts with its dealers which were unlawful under the antitrust laws. A motion to strike the plaintiff's defense charging that the defendant entered into the same contracts which it had alleged were unlawful under the antitrust laws, and therefore was *in pari delicto* with the plaintiff and came into court with unclean hands, was denied. Where parties enter into an agreement which is violative of the antitrust laws, the doctrine of *in pari delicto* is a good defense. In the instant action, the plaintiff and defendant allegedly were parties to the same illegal contracts, and the alleged illegal contracts formed the basis for the counterclaim.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.475.

For the plaintiff: Harper & Matthews (Verne G. Cawley and Harold Harper, of counsel), New York, N. Y.

For the defendant: Friedland, Jobrack & Zurkow (Louis G. Greenfield, of counsel), New York, N. Y.

For a prior decision of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,780.

Opinion

[*Motion to Strike*]

LEVET, District Judge [*In full text*]: Defendant has moved pursuant to Rule 12(f) of the Federal Rules of Civil Procedure for an order striking from plaintiff's reply to defendant's counterclaim the "Second Defense" which charges plaintiff [defendant] with unclean hands and *in pari delicto* with plaintiff.

[*Pleadings*]

Plaintiff, a manufacturer of band instruments at Elkhart, Indiana, is suing to recover an alleged balance on the purchase price of goods sold and delivered to the defendant, and upon promissory notes given for said goods. Defendant asserts in its answer a counterclaim charging that plaintiff has entered into contracts with dealers in its band instruments pursuant to which the dealers have agreed with plaintiff to do and to refrain from doing certain acts which defendant alleges constitute a restraint of trade. Plaintiff's reply sets up the aforementioned "Second Defense," which is as follows:

> "*Forty-Ninth:* If, as alleged in the counterclaim, plaintiff in concert with its franchised dealers entered into a contract or combination with said dealers which was in any respect in restraint of trade or unlawful, nevertheless defendant became a party to said contract, agreed to be bound thereby, ratified, confirmed and approved the said contract, was engaged from time to time in the performance thereof and benefitted thereby, and thus is *in pari delicto* with plaintiff and said other retail dealers in the making and peformance of said contract and, with respect to the matter alleged in said counterclaim, comes before this court with unclean hands."

[*Applicability of Defense*]

The defendant seeks to have the above defense stricken as insufficient. It claims that it is now well established that the doctrine of "unclean hands" is inapplicable and superfluous in antitrust actions, citing *Interborough News Co. v. Curtis Pub. Co.*, D. C. S. D. N. Y., 1952 [1952 TRADE CASES ¶ 67,388], 108 F. Supp. 768, 770, wherein Judge Irving R. Kaufman stated:

> "Regardless of the circumstances under which 'unclean hands' might have constituted a defense to an action under the federal antitrust laws in the past, it seems clear that three recent decisions have, if not completely abolished this defense, narrowed it to cases of extremely limited applicability. The decisions referred to are *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 1951, 340 U. S. 211, 71 S. Ct. 259, 95 L. Ed. 219, *Moore v. Mead Service Co.*, 10 Cir., 1951, 190 F. 2d 540, certiorari denied 1952, 342 U. S. 902, 72 S. Ct. 290, and *Trebuhs Realty Co. v. News Syndicate Co.*, D. C. S. D. N. Y. 1952, 107 F. Supp. 595. In the last cited case Judge Weinfeld granted a motion to strike affirmative defenses of 'unclean hands' in an antitrust case after historically tracing the shrinkage of this defense and concluding that in this context:
>
> 'the defenses of "unclean hands" and "*in pari delicto*" were not considered solely within the framework of traditional equity concepts. In determining whether the defense should be permitted or denied, decisive weight was given to the necessity of vindicating the public interest in free competition—a necessity overriding the particular equities which might exist between the immediate parties.' *Trebuhs Realty v. News Syndicate Co., supra*, 107 F. Supp. at page 598."

However, in none of the above-cited cases were the plaintiff and the defendant parties to the same illegal conspiracy. Here the defendant asserts in its affirmative defenses in the answer (1) failure of consideration because of plaintiff's refusal to continue defendant's dealer franchise; (2) that the promissory notes were executed by the defendant pursuant to an agreement in restraint of trade; (3) that defendant purchased the goods and merchandise in question pursuant to the unlawful agreement; and (4) that the agreement between the parties was violative of the Sherman and Clayton Anti-Trust Acts, 15 USCA. Although, the defendant claims that it entered into the aforesaid agreement under duress, this is a question of fact that cannot be resolved at this time.

In *Pennsylvania Water & Power Co. v. Consolidated Gas Electric Light & Power Co. of Baltimore*, 4 Cir. [1954 TRADE CASES ¶ 67,641], 1953, 209 F. 2d 131, cert. denied 347 U. S. 960, it was held that where the parties had entered into an agreement which was violative of the anti-trust laws, the doctrine of *in pari delicto* was a good defense to plaintiff's action. In affirming the lower court, Judge Soper said:

"We are in accord with the Second Memorandum of the District Judge, filed with the Court on April 6, 1953, that Penn Water is precluded from recovery in this case because it was a party to the illegal agreement upon which it now bases its claim to recover under the anti-trust acts. Penn Water contends that the doctrine of *in pari delicto* is no longer a defense to a private action for damages growing out of an antitrust violation but has been rejected by the recent decisions of the Supreme Court in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U. S. 219, 68 S. Ct. 996, 92 L. Ed. 1328; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U. S. 211, 71 S. Ct. 259, 95 L. Ed. 219; and *Moore v. Mead Service Co.,* 340 U. S. 944, 71 S. Ct. 528, 95 L. Ed. 681; *Id.,* 10 Cir., 184 F. 2d. 338; *Id.,* 10 Cir., 190 F. 2d 540.

"We do not so understand these decisions, for in none of them were the plaintiff and the defendant parties to the same illegal conspiracy or agreement on which the suit was based. * * *"

[*Motion Denied*]

In the instant case, the alleged illegal contract forms the basis for defendant's counterclaim and, therefore, the *Pennsylvania Water & Power Co.* case, *supra,* is apposite. See also 29 *N. Y. U. L. Rev.* 1463 (1954). Accordingly, defendant's motion is denied.

So ordered.

[¶ 68,801] Morris Johnson and Dorothy Johnson v. American Federation of Musicians, et al.

In the United States Court of Appeals for the District of Columbia Circuit. No. 13574. Decided August 14, 1957.

Appeal from the United States District Court for the District of Columbia.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Sufficiency of Proof of Damages.—In a night club lessor's damage action charging that a musicians' union violated the Sherman Act by blacklisting his night club because former lessees of the night club had failed to pay wages owed to certain members of the union, a directed verdict in favor of the union at the close of the lessor's case was affirmed on the ground that the lessor failed to sustain the burden of proving that the action of the union caused ascertainable loss and damage. The evidence did not show the loss of any particular lease or lessee because of the listing. The lessor also argued that prospective lessees were dissuaded from serious consideration of a lease because the listing precluded employment of union musicians and entertainers. However, there was no showing that the night club could not be operated with musicians and entertainers who were not members of the union.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.250.

For the appellants: Edward J. Skeens.

For the appellees: Eugene Gressman, with whom Henry Kaiser and Hyman Smollar were on the brief.

Before WASHINGTON, DANAHER and BURGER, Circuit Judges.

[*Complaint*]

BURGER, Circuit Judge [*In full text*]: This is an appeal from the District Court's grant of a motion for a directed verdict for appellees at the close of appellants' case. The issue therefore is whether substantial evidence had been offered in support of appellants' complaint, requiring submission of the case to the jury. The complaint alleged (1) unlawful interference with appellants' right to make leases of realty; (2) imposition of an unlawful boycott against appellants' realty by means of a combination and conspiracy in violation of the Sherman Act; (3) libel of appellants and their property by an illegal listing on the appellee American Federation of Musicians' "National Defaulters List."

These separate contentions of the appellants merge on this appeal into a single concept that a labor organization is not engaged in a legitimate union activity and,

by implication, on the contrary, engages in an unlawful activity, when it maintains, publishes and enforces a "blacklist" which operates to prevent members from doing business with listed establishments, particularly when that sanction is permitted to operate against the *owner* of the establishment rather than the *lessees* who contracted for entertainers' services and failed to pay for them.

The record shows that appellants, as owners of certain realty, were also owners of a trade name "Club Bengazi" descriptive of the activities carried on in these premises by various lessees. Appellants leased the realty and the right to use the name "Club Bengazi" to various lessees. The several lessees from time to time employed the services of members of the appellee unions and it is conceded that former lessees of appellants failed to pay the wages of certain members of the Federation. At the time suit was commenced several thousands of dollars in wages admittedly due were outstanding.

[*Blacklisting*]

As a means of enforcing collection of wages, among other things, the American Federation of Musicians employs what amounts to a "blacklisting" of defaulting employers to warn union members against taking employment from "defaulters." It appears from this record that the union considers "an establishment . . . liable for indebtedness to [its] members regardless of the fact that a new operator may take over after the original default." [1] A union member who accepts employment from a defaulting establishment or operator is subject to union discipline. No procedure is established by the union for placing a "defaulter" on this list or removing him if he makes good an admitted default. The entire process is within union control and no hearings or other steps are provided.

The default of appellants' lessees led to a listing of "Club Bengazi" on the Federation's "National Defaulters List" from 1948 to the time of trial except for a short interval when the listing was suspended. The essence of appellants' complaint is that the "blacklisting" effectively prevents leasing "Club Bengazi" and the premises associated with that name.

[*Proof of Damages*]

The appellants' evidence in the District Court did not show loss of any particular lease or lessee because of the listing. Appellant argues that prospective or potential lessees were dissuaded from serious consideration of a lease because the listing precluded employment of any union musicians or entertainers. However, there is no showing that a night club could not be operated with entertainers and musicians not members of the appellee unions.

On this record it seems clear that the appellants failed to sustain the burden of proving at least one of the essentials of their case, *i. e.*, that the actions of appellees or any of them caused ascertainable loss and damage. Absent proof of damage we need not pass upon the conduct complained of in the complaint. The action of the District Court directing a verdict in favor of the appellees is therefore affirmed.

[¶ 68,802] The American Securit Company v. Shatterproof Glass Corporation.

In the United States District Court for the District of Delaware. Civil Action No. 1691. Dated July 19, 1957.

Sherman Antitrust Act

Combinations and Conspiracies—Patents—Package Licensing Policy—Legality.—A company's policy of refusing to grant a patent license unless a license under all of its patents is taken constituted a misuse of its patent monopoly. Although the company had, when pressed, offered to license individual patents, it had, at the same time, demanded in payment the same royalty rate as that provided in its group or package license. While it has been held that the mere accumulation of patents is not, of itself, illegal, and that it is not a *per se* misuse to measure consideration for a license under any and all patents related

[1] The union so advised appellants, adding that: "In order for the establishment to be removed from the Defaulters List arrangements have to be made for payment of such indebtedness."

to an industry by a percentage of the licensee's sales, the company, in the instant case, refused to grant a license under one or more of its patents unless a license was taken under all of its patents. Neither business convenience nor the fact that a licensee could cancel its license justified the company's policy. There is no significant difference between conditioning the grant of a license under one patent upon the acceptance of another for an additional consideration and granting a license only under all patents at a fixed rate or under one patent at the same rate. The company's licensing policy was held to have violated the terms of a consent decree entered against the company in a Government antitrust action.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.500.

Private Enforcement and Procedure—Antitrust Law Violations as Defense—Misuse of Patents as Bar to Infringement Suit—Violation of Government Consent Decree as Defense.—A company's policy of group or package licensing its patents constituted a misuse of its patent monopoly; therefore, the company, having failed to purge the misuse of its patents, was barred from enforcing them in its patent infringement action. Also, the company's licensing policy violated the terms of a consent decree entered against the company in a Government antitrust action. The violation of that decree could be asserted as a defense to the company's infringement action.

See Private Enforcement and Procedure, Vol. 2, ¶ 9041.

Department of Justice Enforcement and Procedure—Consent Decrees—Violation of Decree—Jurisdiction of Court to Determine Violation.—The United States District Court for the District of Delaware held that it had jurisdiction to determine in a patent infringement action whether or not the plaintiff violated the provisions of a Government consent decree entered against it in the United States District Court for the Northern District of Ohio, Western Division. The plaintiff's contention that only the district court in Ohio, which retained jurisdiction, should interpret the consent decree was rejected. The retention of jurisdiction by the district court in Ohio did not exclude, by implication, the recognition of the plaintiff's obligations under the decree. The Ohio court acceded to this position when it declined to accept jurisdiction on an application of the alleged infringer to fix royalties and the petition of the Attorney General to enforce the decree. The instant court had competence to test the plaintiff's adherence to its obligations insofar as it might prejudice recovery in the infringement action. The plaintiff's patent licensing policy was held to have violated the terms of the Government consent decree.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8401, 8421; Private Enforcement and Procedure, Vol. 2, ¶ 9041.

For the plaintiff: H. Eugene Savery, Wilmington, Del.; John L. Seymour (of Bauer & Seymour), New York, N. Y.; and Joseph W. Burns (of Fulton, Walter & Halley), New York, N. Y.

For the defendant: Caleb S. Layton (of Richards, Layton & Finger), Wilmington, Del.; and William C. McCoy and William C. McCoy, Jr. (of McCoy, Greene & TeGrotenhuis), Cleveland, Ohio.

[*Patent Infringement Suit*]

LEAHY, Chief Judge [*In full text except for omissions indicated by asterisks*]: Plaintiff sues for infringements of certain patents concerning the tempering of glass. Defendant moved for summary judgment under FR 56. There is no genuine issue as to the material facts. The question before the court is one of law. A brief sketch of the historical background of this litigation is necessary.

[*Government Consent Decree*]

1. On October 30, 1948, a final judgment in the form of a consent decree was filed in the District Court of the United States for the Northern District of Ohio, Western Division, by Judge Kloeb. The government had charged violation of the antitrust statutes. The parties consenting were the United States of America, as plaintiff, and Libbey-Owens-Ford Glass Company, Pittsburgh Plate Glass Company, American

Window Glass Company, Fourco Glass Company, Franklin Glass Company, National Glass Distributors Association, Rolland Glass Company, American Securit Company, and Blue Ridge Glass Corporation, as defendants.

In part, the decree provided the American Securit Company, one of the Corporate defendants, was enjoined from adhering to any agreement providing for a license under any patent relating to the manufacture of flat glass, upon the condition the other party had to accept a license under any other patent owned by any of the defendants in that action. Also, the defendants were to grant to each applicant a nonexclusive license under their patents and were enjoined from including any restriction or condition in any license granted by such defendants, with certain exceptions. Upon receipt of a written request for a license, a defendant was to advise the applicant in writing of the royalty which it deemed reasonable for the patent or patents to which the request pertained. If the parties could not agree upon a reasonable royalty within sixty days from the date the request for the license was received by a defendant, the applicant could apply forthwith to the Ohio Court for the determination of a reasonable royalty. The burden of proof would rest on the owner of the patent to establish the reasonableness of the royalty demanded and the court determination would apply to the applicant and all other licensees under those patents. Pending the completion of negotiations, or any such proceeding, the applicant would have to make use of the patents to which its application pertained without payment of royalty or other compensation, subject to the right of such defendant, or the applicant himself, to apply to the court to fix an interim royalty rate from the date of the filing of the application.

[*Negotiations Between Parties*]

2. Correspondence between the present parties in the suit at bar, which has been stipulated of record, indicates a series of negotiations took place between plaintiff and defendant here with respect to defendant's licensing of plaintiff's patents. The negotiations were opened by defendant on March 20, 1951. On March 7, 1955, almost four years later, plaintiff brought suit in this court against defendant for alleged patent infringement and unfair competition. Defendant's answer denied all counts of infringement, challenged the validity of plaintiff's patents, asserted as a first defense misuse of patents, and, as a second defense, royalty free license under the Ohio decree. Defendant here also counterclaimed for a declaratory judgment.[1]

[*Proceedings in Government Case*]

On July 25, 1955, an application was filed by defendant in the Ohio Court for the determination of royalty fees pursuant to that Court's final judgment entered October 30, 1948. Then, on October 6, 1955, the Attorney-General of the United States petitioned the Ohio Court for orders for the construction and enforcement of the Ohio decree and judgment. Hearing on these matters was had on October 19, 1955. On December 13 the Court refused to take jurisdiction in view of the proceedings here, and ordered a dismissal of both the application and the petition of the Attorney-General. As of the present date, the paper record shows defendant is not working under any license of plaintiff corporation.

[*Complaint—Summary Judgment*]

3. Counts I through IV of the Complaint relate to defendant's alleged infringements of plaintiff's patents, Mosmieri, et al., No. 2,131,406, Despret No. 2,167,294, Eckert No. 2,093,040, and Long No. 2,303,749. Counts V and VI relate to the allegations of unfair competition and fraud on the part of defendant. The motion for summary judgment seeks merely dismissal of Counts I through IV.

[*Motion to Strike Affidavits*]

4. Preliminarily, there is plaintiff's motion to strike the affidavits of Mr. William C. McCoy, Jr., and Mr. William C. McCoy, attorneys for defendant, supporting defendant's motion for summary judgment. FR 56(e) tests the sufficiency of evidentiary affidavits on a summary judgment motion for form and content. It requires affidavits to be made on personal knowledge, to set forth such facts as would be admissible in evidence, and to show affirmatively the

[1] Plaintiff's motion to dismiss defendant's first and second defense was denied by my Opinion-Letter of May 25, 1956, pp. 5-7.

affiant is competent to testify to the matters stated therein.

The affidavit of Mr. William C. McCoy, Jr., describes a conference between the affiant and Mr. Vernon M. Dorsey, a lawyer and then Secretary of the plaintiff, The American Securit Company, held for the purpose of negotiating for a patent license from plaintiff to defendant, Shatterproof Glass Corporation. Part of that affidavit alleges the good faith of the position taken by defendant during the course of negotiations. The affidavit of Mr. William C. McCoy traces the steps of defendant's legal stand, including Shatterproof's negotiations with another defendant (under the Ohio judgment) from whom licenses for several patents, including those relating to the tempering of glass, were granted on an individual basis.

I conclude the supporting affidavit of William C. McCoy and part of the supporting affidavit of William C. McCoy, Jr., are not material to the issues raised by defendant in its motion for summary judgment.[2] They will be disregarded. As to the remainder of the supporting affidavit of William C. McCoy, Jr., plaintiff's motion to strike is denied.

* * *

[*Contentions*]

5. Defendant's position on its summary judgment motion is two-fold: 1. Unenforceability of plaintiff's patents because of (a) misuse, and (b) violation of the terms of the consent decree, and 2. Defendant's right to use the patents during the period of negotiations with plaintiff without payment of royalty by virtue of the provisions of the consent decree.

[*Licensing Policy*]

6. Defendant contends plaintiff has followed a policy of licensing which constitutes a misuse of its patent monopoly, and, therefore, plaintiff is barred from enforcing its patents at this time in an infringement action. No dispute exists as to the policy pursued by plaintiff in licensing its patents. This policy is set out in plaintiff's standard form of license agreement.[7] It provides for a grant of license on all of its patents related to the industry for the specific royalty of 2¢ per square foot of glass manufactured and sold by the licensee. Plaintiff's proposed license also provides for the termination of the license agreement by the licensee at any time after one year from the date of signing by the giving of 30 days' notice in writing to the licensor. The correspondence between the parties and other papers indicate this policy has not been subject to variance, in that plaintiff has consistently refused to license individual patents;[8] and, although it has, when pressed, offered to do so, it has, at the same time, demanded in payment the same royalty rate as that provided for in the group or package-license.[9]

[*Patent Misuse*]

The crux of the legal question is to determine whether plaintiff's policy of licensing constitutes a misuse of its patents. The Supreme Court has said mere accumulation of patents is not, of itself, illegal, nor is it *per se* a misuse to measure consideration for a license under any and all patents related to the industry by a percentage of the licensee's sales, even though none of the patents may in fact be used by the licensee.[10] But the Court stated it was *not*

[2] See 6 Moore, Federal Practice pp. 2328-2329.

* * *

[7] License agreement accompanying letter of Robert Ingouf, Vice-President and Treasurer of plaintiff corporation, to W. B. Chase, President of defendant corporation, dated May 28, 1951, of the stipulated correspondence between the parties.

[8] See the stipulated correspondence between the parties; Ingouf Dep. pp. 120, 121; Ingouf Dep. Ex. 18; Affidavit of William C. McCoy, Jr., submitted in support of defendant's motion.

[9] See letter of V. M. Dorsey, Esq., former counsel and Secretary of plaintiff, to William C. McCoy, Esq., counsel for defendant, dated January 5, 1954, of the stipulated correspondence between the parties.

[10] *Automatic Radio Manufacturing Co., Inc. v. Hazeltine Research, Inc.* [1950-1951 TRADE CASES ¶ 62,634], 339 U. S. 827, affirming 1 Cir. [1948-1949 TRADE CASES ¶ 62,476], 176 F. 2d 799, (one Judge dissenting), affirming D. C. Mass., 77 F. Supp. 493. The petitioner entered into a license agreement with Hazeltine whereby petitioner could make use of all patents held or acquired by Hazeltine at a royalty rate fixed on a sales percentage and regardless of use of the patents. The petitioner argued the license agreement could not be enforced since it was a misuse of patents to require the licensee to pay royalties based on a percentage of the sales of its patents when none of the patents are used. Six members of the Supreme Court (opinion by Justice Minton) found no inherent extension of the monopoly of the patent. The dissent of Justice Douglas, concurred in by Justice Black, reasoned that since the petitioner was obligated to pay as royalty a percentage of its total sales without regard to whether or not the products sold were patented or un-

confronted with the contention that the licensor refused to grant a license under one or more of its patents unless a license was taken under all.[11] Thus, the Supreme Court refused to apply the principle of the so-called "tie-in" cases, of which the Court, in an earlier decision dealing with copyright block-booking, held illegal a refusal to license one or more copyrights unless another copyright was accepted under an additional consideration.[12]

The record here demonstrates the applicability of that principle. The policy of plaintiff to grant no license unless it is under all its patents for a fixed royalty, is one of unlawful coercion contrary to public policy as announced by the courts.[13] And, it can not be said by plaintiff in answer that its practice of group or package-licensing was designed merely to suit its business convenience. Convenience to the patent owner can never justify an unlawful use of the patent monopoly. In this field, a reward granted to an inventor is important, only insofar as it serves to release to the public the product of its genius. That service ceases to be rendered when the reward no longer can be found to relate to the quality of each patent. In such event one patent cannot draw strength from the others and the monopoly of each thus be extended.

7. Plaintiff relies upon the termination clause of the license agreement as a redeeming feature of its patent monopoly. I do not so consider it. As read, the termination provision works an equal, even more aggravating, hardship upon the licensee in that, when invoked, it demands the renunciation of all patents—wanted and unwanted—under the license.[14]

8. Plaintiff then attempts to avert the impact of misuse by arguing, since under its package license the royalty for all patents is the same as for any one, with no increased rate imposed, its package license in no way requires an applicant to accept, under the burden of an added consideration, a license under one patent on condition he accept a license under another. I find plaintiff's offer to license its patents individually was never an alternative to its original, controlling policy to grant a license only under all its patents. Rather it was added by plaintiff in the later stages of its negotiations with defendant in the present case to counteract the harshness of plaintiff's position by seemingly meeting the demand of defendant in that regard. Although this offer may be said, on the surface, to treat of individual patents, its design was evident—a catalyst to encourage the licensing of all patents at the same fixed rate—and its result the same—unlawful coercion on the licensee to accept unwanted patents and an illegal extension of the patent monopoly.

I thus find no significant difference between, on the one hand, conditioning the granting of a license under one patent upon the acceptance of another for an additional consideration, a practice the Supreme Court has condemned, and, on the other, as here, granting a license only under all patents at a fixed rate, or under any one patent at the same rate, which is, in effect, equivalent to apportioning the fixed rate amongst all the patents and then requiring the applicant to take a license under all if he wishes to have a license under one. In either case plaintiff's policy is inexorable. Plaintiff having failed to "purge"[15] the misuse of its patents, is barred from enforcing them in its infringement action in this court.

[*Violation of Consent Decree*]

9. I will consider, as well, whether this court as other than the court entering a

patented, the patentee received royalties on unpatented as well as patented products to obtain a larger monopoly of the market than the statute permits.

[11] This contention, included by petitioner in support of its motion for summary judgment, was not pressed on appeal, and, in any event, was found not properly supported by the record, 339 U. S. 827, 831.

[12] *United States v. Paramount Pictures, Inc., et al.* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131, 156-159, affirming D. C. N. Y. [1946-1947 TRADE CASES ¶ 57,470], 66 F. Supp. 323.

[13] 15 U. S. C. §§ 1 and 2. See *Apex Electrical Mfg. Co., et al. v. Altofer Bros. Co.,* D. C. Ill. [1955 TRADE CASES ¶ 68,121], 130 F. Supp. 152, 154-156, 159; *Hazeltine Research, Inc. v. Avco Mfg. Corp., et al.,* 7 Cir. [1955 TRADE CASES ¶ 68,178], 227 F. 2d 137, 146-149; and *Baker-Cammack Hosiery Mills, Inc., et al. v. Davis Co.,* 4 Cir. [1950-1951 TRADE CASES ¶ 62,606], 181 F. 2d 550, 568-573.

[14] Paragraph 7 of plaintiff's standard form of license agreement provides: "The licensee may surrender its license hereunder and terminate this agreement at any time after one (1) year from the date hereof by giving the Licensor thirty (30) days' notice in writing of the Licensee's intention so to do."

[15] See, in this regard, *United States Gypsum Co. v. National Gypsum Co., et al.,* [1957 TRADE CASES ¶ 68,627], 352 U. S. 457, reversing and remanding D. C. D. C. [1954 TRADE CASES ¶ 67,813], 124 F. Supp. 573.

final judgment via consent decree, has jurisdiction to determine a violation of the latter's decree, whether the terms of plaintiff's standard form of license agreement violate the terms of the decree to which it consented, and, if it does, whether violation renders the patents unenforceable in an action for infringement.

[*Jurisdiction of Court*]

Plaintiff takes the position [that] only the Ohio Court, which retained jurisdiction,[16] should interpret the Ohio judgment. The retention of jurisdiction by the Ohio Court does not exclude by implication in this court the recognition of plaintiff's obligations under the decree. The Ohio Court acceded to this view when it declined to accept jurisdiction both on the application of defendant (to fix royalty fees) and the petition of the Attorney-General (to enforce the consent decree). This court now has competence at this juncture to test plaintiff's adherence to its obligations in so far as it may prejudice recovery in this infringement action. If the decree is wrongly interpreted, or the consequences which flow therefrom are wrongly judged, the power rests with a higher body to set it straight.[17]

The final judgment of the Ohio Court was not an adjudication of issues of fact or law in that action. It did not constitute evidence or admission of any such issue.[18] Nevertheless, since a violation of the laws of the United States was in issue in the Ohio proceedings, the provisions of its decree, to which the United States consented, became a declaration of public policy to govern the future behavior of the named defendants. The master fact, then, is that plaintiff, a defendant in that action, consented to the entry of judgment and it thereby assumed obligations with respect to the licensing of its patents. It follows, if under the terms of its licensing agreement, plaintiff violated the terms of the decree, plaintiff must be prevented from enforcing its patents in an action for infringement such as in the instant case here. This is in keeping with time-honored principles of equity. Defendant, as a prospective licensee, has shown itself as a corporate personality within the purview of the decree. Clearly, it may seek its protection here.

[*Licensing Policy Violates Decree*]

10. Passing to precise questions of violation, I find the terms of the standard form of license agreement employed by present plaintiff, The American Securit Company, is in conflict with Paragraph XIV B and Paragraph XVII(1)(a) of the Final Judgment rendered in C. A. 5239 in the District Court of the United States for the Northern District of Ohio, Western Division, between The United States of America, plaintiff, and Libbey-Owens-Ford Glass Company, et al., defendants. Paragraph XIV B of the decree forbids the inclusion of any restrictions or conditions whatsoever in any license granted by the corporate defendants, except certain enumerated ones.[19] The terms

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[16] Paragraph XXXI of the Final Judgment provides:

"Jurisdiction is retained for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment or for the modification or termination of any of the provisions thereof, and for the purpose of the enforcement of compliance therewith and the punishment of violations thereof."

[17] See *Hughes v. United States* [1952 TRADE CASES ¶ 67,213], 342 U. S. 353; *United States v. The Liquid Carbonic Corporation, et al.*, D. C. N. Y., [1954 TRADE CASES ¶ 67,760] 121 F. Supp. 141, [1954 TRADE CASES ¶ 67,856] 123 F. Supp. 653, reversed and remanded per curiam in [1955 TRADE CASES ¶ 68,174] 350 U. S. 869.

[18] Page 1 of the Final Judgment provides, in part:

"* * * the plaintiff and said defendants by their attorneys having severally consented to the entry of this Final Judgment herein, without adjudication of any issue of fact or law herein and without this judgment constituting evidence or admission in respect of any such issue:

"Now, Therefore, without adjudication of any issue of fact or law herein, and upon consent as aforesaid of all the parties hereto and not upon evidence, * * *"

[19] Paragraph XIV B of the Final Judgment provides:

"Each corporate defendant is hereby enjoined and restrained from including any restriction or condition whatsoever in any license or sublicense granted by it pursuant to the provisions of this Section except that (1) the license may be non-transferable; (2) a reasonable non-discriminatory royalty may be charged; (3) reasonable provisions may be made for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee who shall report to the licensor only the amount of the royalty due and payable; (4) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalties or to permit the inspection of his books and records as hereinabove provided; (5) the license must provide that the licensee may cancel the

of plaintiff's standard licensing form impose a condition heretofore described,[20] which clearly is not within the scope of any of the excepting provisions. Consequently, it is the type of condition which the Ohio decree was designed to combat. Plaintiff, in this regard, further violates Paragraph XVII(1)(a), which specifically prohibits the licensing of any patent upon the condition that the licensee shall accept a license under any other patent owned or controlled by the licensor.[21] The argument of plaintiff that any variance in its licensing policy in defendant's favor, or otherwise, would have resulted in discrimination against the existing licensees[22] is without merit. While I appreciate the sensitiveness of a licensor not to discriminate among licensees, it has not been demonstrated by heeding defendant's wishes for the licensing of individual patents at royalty rates distinct from the package rate, plaintiff would have traveled the sure road to discrimination. On the contrary, such a change by plaintiff in its licensing policy would have been in line with its legal obligations under the Ohio consent decree.

[*Defense*]

I conclude, therefore, plaintiff's standard form of license agreement violates the terms of the consent decree rendered by the Ohio Court, and defendant, here, may assert the violation of that decree as a defensive shield to ward off the infringement action of plaintiff in this court.

[*Right to Use Patents*]

11. These findings make it unnecessary to decide defendant's final contention, except to note that the provisions of the Ohio judgment dealing with the court's determination of reasonable royalty rates and interim royalty rates seem to be expressed in terms of prior filing of an application. The difficulty is that, read apart, the filing of the application appears to be permissive and not mandatory upon the applicant. In the event no application is filed, the inference, then, is these provisions cannot be brought into play, with the result that implementation of the decree becomes seriously impaired.

[*Motion Granted*]

For the foregoing reasons, defendant's motion for summary judgment as to Counts I through IV of the Complaint is granted. An appropriate order may be submitted but only after there is a determination by trial, or otherwise, of the remaining counts in plaintiff's complaint.

[¶ 68,803] Yonkers Raceway, Inc. v. Standardbred Owners Association, Inc., Francis P. Smith, Arthur J. Brown, Russ C. Carpenter, William R. Haughton, John P. Simpson, Stanley F. Dancer, Joe O'Brien, Delvin Miller, Hugh A. Bell, Edward Cobb, William M. Myer, James W. Jordan, Franklin Sanford, Wendell Wathen, Percy Gray, Morris Pivnick, Sanders Russell, Morris MacDonald, Edward Dougherty, Al Karet, Henry Critchfield.

In the United States District Court for the Southern District of New York. Civil No. 121-273. Filed July 8, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Injunctive Relief—Temporary Restraining Order—Sufficiency of Proof of Violation.—An association of owners and drivers of harness race horses and certain of its members did not violate a temporary restraining

license at any time after one year from the initial date thereof by giving thirty days' notice in writing to the licensor."

[20] See the text surrounding note 2, *supra*.

[21] Paragraph XVII(1)(a) of the Final Judgment provides, in part:

"The corporate defendants are severally and jointly enjoined and restrained from entering into, adhering to, maintaining, furthering, or renewing, directly or indirectly, any contract, agreement, understanding or arrangement which provides for:

"(1) a license * * * under any patent; * * * relating to the manufacture of flat glass, upon the condition or requirement that the other party thereto shall:

"(a) * * * accept a license * * * under any other patent owned or controlled by any defendant;"

[22] Licensees operating under plaintiff's standard form of license include Libbey-Owens-Ford Glass Company, Conaname, Inc., Pittsburgh Plate Glass Company, West Penn Mirror Company, Permaglass, Inc., Corning Glass Works, and Eagle Convex Glass Specialty Company. See letter of V. M. Dorsey to W. B. Chase, dated March 19, 1953, of the stipulated correspondence; the Affidavit of Robert Ingouf in this action; and the Transcript of Proceedings in Ohio on Defendant's Application For Royalty Fees, p. 46.

order prohibiting them from failing, in concert, to enter their horses in races scheduled to be held at the plaintiff's race track and from refusing, in concert, to drive their horses or the horses owned by members of the association in such races. Although a number of the defendants removed their horses from the race track and/or refused to file entries to participate in races, the evidence did not establish that the acts of the defendants were done in concert or by agreement, expressed or implied, between the defendants. The plaintiff failed to establish sufficient facts to warrant the drastic remedy of finding the defendants in contempt.

See Private Enforcement and Procedure, Vol. 2, ¶ 9028.

For the plaintiff: Bleakley, Platt, Gilchrist & Walker (Chapman, Walsh & O'Connell, by Charles M. Metzner, of counsel), New York, N. Y.

For the defendants: Donovan, Leisure, Newton & Irvine (Breck P. McAllister, James V. Hayes, Sidney P. Howell, Jr., and Samuel W. Murphy, Jr., of counsel), New York, N. Y.

For other opinions of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,804 and 68,805.

Memorandum

[*Contempt*]

DAWSON, District Judge [*In full text*]: This is a motion brought on by an order to show cause for an order adjudging the defendants in contempt for violation and contemptuous disregard of a certain temporary restraining order signed by Judge Levet on June 13, 1957 and extended by Judge Dawson on June 19, 1957, pending determination of an application for an injunction *pendente lite.*

[*Restraining Order*]

The temporary restraining order issued by Judge Levet prohibited the defendant Association and individual defendants and the members of the defendant Association, their agents, servants, employees and attorneys and all persons in active concert and participation with them from failing in concert to enter their horses in the races scheduled to be held at Yonkers Raceway on June 14, 1957 and thereafter, from refusing in concert to drive their horses or the horses owned by members of the defendant Association in said races, and from otherwise impeding, obstructing or interfering, by any act or failure to act, with the conduct of said races at Yonkers Raceway.

[*Alleged Violation*]

The plaintiff contends that the defendants, or some of them, violated the temporary restraining order by acting in concert in failing to enter their horses in races scheduled to be held at Yonkers Raceway after June 14, 1957, and by refusing in concert to drive their horses or horses owned by members of the Association in said races, and by impeding, obstructing or interfering with the conduct of said races at Yonkers Raceway. Defendants deny any concerted action.

There seems to be no dispute that following June 29, 1957 a number of defendants removed their horses from Yonkers Raceway and/or refused to file entries to participate in races at Yonkers Raceway. It was conceded that the defendants had knowledge of the temporary restraining order.

[*Concerted Conduct*]

The primary issue is, of course, whether the acts of the defendants were done in concert and in contemptuous disregard of the temporary restraining order.

There was no direct proof that the acts of the defendants in withdrawing their horses or refusing to enter horses in races at Yonkers Raceway were done in concert or by agreement, expressed or implied, between the defendants. To prove "concert" plaintiff must establish something more than an inference. The Court, in the restraining order, did not restrain individual action on the part of the defendants, or action not taken in concert, nor would the Court have had the power to do so.

Plaintiff presented proof that a number of the members of the Association attended a meeting held at the Hotel Gramatan, in Bronxville, New York, on June 29, 1957, at which meeting defendant Smith, as president of the Association, read the following statement:

"Gentlemen: I have a brief statement to make to you as president of the SOA.

"It is my duty and obligation to inform you that you must honor all the horses that you have entered to race at Yonkers Raceway as of this time.

"As your president, I would also like to inform you that it is your obligation to fulfill all your commitments and to race at Yonkers Raceway all entries made by you up to this time.

"I wish to advise you further if you so desire that you do not have to enter any horses to race at Yonkers Raceway from this time on unless you hear otherwise from me.

"I would also like to advise you, if you so desire, that you can remove your horses from Yonkers Raceway at this time until you hear otherwise from me to the contrary."

Following that meeting a number of the members of the Association removed their horses from the track and did not enter their horses for future races. As a result the number of horses entered in races at the track declined considerably and there has been some decrease in attendance at the track and in pari-mutuel betting at the track.

Mr. Smith testified that previous to this meeting on June 29th he had been advised by his attorneys that the restraining order had expired by passage of time and was no longer in effect, and that if he had not been so advised he would not have read the statement quoted above, for in that event, it might, in his opinion, have been a violation of the restraining order.

It is not necessary for a determination of this motion to decide whether the restraining order had expired by passage of time. Even if we assume that the temporary restraining order continued in effect the Court finds that nothing in the communication read by Mr. Smith at the meeting held on June 29th establishes by a fair preponderance of the evidence that the defendants were taking "concerted action" to violate the restraining order. All that Mr. Smith advised was that the individual members could take such action as they individually chose to take and that the restraining order prohibited concerted action but did not prohibit individual action. The testimony of Mr. Brown, an officer of the Association, who attended this meeting, was to the following effect:

"The Court: Was any question raised that if anyone removed his horses it would be a violation of the Court order? Did anyone raise that question?

"The Witness: I think they did, and they were told that if they did it in concert—if they wanted to go and race somewhere, they had a perfect right to do so, but not to get anyone else to do it or to make sure that nobody got them to do it.

"That's all that was clarified. Whatever they did was their own feelings, and nobody else had anything to do with it."

In the absence of proof that the defendants agreed between themselves to take prohibited action the Court finds that the plaintiff has failed to establish by a fair preponderance of the evidence that the defendants or any of them violated the temporary restraining order.

[*No Violation*]

The Court finds that plaintiff has failed to establish sufficient facts to warrant the drastic remedy of finding the defendants in contempt.

The motion is denied. So ordered.

[¶ 68,804] Yonkers Raceway, Inc. v. Standardbred Owners Association, Inc., Francis P. Smith, Arthur J. Brown, Russ C. Carpenter, William R. Haughton, John P. Simpson, Stanley F. Dancer, Joe O'Brien, Delvin Miller, Hugh A. Bell, Edward Cobb, William M. Myer, James W. Jordan, Franklin Sanford, Wendell Wathen, Percy Gray, Morris Pivnick, Sanders Russell, Morris MacDonald, Edward Dougherty, Al Karet, Henry Critchfield.

In the United States District Court for the Southern District of New York. Civil No. 121-273. Filed July 8, 1957.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Boycott—Preliminary Injunction.—In a race track's action charging that an association of owners and drivers of harness race horses and certain of its members engaged in an illegal boycott designed to force the race

track to increase the amount of the purses offered for racing, the race track was held to be entitled to a preliminary injunction restraining the association and its officers from endeavoring to induce owners of horses not to ship them to the race track and not to race them at the track. The race track had established that the association and one of its officers, in unison, sought to induce horse owners to refrain from racing their horses at the race track. Such action would be an attempt at an illegal boycott which would be in violation of the antitrust laws. The race track had no adequate remedy at law. However, the race track was not entitled to a preliminary injunction against the individual defendants since it did not establish that the actions of such defendants were the result of, or evidenced, a combination or conspiracy to violate the antitrust laws. A preliminary injunction should not be granted unless the court is convinced with reasonable certainty that the moving party will succeed at the trial of the action, and such an injunction generally will not be granted where there are doubtful issues of fact.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.533; Monopolies, Vol. 1, ¶ 2610.720; Private Enforcement and Procedure, Vol. 2, ¶ 9026.15.

For the plaintiff: Bleakley, Platt, Gilchrist & Walker (Chapman, Walsh & O'Connell, by Charles M. Metzner, of counsel), New York, N. Y.

For the defendants: Donovan, Leisure, Newton & Irvine (Breck P. McAllister, James V. Hayes, Sidney P. Howell, Jr., and Samuel W. Murphy, Jr., of counsel), New York, N. Y.

For other opinions of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,803 and 68,805.

[*Preliminary Injunction Sought*]

DAWSON, District Judge [*In full text*]: This is a motion for a preliminary injunction pending trial in which plaintiff seeks an order enjoining the defendants, their agents, servants or employees, from failing in concert to enter horses in the races scheduled to be held at Yonkers Raceway on June 14, 1957 and thereafter, and from refusing in concert to drive their horses or the horses owned by members of the defendant Association in said races, and from otherwise impeding, obstructing or interfering, by any act or failure to act, with the conduct of said races.

[*Complaint*]

The complaint alleges violations of §§ 1 and 2 of the Sherman Act. 15 U. S. C. §§ 1, 2.

The action is one brought under the antitrust laws for an injunction and damages. 15 U. S. C. § 26, 15.

[*Established Facts*]

The moving papers establish without substantial dispute:

1. The plaintiff is a New York corporation which since April 1950 has conducted harness horse racing, accompanied by pari-mutuel betting, at Yonkers Raceway at Yonkers, New York, and has a substantial investment in such raceway.

2. Under the New York laws relating to pari-mutuel betting (McKinney's Unconsolidated Laws, § 7603) plaintiff is required to deduct 15% from the pari-mutuel pool and the balance of the pool is paid to the holders of winning tickets. Out of the 15% a certain proportion is paid to the State of New York as tax and the balance is retained by the plaintiff. The plaintiff also derives additional revenue from admission charges, parking fees and concessions. From the money retained by the plaintiff from the pari-mutuel pool it pays certain amounts to the owners of the horses participating in the races, usually proportioned to the success or lack of success in winning the respective races.

3. The defendant Association is a membership corporation organized in 1951 under the laws of the State of New York and has a membership of approximately 450 owners and drivers of harness horses. The members of the Association engage in the business of owning, training and driving harness horses at Yonkers Raceway and at various other harness tracks and fairs in the State of New York and elsewhere. It is alleged that the membership of the Association includes 90% of the owners and drivers engaged in harness racing in the New York City metropolitan area.

4. The defendant Smith is the president and a director of the Association. The other

individual defendants are members of the Association and are either directors of the Association or owners or drivers of harness horses.

5. The activities of harness racing are activities in interstate commerce in that the horses, in going from track to track, go across state lines.

6. Prior to the formation of the Association in 1951 the practice was that in advance of the opening of a race meeting the plaintiff advertised its proposed purse schedule and the drivers and owners electing to compete for the purses filed applications for stall space and thereafter entered their horses in the races and competed for the purses offered. At that time the purses were approximately 18% of the sums retained by the plaintiff out of the pari-mutuel pool.

7. In 1954 the plaintiff entered into negotiations with the Association with reference to the amounts of these purses. As a result of these negotiations the parties entered into a contract by which plaintiff agreed to pay purses totaling 35% of the amount retained by the track out of the pari-mutuel pool. This contract ran for a period of three years from May 25, 1954.

8. Prior to the opening of the Spring, 1957 meeting at Yonkers Raceway, plaintiff advertised that it intended to continue its 35% purse policy. The track distributed applications for stall space which in part provided that the owners and drivers occupying stall space would agree to race for purses of the amount offered. A number of the members of the Association executed such applications.

9. In May 1957 defendant Smith, as president of the Association, and the Board of Directors of the Association demanded that the purses be increased from 35% to 45% of the sums retained by the plaintiff out of the pari-mutuel pool. At a meeting of the members of the Association on June 1, 1957 a Committee of three was appointed as a negotiating delegation to represent the Association and its members in connection with this and other demands. When the plaintiff refused to accede to these demands another meeting of the members of the Association was held on June 6, 1957. The members voted unanimously to stand by their proposals as previously submitted and instructed the Committee to notify the plaintiff that the members of the Association would not enter horses for racing at Yonkers Raceway after 6 P. M. on June 9, 1957.

10. In the June 12, 1957 issue of "The Harness Horse," a magazine with a circulation among horse owners and horse riders, the defendant Association caused a full page advertisement, reading as follows, to be inserted:

"Notice

"To All Horsemen . . .

"The Standardbred Owners Association, which represents horse owners, trainers and drivers who race at Yonkers Raceway, after futile attempts to negotiate with the management of Yonkers Raceway, have served notice of a suspension of racing at Yonkers Raceway, effective Friday, June 14, 1957 in accordance with the rules and regulations of the U. S. T. A. and the New York Harness Racing Commission.

"We Horsemen At Yonkers Raceway Urgently Request That You, Our Fellow Horsemen, Do Not Ship Any Horses To Yonkers Raceway Until We Have Resolved Our Differences With Yonkers Raceway And Have Agreed On A Formal Contract Covering Racing Activities At Yonkers Raceway.

"Standardbred Owners Association
"Francis P. Smith,
"President."

[*Prior Motion*]

On June 13, 1957 the present action was started in this Court and on the same day a motion was made for a temporary injunction and for a stay until determination of the motion. The stay was granted by Judge Levet and racing has continued at Yonkers Raceway.

[*Boycott Charged*]

The plaintiff contends that the action of the defendants is such that it constitutes an illegal boycott designed to force the plaintiff to increase the amount of the purses offered for racing at the Yonkers Raceway, and hence is an illegal conspiracy to fix prices. The only issue now before the Court is whether the injunction *pendente lite* should be granted. The remedy of a preliminary injunction is a drastic one. It should not be granted unless the Court is convinced with reasonable certainty that the moving party will succeed at the trial of the action. Furthermore, such remedy will

generally not be granted where there are doubtful issues of fact which may determine the result.*

[*Legality of Activity*]

Price-fixing by a combination or conspiracy is illegal per se. See *Union Circulating Co. v. FTC* [1957 TRADE CASES ¶ 68,637], 241 F. 2d 652 (2d Cir. 1957). The result of applying this rule to the matter in controversy turns on the meaning of the terms conspiracy and combination as well as upon what is required to prove their existence. Several specific questions present themselves. May over 100 independent horse owners collectively negotiate with the track as to its purse policy? May the horse owners appoint a bargaining representative, such as the Association, to represent them in these negotiations? And if no agreement can be reached with the track, can the horsemen independently refuse to race?

To answer these questions in the negative would extend the Sherman Act far beyond its original purpose. On one side of the controvery is a race track which by the laws of New York (McKinney's Unconsolidated Laws, § 7598) has been given a monopoly on harness horse racing at a particular locality. On the other side of the controversy are hundreds of individual owners of horses who are extended the privilege of racing their horses at that track and of competing for purses. Many of these individuals have been represented in negotiations with the track by the defendant Association. With a group of entrepreneurs on one side and a powerful single corporation on the other side, there would appear to be nothing illegal in that group of individuals having a single agent to represent them in any negotiations. The Association has urged that larger purses be offered to the horse owners. The raceway had refused to consider increasing the purses. Is this Court empowered under the circumstances to direct that the horse owners must continue to race their horses at the track for the purses offered by the track? For the Court to so direct would mean that each individual horse owner must negotiate separately with the track,** or that if the horse owners negotiate through a common agent and the agent advises that he is unable to reach a satisfactory agreement with the track, that the horse owners then may not individually determine to abide by their agent's recommendation not to enter the races for the purses offered by the track. The Sherman Act does not sanction such prohibition against individual action.

[*Combination or Conspiracy*]

There is presented on the papers a distinct issue of fact as to whether the horse owners have in fact entered into a combination, agreement or conspiracy not to race horses at Yonkers Raceway, or whether on the other hand, the horse owners decided, as a result of the refusal of the track to negotiate an increase in the purses, that they would in their individual judgment refuse to race under the terms offered. In other words: Is there a combination or conspiracy between the defendant themselves to boycott the track whereby each has bound himself to his fellow-horsemen not to enter horses at the track, or is it a situation where many horse owners have each individually determined not to race his horses? People may certainly reach the same conclusion without having entered into a contract or conspiracy. If, for example, the Association reported to a number of its members that the race track arbitrarily refused to discuss or consider an increase in purses offered, and if as a result of this report a number of the members unanimously stated that they would not race their horses at the track, the members may be acting in a common manner but this does not necessarily prove that they have entered into an illegal combination, contract or conspiracy with each other not to race horses. The

* See *Huber Baking Co. v. Stroehmann Bros. Co.*, D. C. S. D. N. Y. 1953, 114 F. Supp. 411; affirmed 2 Cir., 208 F. 2d 464; *Federal Telephone & Radio Corp. v. Federal Television Corp.*, 2 Cir., 1950, 180 F. 2d 250; *Atlantic & Gulf West Coast v. United States*, D. C. S. D. N. Y. 1950, 90 F. Supp. 554; *Margolis v. Franks*, D. C. S. D. N. Y. 1956, 138 F. Supp. 9.

** Plaintiff has construed part of defendants' Answer as expressing an admission of guilt. Paragraph 27 of the Answer asserts that "collective negotiation" is necessary on the part of the horseowners if they are to negotiate effectively with the track. Irrespective of the truth of this allegation it does not constitute an admission of illegal conduct in concert, but is merely a statement that instead of 100 horseowners sitting down with the track, the appointment of a delegation is a more efficacious technique. Furthermore, collective bargaining does not necessarily infer an agreement precluding an individual from acceding to terms he deems acceptable.

difference is this: Did the defendants agree with each other that they would not race horses, or did they, without any such agreement inter se, separately reach a determination at the same time to reject the terms offered by the track and to take their horses home or to another track? It does not appear that the anti-trust laws prohibit competitors from reaching the same conclusion; rather they apply where the parties between themselves have entered into an agreement or combination to boycott or refuse to do business with another party to the dispute. Whether the individual defendants have acted or now threaten to act in concert is a question as to which the moving papers are insufficient to justify a preliminary injunction. Accordingly, until this issue of fact is fully litigated at trial, no provisional action by the Court is appropriate.

[*Relief Against Association*]

The primary items of proof relied upon by the plaintiff are that the individual horsemen unanimously voted to withdraw, and that the Association advertised in a nationally distributed trade publication requesting other horse owners not to race at the Yonkers Raceway. Upon analysis, the fact that individual horsemen were unanimously determined to withdraw is not under the circumstances of sufficient value to establish that this was the result of a combination or conspiracy. It must be contrasted with a situation where, for example, the majority favored withdrawal and the minority favored continued racing, and despite the divergence, all followed the majority will and withdrew. That would be a case of concerted activity, and differs from the facts in the present controversy where there has been no proof that any horse owners have withdrawn contrary to their own inclination and determination. The activity of the Association, on the other hand, is clearly culpable. The advertisement it directed to horse owners around the nation was an unequivocal attempt to precipitate a classic form of secondary boycott. Accordingly, injunctive relief against the Association is, under the circumstances, merited. See *Metropolitan Bag & Paper Distributors Ass'n v. F. T. C.* [1957 Trade Cases ¶ 68,589], 240 F. 2d 341 (2d Cir. 1956) (injunction issued against Association but not against members who did not participate in illegal conspiracy).

The Court therefore concludes that it would not be desirable or proper at this time, on the papers submitted, to issue a temporary injunction in the form sought by the plaintiff, and said motion for a temporary injunction is denied and the stay vacated. The Court directs, however, that an injunction pendente lite issue prohibiting the defendant Association, its officers, agents and servants from endeavoring to induce owners of harness horses not to ship horses to the Yonkers Raceway or not to race horses at the Yonkers Raceway.

[*Economic Dispute*]

In reaching this determination the Court is mindful of the fact that the controversy here involved is an economic dispute. In the long run the success of harness racing in this State can only be achieved by a certain degree of cooperation between the race tracks and the owners of the horses which are to race at those tracks. To use the strong arm of the Court to enforce terms on either side would not lead to long-term good relations between the parties or the success of this sport. The Court has sought to bring the parties together on a basis of mutual discussion in an endeavor to reach a satisfactory settlement of the controversy. The arbitrary attitude of the plaintiff has made such efforts fruitless. Plaintiff seems to have taken the position that it wishes to negotiate with the horse owners under the aegis of a Court injunction which would in effect deprive the other parties of real bargaining power. This may be a legalistic approach but it is not a realistic approach to a very practical problem. The controversy easily could be brought to a conclusion satisfactory and profitable to both sides if on both sides there was a desire to reach a fair determination. That desire up to now seems missing.

[*Conclusions*]

The Court concludes:

1. Plaintiff has not established to the Court's satisfaction that the actions of the individual defendants were the result of or evidenced a combination or conspiracy to violate the anti-trust laws.

2. Plaintiff has established that the defendant Association and the defendant Smith did in unison seek to induce horse owners to refrain from racing horses at the Yonkers Raceway, and that this was an attempt at

a boycott of this track to compel the track to pay a higher price to the horse owners for racing at the track; that such action would be an attempt at an illegal boycott which would be in violation of the anti-trust laws; and for which plaintiff has no adequate remedy at law.

3. That an injunction pendente lite should issue restraining the Association and defendant Smith and the officers, directors and agents of the Association from endeavoring directly or indirectly to induce owners of horses not to ship them to Yonkers Raceway or not to race them at Yonkers Raceway.

4. That except as hereinabove provided the motion for a temporary injunction should be denied and the stay vacated.

This opinion shall constitute the findings of fact and conclusions of law of the Court.

Submit decree on or before July 11, 1957.

[¶ 68,805] Yonkers Raceway, Inc. v. Standardbred Owners Association, Inc., Francis P. Smith, Arthur J. Brown, Russ C. Carpenter, William R. Haughton, John P. Simpson, Stanley F. Dancer, Joe O'Brien, Delvin Miller, Hugh A. Bell, Edward Cobb, William M. Myer, James W. Jordan, Franklin Sanford, Wendell Wathen, Percy Gray, Morris Pivnick, Sanders Russell, Morris MacDonald, Edward Dougherty, Al Karet, Henry Critchfield.

In the United States District Court for the Southern District of New York. Civil No. 121-273. Filed August 16, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Pretrial Procedures—Depositions and Subpoena *Duces Tecum*.—On a plaintiff's motion to quash a subpoena *duces tecum* and to vacate a notice for the taking of a deposition, the court ruled that the subpoena *duces tecum* was not oppressive, that the notice to take the deposition was not defective, that the defendants were not acting in bad faith in seeking discovery from the plaintiff, and that the defendants were entitled to examine the plaintiff in the quest of additional facts as to whether the plaintiff was engaged in interstate commerce and whether the defendants' acts constituted an illegal boycott even though findings as to such facts had been made on a motion for a preliminary injunction.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.775, 9013.975.

For the plaintiff: Chapman, Walsh & O'Connell (Charles M. Metzner, of counsel), New York, N. Y.

For the defendants: Donovan, Leisure, Newton & Irvine (Breck P. McAllister, of counsel), New York, N. Y.

For prior opinions of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,803 and 68,804.

Opinion

[*Complaint*]

SIDNEY SUGARMAN, District Judge [*In full text*]: Plaintiff, operator of a harness racing track, brought this suit against an association of and certain individual owners and racers of harness racing horses. The complaint charges defendants with violation of the anti-trust laws in that they conspired to boycott plaintiff's track and to induce others to do likewise in order to compel plaintiff to increase the race purses.

[*Deposition—Production of Documents*]

Defendants served plaintiff with a notice to take plaintiff's deposition and with a subpoena *duces tecum* to produce voluminous books, records and documents of the plaintiff at the deposition.

[*Objections*]

Plaintiff now moves for an order:

"(1) quashing the subpoena *duces tecum* . . . upon the ground that it is unreasonable and oppressive;

"(2) vacating the . . . notice for the taking of plaintiff's deposition upon the ground that it does not comply and is not in conformity with Rule 28 of the Federal Rules of Civil Practice [sic] and upon the further ground that it is premature;

"(3) or in the alternative, why a protective order should not be issued pursuant to subdivision (b) of Rule 30 of the Federal Rules of Civil Practice, limiting the scope of the examination as to the question of whether the defendants engaged in an illegal boycott and an illegal price-fixing combination in violation of the Anti-Trust Laws; and

"(4) why plaintiff should not have such other further and different relief as in the premises may be just, equitable and proper."

Among other things the supporting affidavit states:

"Plaintiff's position on this application simply is that defendants' purpose is to be vexatious and oppressive. That is the only reason why defendants have precipitantly sought to take plaintiff's depositions on matters that can have no possible relevancy to the issues presented by this litigation, as is evidenced by the unreasonable and oppressive subpoena *duces tecum* served and the threats voiced by the defendants' representatives in connection therewith. It appears from the notice and subpoena itself that several truck loads of records will be required to be produced by the plaintiff at the office of defendants' counsel before some unnamed notary public. It conclusively appears from the minutes before Judge Dawson that there is no issue of fact here present and, furthermore, that the records sought to be produced and the pre-trial examination sought to be conducted as reflected by the subpoenaed records can have no possible relevancy to the matters in litigation." (Tananbaum affidavit 6/27/57, pp. 2-3.)

[*Oppressiveness*]

The movant first claims that the subpoena *duces tecum* is oppressive in that it requires the movement of a large volume of records to this city. This will be remedied by providing in the order to be settled hereon that the oral examination of plaintiff be had either at plaintiff's place of business or, at defendants' option, at the office of the clerk of this court, provided, however, that if defendants elect to take plaintiff's deposition at the clerk's office, the defendants shall prepay the packing and trucking expenses necessarily involved in transporting the items to and from the examination. This also cures the claimed defect in the notice in that it calls for the deposition to be taken at the office of defendants' counsel.

[*Sufficiency of Notice*]

The movant next claims that the notice to take plaintiff's deposition is defective. This contention is without merit as to either its failure to name the officer before whom the deposition will be taken [1] or its timeliness.[2]

[*Scope of Deposition*]

The alternative relief seeks a limitation of the scope of the deposition based (a) on allegations of defendants' bad faith and (b) on a contention that there

"is no issue of fact which this case presents in the light of the admitted activities of the defendants and in the light of the admissions made by their counsel before the Court, . . ." (Tananbaum affidavit 6/27/57, pp. 5-6.)

There is nothing in the papers on file in this action to justify a finding at this time that the defendants are acting in bad faith in seeking discovery from the plaintiff under their above-mentioned notice and subpoena *duces tecum*. Plaintiff has adequate means of protecting itself from abuse during the taking of the deposition should it then develop that defendants are not acting in good faith.[3]

In opposition to this motion, defendants in part justify the examination of plaintiff and the production of its books, records and documents, on the question of whether harness racing is interstate commerce. Plaintiff relies strongly on Judge Dawson's decision of July 8, 1957 on plaintiff's motion for a preliminary injunction wherein he found that "[t]he moving papers establish without substantial dispute: . . . 5. [t]he activities of harness racing are activities in interstate commerce . . ." and wherein he concluded that "2. [p]laintiff has established . . . that such action would be an attempt at an illegal boycott which would be in violation of the anti-trust laws . . ."

The defendants' answer was not served and filed until after the hearing before Judge Dawson on the plaintiff's motion for a preliminary injunction, although before his decision. His discretionary decision was clearly predicated only upon the moving

[1] *Zweifler v. Sleco Laces*, 11 F. R. D. 202 (S. D. N. Y. 1950).

[2] 4 *Moore's Fed. Prac.* (2d ed.), para. 26.09, p. 1040.

F. R. Civ. P. 30(d).

papers, arguments and briefs of counsel submitted upon that motion. The answer squarely raises the issue of the nature of plaintiff's business, i.e., interstate or not, and the nature of defendants' acts, i.e., illegal boycott or not. Inquiry into those issues cannot be foreclosed by the decision on the motion for the preliminary injunction. The rule is stated to be:

> "This court will not consider any of the questions decided on the hearing for a preliminary injunction as *res judicata.* They are open for review, but they should be adhered to, unless it clearly appears that an error was committed, or that additional facts were brought out at the trial which demand a modification or reversal of the views expressed at the preliminary hearing." [4]

The defendants are entitled to examine the plaintiff in the quest of additional facts as to whether plaintiff is engaged in interstate commerce and whether defendants' acts constituted an illegal boycott.

[*Ruling*]

The plaintiff's motion is denied [5] except to the extent that the notice and subpoena *duces tecum* are modified as hereinabove indicated.

Settle an appropriate order on notice.

[¶ 68,806] United States v. Continental Can Company, Inc., and Hazel-Atlas Glass Company.

In the United States District Court for the Southern District of New York. Civil No. 112-387. Filed August 21, 1957.

Case No. 1301 in the Antitrust Division of the Department of Justice.

Clayton Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Pretrial Procedures—Interrogatories.—In an action charging that a can company violated Section 7 of the Clayton Act, the company's objection to certain Government interrogatories on the ground that they ask that the desired information be furnished as of the date of the filing of the interrogatories and not as of the date of the commencement of the action was overruled. The company based its objection on *U. S. v. E. I. du Pont de Nemours and Co., et al.,* 353 U. S. 586, 1957 TRADE CASES ¶ 68,723, which held that the test of a violation of Section 7 of the Clayton Act is whether "at the time of suit" there is a reasonable probability that the acquisition is likely to result in the condemned restraints. The court ruled that the "time of suit" is not restricted to the time of commencement of suit.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4205; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225.260.

For the plaintiff: William H. McManus and John M. O'Donnell, Antitrust Division, Department of Justice, New York, N. Y.

For the defendants: Willkie, Owen, Farr, Gallagher & Walton, (Mark F. Hughes and Helmer R. Johnson, of counsel), New York, N. Y., for Continental Can Co., Inc.

For a prior decision of the U. S. District Court, Southern District of New York, see 1956 Trade Cases ¶ 68,479.

Opinion

[*Government Interrogatories*]

SIDNEY SUGARMAN, District Judge [*In full text*]: The defendant, Continental Can Company, Inc., objects to certain interrogatories served upon it by the plaintiff, United States of America, in an action alleging a violation of Section 7 of the Clayton Act, 15 U. S. C. A. § 18.

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[4] *Rodgers v. Pitt,* 129 Fed. 932, 937 (Nev. 1904); approved in *O'Connell v. Gentry County Bank,* 55 F. 2d 806, 809 (8th Cir. 1932); *cf. Harvey Aluminum v. American Cyanamid Co.,* 15 F. R. D. 14, 20 (S. D. N. Y. 1953); Injunctions 43 C. J. S. § 200(b).

[5] This denial is not to be construed as any indication that defendants may see or copy any of the plaintiff's books, records and documents produced at the deposition. *Cf. Joseph L. Lee, Inc. v. Margon Corporation,* 18 F. R. D. 390 (S. D. N. Y. 1956).

By stipulation, interrogatory 12 is withdrawn by the plaintiff. The parties have partially resolved objections to interrogatories 6, 7, 13, 14 and 17.

I.

[*Up-to-Date Information*]

The defendant objects to answering interrogatories 1 to 5 inclusive, 8, 9 and 10 because [a]

> "These interrogatories ask that the desired information be furnished as of the date of the filing of the interrogatories—not as of the date of commencement of the action."

and [b]

> "The organization which is now Continental Can Company, Inc. is a substantially different organization from what it was at the date of the acquisition of the assets of Hazel-Atlas Glass Company. Subsequent to that date it has merged with Robert Gair Company, Inc. and as a consequence its corporate structure has been changed both with respect to indebtedness and with respect to stock outstanding; its holdings of subsidiaries has been changed; and the scope of its business changed. The question here at issue is the probable competitive or monopolistic effects of a previous acquisition with respect to which the complaint has been filed before such changes took place."

The defendant claims, but the court does not find, support for defendant's first ground of objection, [a] above, in *United States v. du Pont & Co.* [1957 TRADE CASES ¶ 68,723], 353 U. S. 586, where the court said at page 597:

> "The Clayton Act was intended to supplement the Sherman Act. Its aim was primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil, *which may be at or any time after the acquisition, depending upon the circumstances of the particular case.* . . . To accomplish the congressional aim, the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce." (Emphasis supplied.)

and restated the rule at page 607:

> "We repeat, that the test of a violation of § 7 is whether at the time of suit there is a reasonable probability that the acquisition is likely to result in the condemned restraints."

The "time of suit" is not restricted to the time of *commencement* of suit.[1]

[*Change in Corporate Structure*]

In so far as defendant seeks, in its second ground of objection [b] above, to be relieved of answering these interrogatories because of changes in its corporate structure after this suit was brought, the short answer is that "the circumstances of [this] particular case" (see quotation from *du Pont* case *supra*) are that these changes were made by defendant with full knowledge of this suit and the possible consequences thereof. On September 13, 1956, before defendant acquired Hazel-Atlas and before it merged with Gair, this court, in denying plaintiff a temporary restraining order, stated

> "Should the acquisition be ultimately held violative of the Clayton Act, plaintiff's relief may be accomplished by a decree of divestiture."

Defendant cannot now present plaintiff with a *fait accompli* and frustrate its rights, if any, to a restoration of the status quo.

II.

[*Domestic Affiliates*]

The defendant objects to answering interrogatories 6 and 7 in so far as they seek certain information regarding domestic affiliates because (1) it does not control all of these affiliates and (2) the task of compiling the information would be unduly burdensome.

Of course, a party is not expected to perform the impossible in answering interrogatories. (1) As to those affiliates described in interrogatories 6 and 7, defendant will give such information as it can and it will state briefly what efforts it has made in an unsuccessful effort to obtain all the requested information from those affiliates which refuse to disclose the facts. As to those affiliates which will cooperate, de-

[1] *Caldwell-Clements Inc. v. McGraw Hill* [1952 TRADE CASES ¶ 67,261], 12 F. R. D. 531 (S. D. N. Y. 1952).

fendant shall furnish the information sought by the plaintiff.

(2) The claim of undue hardship, particularly since the limitation thereof by the stipulation of July 2, 1957, in supplying this information is not sustained by the papers on this motion.[2]

III.

[*Compilations*]

The objections to answering interrogatories 11 and 25 are not well taken. They are obviously burdensome but this alone is no valid ground for declining to answer.[3]

The essence of defendant's opposition is that its answers would be meaningless because of the numerous factors which enter into a definition of " 'break even' point" and "total cost." It is the government's contention that the information requested is not opinion evidence but a compilation of information based on facts.

The movant's papers on this motion show that an answer to each of these interrogatories can be given, although the final conclusions will reflect the inferences and assumptions of the compiler of the figures. This vice is inherent in every system of cost accounting. Interrogatories 11 and 25 should be answered.

To avoid any prejudice to the defendant arising from its answer to these interrogatories, it may include therein any explanatory matter it desires, to show the formulae used in arriving at its computations, and otherwise to explain the acounting practices used.

Objections IV and V are withdrawn.

VI.

[*Customer Lists*]

Despite the reluctance of the court to require a party to reveal its complete customer lists, the court is persuaded that the plaintiff requires the names and quantities and types of purchases of movant's customers, together with the other information requested in interrogatories 14 to 22 inclusive, in order properly to prepare its case. The parties having agreed on a means of protecting the defendant's rights in answering interrogatory 17 the same may be incorporated in the order to be settled on this motion. Similar protection shall be afforded movant in regard to its answers to the other interrogatories in this group.

VII.

[*Industry Position*]

The material sought by interrogatory 29 is well within the bounds of relevance to the subject matter of the instant suit. Movant's position in the industry can be evaluated more precisely in the light of the facts which this interrogatory will bring forth.

Settle an order on notice, consistent herewith.

[¶ 68,807] General Electric Company v. Hess Brothers, Inc.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 21,237. Filed August 19, 1957.

McGuire Act, Miller-Tydings Act, and Pennsylvania Fair Trade Act

Fair Trade—Enforcement of Fair Trade Prices—Defense—Fair Trader's Enforcement Activity—Applicability of Statutory Defense.—In a fair trade enforcement action, it was held that the fair trader satisfied the general equitable requirement of reasonable and diligent enforcement as a prerequisite to securing an injunction, and that the 1956 amendment to the Pennsylvania Fair Trade Act (which provides that it shall be a complete defense to an enforcement action for the defendant to prove that the fair trader, after at least 7 days written notice given by the defendant prior to the commencement of such action, has failed to take reasonable and diligent steps to prevent the continuation of fair trade violations by those in competition with the defendant) did not take effect until September 1, 1956, and, hence, was inapplicable to the action. Assuming that the 1956 amendment was applicable, the phrase "after at least 7 days written notice given by the defendant prior to the commencement of such action" contemplates that a retailer cannot

[2] 4 *Moore's Fed. Prac.* (2d ed.), para. 33.20, p. 2314 *et seq.*

[3] Note 2 *supra.*

rely on the defense unless he has given the fair trader notice of sales below the minimum prices by his competitor at least 7 days before suit has been instituted. It does not require the fair trader to take "reasonable and diligent steps to prevent" competitors from selling below fair trade prices within 7 days of receipt of notice from the defendant that such competitors are making such sales.

However, the court also made the following rulings in the event that the above rulings were held to be incorrect: (1) Where, immediately prior to notice from a retailer that another retailer has made a sale below a fair trader's prices, the fair trader has conducted 3 shoppings to determine if the other retailer is selling at less than these prices (disclosing 3 refusals to sell for less than such prices) and the notice is received during a well-advertised price-cutting sale by the defendant-retailer, the intent of the amendment's requirement of taking steps, within the 7 days, is not violated by the failure to act within the period when the defendant-retailer continued its price-cutting during this period. (2) Under the amendment, the fair trader has no duty to notify a defendant-retailer of what steps it is taking from time to time against violators of whom the defendant-retailer has given it notice, but the fair trader should inform the defendant-retailer that it has received the notice and has acted within the 7-day period.

See Fair Trade, Vol. 1, ¶ 3440.40.

Fair Trade—Sales Which May Be Exempted from Price Restriction—Sales to Employees of Fair Trader, Sales to Employees of Dealers, Sales to Governmental Agencies, and Sales to Institutional Establishments Buying for Own Use—Legality of Fair Trade Contract Exemptions.—A clause contained in a fair trade minimum price schedule which exempted from fair trade price restrictions sales to employees of the fair trader, sales by distributors or dealers of the fair traded products to their own employees, and sales to governmental agencies or to commercial or institutional establishments buying for their own use and not for resale did not violate the specific restrictions to fair trade pricing in the McGuire Act and the Miller-Tydings Act. The exemptions were not shown to be an unreasonable and arbitrary classification and discriminatory in view of the maintenance of fair trade prices for the rest of the community, and such exemptions did not render the Pennsylvania Fair Trade Act or the McGuire Act unconstitutional. The burden of showing that the exemptions were so unreasonable or arbitrary as to constitute a discrimination depriving a person of his constitutional rights under the United States Constitution was not sustained.

See Fair Trade, Vol. 1, ¶ 3226, 3230, 3232.40.

Fair Trade—Fair Trade Agreement Between Competitors—Manufacturer's Sales to Employees—Manufacturer as Competitor of Retailer.—The fact that a manufacturer sold its fair-traded products at discount prices to its own employees for their own use did not place the manufacturer in the position of being a competitor of a retailer for such employee business within the ban of the McGuire Act which specifically excludes from its immunity provisions any contract or agreement providing for the establishment or maintenance of minimum resale prices between persons, firms, or corporations in competition with each other. Operations of this type are considered as accessory to the overall operations of the employer and not such as to constitute the employer a retail seller. Therefore, the manufacturer's fair trade contracts were not illegal. However, the defendant-retailer in the instant action was given the opportunity to show that the manufacturer's program of sales to employees was not effective in restricting such sales to items for the use of individual employees.

See Fair Trade, Vol. 1, ¶ 3100, 3230.

Fair Trade—Constitutionality—Pennsylvania Fair Trade Act, McGuire Act, and Miller-Tydings Act.—The Pennsylvania Fair Trade Act, the McGuire Act, and the Miller-Tydings Act were held not to be violative of the United States or Pennsylvania Constitution. The court noted that the Federal constitutional objections to the Pennsylvania Fair Trade Act had been rejected by other courts, and that the objections to the Act based on the Pennsylvania Constitution should be presented to the Pennsylvania Supreme Court in view of a decision of that court holding the Act constitutional and the Pennsyl-

vania rule that, where an appellate court has passed on any constitutional objection to an act, it is presumed to have passed on all constitutional objections to that act. It had been contended, among other things, that the exemption, by contract, of certain sales from fair trade price restrictions made the Pennsylvania Act a discriminatory violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution and made the enabling McGuire Act a violation of the Fifth Amendment. The fair trade contract involved in the instant suit exempted certain types of sales from the fair trade price restrictions. The burden of showing that the exemptions were so unreasonable or arbitrary as to constitute a discrimination depriving a person of his constitutional rights under the United States Constitution was not sustained.

See Fair Trade, Vol. 1, ¶ 3035, 3040.20, 3085.40.

For the plaintiff: Henry W. Sawyer, III, of Drinker, Biddle & Reath, Philadelphia, Pa.

For the defendant: Orrin E. Boyle, Allentown, Pa.

Sur Pleadings and Proof

I. Findings of Fact

FRANCIS L. VAN DUSEN, District Judge [*In full text*]: The trial judge makes the following Findings of Fact and Conclusions of Law:

1. Plaintiff's requested Findings of Fact Nos. 1, 2, 4-15, and defendant's requested Findings of Fact Nos. 2, 6-23,[1] 25, and 26 are adopted as the Findings of this court.

Defendant's requested Findings of Fact Nos. 84-91 are adopted as being substantially correct (see affidavits attached to the stipulation filed March 29, 1957).

The advertising of defendant preceding and during its sale from August 24 to September 4, 1956, of plaintiff's fair-traded products at less than the minimum fair trade prices and the sales by defendant at these prices during these ten days caused a general collapse in plaintiff's ability to maintain fair trade prices in defendant's trading area (see, for example, Exhibits P-2, P-3, P-4, P-5, P-7, P-8 and P-9).

2. Plaintiff's requested Finding of Fact No. 16 is adopted with the following modifications:

(a) *Benco Sales Company*

Add on page 5, following the activity on the date of July 11, 1956:

> "*Aug. 8, 1956.* Plaintiff received notice from the defendant in a letter dated August 8, 1956 (Exhibit D-23), as to the sale of a General Electric fair-traded product below the fair trade price.
>
> "*Aug. 10, 1956.* Plaintiff authorized its agents to place an order by mail for goods at less than the fair trade price."

Add on page 5 plaintiff's answer to defendant's Interrogatory No. 5-j (see Clerk's document No. 19) following the activity of September 12, 1956.

(b) *Save-All, Inc.*

Add on page 5 plaintiff's answer to defendant's Interrogatory No. 5-a (see Clerk's document No. 19) following the activity of June 21, 1956.

(c) *Lee-Mart*

Add on page 5, following the activity on the date of July 9, 1956:

> "*July 13, 1956.* Plaintiff received notice from the defendant in a letter dated July 9, 1956, as to the sale of a General Electric fair-traded product below the fair trade price. (N. T. 357)."

Add on page 6 plaintiff's answer to defendant's Interrogatory No. 5-b (see Clerk's document No. 19) following the activity of August 28, 1956.

(d) *Bargain Center (Freemansburg)*

Add the following on page 8, following the title "Bargain Center (Freemansburg)":

> "*June 27, 1956.* Plaintiff received notice from General Electric Supply Co. in Allentown reporting a verbal complaint made to it from defendant (N. T. 299-300).
>
> "*June 28, 1956.* Plaintiff wired Bargain Center advising them of General Electric's fair trade prices and General Electric's intention to enforce fair trade prices.

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[1] Paragraphs 6 to and including 15 of defendant's requested Findings of Fact are correct, but are believed to be of slight relevancy in view of (1) the principle that a plaintiff who has corrected any defect in his fair trade enforcement policy by the time of suit is not to be penalized for past defects, (2) the fact that Act No. 589 of the 1955 General Assembly was not approved until May 25, 1956, and (3) the vigorous enforcement policy in defendant's trading area carried out by plaintiff in the late spring and early summer of 1956.

Also, plaintiff mailed its No. 1 warning letter by certified mail and prepared a shopping double-purchase authorization, which was dated July 2, 1956 (N. T. 300)."

Add on page 9, following the activity on the date of July 6, 1956:

"*July 6, 1956.* Plaintiff received back its No. 1 warning letter marked 'Refused' (see Exhibit P-14) and authorized Pinkerton Detective Agency to personally deliver the same letter (N. T. 315-6).

"*July 13, 1956.* Plaintiff received notice from the defendant in a letter dated July 9, 1956, repeating the complaint of June 29, 1956, noted above, as to the sale of a General Electric fair-traded product below the fair trade price (N. T. 316)."

Add on page 9 plaintiff's answer to defendant's Interrogatory No. 5-c (see Clerk's document No. 19) following the activity of August 10, 1956.

(e) *Roth Brothers*

Add on page 9, following the activity on the date of August 8, 1956:

"*Aug. 8, 1956.* Plaintiff mailed its No. 1 warning letter by certified mail with return receipt requested, and prepared a shopping authorization dated August 16, 1956 (N. T. 320)."

Add on page 10 plaintiff's answer to defendant's Interrogatory No. 5-d (see Clerk's document No. 19) following the activity of August 27, 1956.

(f) *A. O. Gehman & Sons*

Add on page 10, following the activity on the date of August 8, 1956:

"*Aug. 8, 1956.* Plaintiff mailed its No. 1 warning letter by certified mail, with return receipt requested, and prepared a shopping authorization dated August 16, 1956 (N. T. 324).

"*Aug. 10, 1956.* A return receipt showing the delivery of notice No. 1 came back to plaintiff bearing the date of receipt of August 10, 1956 (N. T. 325).

"*Aug. 16, 1956.* Plaintiff instructed the Pinkerton Agency to make a shopping (N. T. 325).

"*Aug. 27, 1956.* Second notice received from defendant of separate violation (see affidavit of John C. Boettinger, Clerk's document No. 4)."

Add on page 10 plaintiff's answer to defendant's Interrogatory No. 5-e (see Clerk's document No. 19) following the activity of August 27, 1956.

(g) *Phillips Music House*

Add on page 11, following the activity on the date of August 8, 1956:

"*Aug. 8, 1956.* Plaintiff mailed its No. 1 warning letter by certified mail and prepared a shopping authorization dated August 15, 1956 (N. T. 328).

"*Aug. 10, 1956, and August 15, 1956.* Plaintiff authorized shoppings."

Add on page 11 plaintiff's answer to defendant's Interrogatory No. 5-f (see Clerk's document No. 19) following the activity of August 24, 1956.

(h) *Greene's Electric*

Add on page 12 plaintiff's answer to defendant's Interrogatory No. 5-g (see Clerk's document No. 19) following the activity of August 27, 1956.

3. Plaintiff's requested Finding of Fact No. 17 is adopted with the following modifications:

Add on page 13, after line 16, plaintiff's answer to defendant's Interrogatory No. 5-i (see Clerk's document No. 19); and on page 13, at the end of requested Finding of Fact No. 17, add plaintiff's answer to defendant's Interrogatory No. 5-h (see Clerk's document No. 19).

4. The record contains no proof of when, if at all, defendant notified plaintiff that D. Weiman was selling General Electric fair-traded products below the fair trade prices. Plaintiff took the action as to D. Weiman in the period since September 19, 1956, described in plaintiff's answer to defendant's Interrogatory No. 5-k (see Clerk's document No. 19).

5. Plaintiff's answer No. 4-d to defendant's interrogatories (see Clerk's document No. 19) is adopted as a correct statement of the facts.

6. Plaintiff's requested Findings of Fact Nos. 18-24[2] are adopted as the findings of this court.

All requests for Findings of Fact which are inconsistent with the foregoing are denied.

[2] Defendant's contention that the lack of investigation experience by plaintiff's shoppers prevent their obtaining "buys" below the fair trade price of plaintiff's fair-traded products is rejected by the hearing judge.

Discussion

[*Motions*]

As indicated by Finding of Fact No. 1, this case has its background in defendant's well-publicized belief that the policy of minimum fair trade prices is not only economically unsound but also illegal. After defendant issued advertisements in several newspapers, stating that it would sell plaintiff's fair-traded products for amounts below the specified minimum prices, the plaintiff filed a motion for a temporary injunction, which was not granted until after the completion of hearings lasting four days (August 29 to September 1, 1956). After injunction issued on September 4, 1956, defendant asked leave to file additional affidavits and interrogatories, and the record was not complete until the filing of a second stipulation on August 15, 1957. There are now before the court defendant's motion to vacate the preliminary injunction and plaintiff's motion to make it permanent.

[*Constitutional Objections*]

The federal constitutional objections to the application of the Pennsylvania Fair Trade Act (73 P. S. §§ 7 and 8) to this defendant under the facts of this case have been rejected by the decisions of the United States Courts of Appeal for the Third and Sixth Circuits in *Morris Corp. v. Hess Brothers, Inc.* [1957 TRADE CASES ¶ 68,660], 243 F. 2d 274 (3rd Cir. 1957), and *Sunbeam Corporation v. Richardson,* [1957 TRADE CASES ¶ 68,678], 243 F. 2d 501 (6th Cir. 1957).[3] See, also, *Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co.* [1953 TRADE CASES ¶ 67,516], 205 F. 2d 788 (5th Cir. 1953), cert. den. 346 U. S. 856 (1953). The objections to the Act based on the Pennsylvania Constitution should be presented to the Pennsylvania Supreme Court in view of the decision of that court holding the Act constitutional[4] and the Pennsylvania rule that, where an appellate court has passed on any constitutional objection to an Act of Assembly, it is presumed to have passed on all constitutional objections to that Act.[5] *Cf. Morris Corp. v. Hess Brothers, Inc., supra,* at p. 279; *Sunbeam Corporation v. Richardson, supra,* at pp. 503-4.

[*Contract Exemptions*]

Also, defendant contends that the exemptions contained in a footnote to plaintiff's "List of Fair Trade Minimum Retail Prices Effective July 9, 1956" (see Exhibit P-6) are violative of the specific restrictions to fair trade price-fixing in the McGuire amendment, 15 U. S. C. A. § 45(a), 66 Stat. 632 (1952), of 5(a) of the Federal Trade Commission Act, and the Miller-Tydings amendment, 15 U. S. C. A. § 1, 50 Stat. 693 (1937), of § 1 of the Sherman Act.

Both Acts provide for the legality of minimum price-fixing agreements between plaintiff and its retailers as an exemption from the federal anti-trust legislation, but specifically do not include within the scope of the legalized agreements "any contract or agreement providing for the establishment or maintenance of minimum resale prices . . . between persons, firms, or corporations in competition with each other."

The relevant portion of the language containing the exemptions to plaintiff's fair trade price contracts reads as follows:

> "The indicated retail prices do not apply to sales made to employees of the General Electric Company or to sales by distributors or dealers of these products to their own employees, or to sales to governmental agencies or to commercial or institutional establishments buying for their own use and not for resale."

These exemptions are a voluntary relinquishment by plaintiff of its right under the fair trade laws to maintain fair trade prices in sales to these groups, and defendant, as well as any other retailer, may likewise make such sales to these groups without re-

[3] The lower court decision in this case (reported at [1956 TRADE CASES ¶ 68,407], 144 F. Supp. 583) was the principal constitutional authority relied on by defendant at the argument held in September 1956. This decision was reversed by the decision of the United States Court of Appeals for the Sixth Circuit. See, also, House Report No. 1437 of 2/27/52 to accompany H. R. 5767, 82nd Cong., 2nd Sess. (House Misc. Reports 1). The contentions that the exemptions of sales to certain groups makes the Pennsylvania Act, as applied by plaintiff, a discriminatory violation of the equal protection clause of the Fourteenth Amendment and makes the enabling McGuire Act (15 U. S. C. A. § 45(a)) a violation of the Fifth Amendment, are considered below at pages 6-11 of this Discussion.

[4] *Burche Co. v. General Electric Co.* [1955 TRADE CASES ¶ 68,078], 382 Pa. 370 (1955); *Gever v. American Stores Co.* [1956 TRADE CASES ¶ 68,569], 387 Pa. 206 (1956).

[5] See *Turco Paint & Varnish Co. v. Kalodner,* 320 Pa. 421, 428 (1936), approved in footnote 1 of the *Burche case, supra,* at p. 373.

gard to minimum fair trade prices. Plaintiff has not attempted to set minimum fair trade prices for others which it is not following.[6] Providing for such exemptions will not prevent plaintiff from maintaining fair trade prices for the general community, unless the exemptions are shown to be an unreasonable and arbitrary classification and discriminatory in view of the maintenance of fair trade prices for the rest of the community.[7]

The exemption here under consideration has been upheld by numerous appellate courts[8] and similar or broader exemptions likewise have been viewed as being within the spirit of the fair trade laws.[9] In the light of these decisions (particularly *Burche Co. v. General Electric Co., supra,* footnote 8), defendant has not sustained its burden of showing these exemptions[10] to be so unreasonable or arbitrary[11] as to constitute a discrimination depriving defendant of its con-

[6] *United States v. McKesson & Robbins* [1956 TRADE CASES ¶ 68,368], 351 U. S. 305 (1956), and *Esso Standard Oil Co. v. Secatore's, Inc.,* CCH 1957 TRADE CASES, ¶ 68,695 (1st Cir. 1957), are not applicable, since even if Plaintiff herein is considered to be in competition with defendant and other retailers for sales to the exempted groups, it has not required such competitors to meet minimum fair trade prices in sales to the exempted groups. Similarly, *Bristol-Myers Company v. Bamberger & Co.,* 195 Atl. 625 (N. J. 1937), involved sales at a discount to a non-exempted group. *Cf. Burroughs, Wellcome & Co. v. Weissbard,* 20 A. 2d 445 (N. J. 1941), aff'd on the lower court opinion 23 A. 2d 396 (N. J. 1942).

[7] *Cf. Morey et al. v. Doud et al.,* 25 L. W. 4551 (No. 475, Oct. Term 1956, in Supreme Court of the United States, opinion of 6/24/57).

[8] See *Burche Co. v. General Electric Co.* [1955 TRADE CASES ¶ 68,078], 382 Pa. 370 (1955), noting in particular Exhibit B at p. 15 of Vol. 4246 Paper Books of the Supreme Court of Pennsylvania (382 Pa. 370-380); *General Electric Co. v. Perloff,* C. P. No. 4 of Phila. County, March Term 1954, No. 8847 in Equity, opinion of Judge Guerin of February 9, 1955 (not reported), per curiam opinion of July 11, 1955, sur exceptions to adjudication, noting in particular Exhibit B attached to the complaint. This exemption was apparently upheld after argument on the point, but without discussion by the court, in *General Electric Co. v. Auction Sales Co.,* C. A. No. 19, 700 (E. D. Pa., order of April 24, 1956). See, also, *General Electric v. S. Klein-on-the-Square* [1953 TRADE CASES ¶ 67,443]. 121 N. Y. Supp. 2d 37 (N. Y. Sup. Ct. 1953); *General Electric v. Monarch-Saphin Co., Inc.* [1950-1951 TRADE CASES ¶ 62,738], 80 N. Y. Supp. 2d 419 (N. Y. Sup. Ct. 1948), modified on other grounds and affirmed 103 N. Y. Supp. 2d 128 (1951); *General Electric Co. v. Federal Employees Distributing Co.* [1955 TRADE CASES ¶ 68,235], 291 P. 2d 942 (Cal. Sup. Ct. 1955), rehearing den. 1956; *General Electric v. Kimball Jewelers, Inc.* [1956 TRADE CASES ¶ 68,291], 132 N. E. 2d 652 (Mass. Sup. Ct. 1956); *General Electric Co. v. Masters, Inc.* [1954 TRADE CASES ¶ 67,776], 120 N. E. 2d 802 (N. Y. Ct. App. 1954).

In *General Electric Co. v. Perloff, supra,* Judge Guerin stated:

"Defendant next argues that plaintiff does not come before this court with clean hands because of certain exceptions which it makes to its minimum retail price list. Defendant asserts that the only cases in which plaintiff's Fair Trade Contracts do not apply are those specifically listed in Sec. 7 and 9 of the Pennsylvania Fair Trade Act.

"It is admitted that plaintiff has provided certain exceptions other than those appearing in the Fair Trade Act by setting forth at the bottom of the minimum price list, which are incorporated in their Fair Trade Contracts by reference, the following: 'The indicated retail prices do not apply to sales made to employees of the General Electric Company or to sales by distributors or dealers of these products to their own employees, or to sales to governmental agencies or to commercial or institutional establishments buying for their own use and not for resale.'

"Although there are no recorded cases in Pennsylvania on this point, in other states having similar Fair Trade Acts as ours, such exceptions have been held consonant with the purposes and intent of these laws. *Burroughs Wellcome & Co. (U. S. A.), Inc. v. Weissbard,* 129 N. J. Eq. 563, 564, affirmed without opinion 130 N. J. Eq. 605; *Schill v. Remington Putnam Book Co.* (Md.), 17 A. (2d) 175, 180; *Burroughs Wellcome & Co. v. Johnson Perfume Co.* (Conn.), 24 A. (2d) 841, 845; *General Electric Co. v. Monarch-Saphin Co., Inc.,* 80 N. Y. S. 2d 419, 420.

"We agree with the reasoning in *General Electric Co. v. Monarch-Saphin Co., Inc., supra,* where the court said at page 420: 'There is nothing discriminatory in this agreement, nor is it lacking in uniformity. Under it defendant and others may sell below the fixed price to those coming within the exception clause. Were plaintiff or its subsidiary making sales to those described in the exception clause without giving defendant and others a similar opportunity to make such sales discrimination might be claimed.' Reasonable exceptions such as those provided in plaintiff's price schedule, which are open to any retailer to make, do not destroy the validity of the schedule. Evidence produced at trial indicated that sales made under this exception were in all respects in conformity therewith."

[9] See *Burroughs, Wellcome & Co. v. Weissbard, supra; Union Carbide & Carbon Corp. v. White River Distributors, Inc.* [1954 TRADE CASES ¶ 67,711], 118 F. Supp. 541 (E. D. Ark. 1954); *Burroughs Wellcome & Co. v. Johnson Perfume Co.* [1940-1943 TRADE CASES ¶ 56,194], 24 A. 2d 841 (Conn. 1942).

[10] Since plaintiff does not have any arrangement with any dealer to enable plaintiff's employees to get a discount from the dealer of a fair-traded item (N. T. 824-5), defendant's contention that rebates are discriminatory need not be further considered.

[11] Defendant's contention that sales by plaintiff to commercial establishments for their own use below minimum fair trade prices creates

stitutional rights guaranteed by the Fourteenth and Fifth Amendments.

[*Fair Trader's Sales to Employees*]

Plaintiff's discount sales to its own employees for their own use does not place it in the position of being a competitor of defendant for such employee business within the ban of the statutory language quoted above. See cases cited in footnotes 8 and 9 and *Frawley Corp. v. Grosslight*, CCH 1954 TRADE CASES, Par. 67,681 (Cal. Superior Ct. 1954); *Hanson v. Lagerstrom*, 133 F. 2d 120, 122 (8th Cir. 1943); and *Mitchell v. Anderson*, 235 F. 2d 638 (9th Cir. 1955), rehearing den. 1956,[12] where courts considered operations of this type as accessory to the overall operation of the employer and not such as to constitute the employer a retail seller.

Though the testimony given in affidavit form by Harold Kaplan, Esq., shows that the employees of the General Electric Company's Allentown, Pa., plant, from 2/8/55 to 8/28/56, and the employees of the General Electric Supply Company, Allentown, Pa., from January 1955 to September 1956, were making duplicate purchases of plaintiff's fair trade price-fixed appliances, the new plans instituted in these plans locally and by plaintiff on a nationwide scale during the period from August 26, 1956 to March 1, 1957, indicate that such abuses of plaintiffs minimum fair trade price scales through sales to its employees are not now possible. Plaintiff's new plans prevent the sale in any one calendar year (with certain reasonable exceptions) of more than one of each type of General Electric fair-traded appliance, and require the purchasing employee to certify in writing that the purchase is for his own use and not for resale (see affidavits of E. F. Corkery, J. H. Melchior, and Robert C. Walton, all of which are included in Clerk's document No. 16).

These aforementioned new plants for employee sales and the testimony of Mr. Walton (affidavit in Clerk's document No. 16), that the excess or duplicate sales to plaintiff's employees, pointed up by defendant, are less than two-thirds of one per cent. (.65) of the total unit retail sales in the trading area for the period involved, prevent the hearing judge from refusing injunctive relief to plaintiff on this ground. Defendant contends that plaintiff's past policies prevent the granting of injunctive relief, but "Equity will not stand aside the one whose rights have been transgressed and permit them to be appropriated because of previous bad conduct . . . ." *Valley S. C. Co. v. Mfgrs'. Water Co.*, 302 Pa. 232, 238 (1930). The doctrine that he who comes into equity must come with clean hands has been limited in many instances, one of which is that " 'a party purging his conduct as far as possible has obtained relief' (21 C. J. 187), and the right to proceed may be conditioned upon his so doing." *Comstock v. Thompson*, 286 Pa. 457, 462 (1926). See, also *Hartman v. Cohn*, 350 Pa. 41 (1944), and *Sylvania Industrial Corporation v. Visking Corporation* [1940-1943 TRADE CASES ¶ 56,255],132 F. 2d 947, 957-8 (4th Cir. 1943), app. dismissed, 319 U. S. 777 (1943).

The court will grant defendant an opportunity[13] to show, if it can, that plaintiff's new program of sales to employees is not being effective to restrict such sales to items for the use of such individual employees.

[*Enforcement Policy*]

It has been consistently recognized by courts asked to enforce fair trade laws, such as the Pennsylvania Act (73 P. S. § 7ff.), that the manufacturer is not entitled to an injunction unless he has reasonably and diligently enforced the fair trade prices specified by him. As stated in *General Electric Co. v. R. H. Macy & Co.* [1950-1951 TRADE

a potentially large group of customers that can conceivably upset the entire fair trade price structure has not been proved and the hearing judge is unable to find unreasonableness or discrimination in including this class within the exemption. The *McKesson & Robbins* case, *supra*, and the *Secatore's* case, *supra*, discussed in footnote 6, are, therefore, capable of being distinguished on the additional ground that the substantial nature of the competition alleged to be a discrimination against defendant has not been adequately shown. *Cf. General Electric v. S. Klein-on-the-Square, supra, General Electric v. Federal Employees Distributing Co., supra*, and *General Electric v. Masters, Inc., supra*, where statistics concerning this exemption were available and the exemption was upheld as not being so broad as to make enforcement as to ordinary retail trade unfair and discriminatory.

[12] See, also, *Consolidated Timber Co. v. Womack*, 132 F. 2d 101 (9th Cir. 1942); *Mid-Continent Petroleum Corp. v. Keen*, 157 F. 2d 310 (8th Cir. 1946); and *Collins v. Kidd Dairy & Ice Co.*, 132 F. 2d 79 (5th Cir. 1942).

[13] See discussion below concerning opportunity granted defendant 60 days after July 22, 1957 (see attached letter) [not reproduced] to present evidence on the application of Act No. 589 (see pages 13-16 of this Discussion).

CASES ¶ 62,764], 199 Misc. 87, 92, 103 N. Y. S. 2d 440, 446-7 (1951), which is perhaps the leading case on this subject:

"In establishing this requirement the courts have held that it is not necessary that there be simultaneous enforcement against all violators nor that the price structure be perfect. . . . There, the court laid down the principle that in order to avail himself of the benefits of the statute, the producer or plaintiff must make a sincere and diligent effort to prevent price cutting of branded products, through legal process if necessary." [14]

Although counsel and the hearing judge have not been able to find any Pennsylvania appellant court decision discussing this principle, the hearing judge finds that it is consistent with Pennsylvania law as it existed on May 1, 1956, and would be applied by the Pennsylvania appellant courts in an appropriate case. The record in this case shows clearly that the plaintiff has maintained reasonable and diligent enforcement of its fair trade prices in defendant's trading area immediately prior to and since this suit.[15] The enforcement activities carried on in this case are far more vigorous than those upheld in most of the cases holding that reasonable and diligent enforcement was present.[16] The general enforcement policy of plaintiff,[17] which was supplemented in this case by an intensive enforcement drive in the two months preceding plaintiff's [sic] widely advertised price cutting, has been upheld by numerous courts. See *General Electric Co. v. Kimball Jewelers, Inc., supra; General Electric v. S. Klein-on-the-Square, Inc.* [1953 TRADE CASES ¶ 67,443], 121 N. Y. S. 2d 37 (N. Y. Sup. Ct. 1953).[18] In the *Kimball* case, the court said, at p. 657 of 132 N. E. 2d:

"The method employed by the plaintiff in investigating and enforcing the prices at which retail dealers were bound to sell their trade marked appliances was not unreasonable or dilatory, or such as to lead anyone to believe that the plaintiff had waived or abandoned its right to enforce the minimum retail resale prices which had been fixed by its fair trade contracts. (Citing cases.)"

In the *S. Klein-on-the-Square, Inc.* case, the court said at p. 55:

"In retrospect it of course is now possible to look back and say that in this detail or that a slightly different approach or line of action might have been more effective than the particular approach or line of action which was followed; but that there was an approach and a line of action honestly designed to minimize violations and stop violators is established beyond question; . . .

. . .

"The defense of lack of diligent effort to enforce compliance with plaintiff's stipulated prices is not sustained."

On the basis of the foregoing authorities, the hearing judge concludes that plaintiff has satisfied the general equitable requirement of reasonable and diligent enforcement as a prerequisite to securing an injunction.

[*Amendment to Fair Trade Act*]

Act 589 of the 1955 General Assembly (Act of May 25, 1956, P. L. (1955) 1756, 73 P. S. § 8, which is referred to in this Discussion as Act 589) was signed by the Governor on May 25, 1956, but did not become effective until September 1, 1956,

[14] At p. 449, the court added:
"Enforcement activities may take such form as is called for by the nature of the product, the industry, and the violations by the retailers, providing they add up to a reasonable and diligent effort in the light of all the facts."

[15] See Plaintiff's Requests for Findings of Fact Nos. 18 to 20, adopted by paragraph 6 of the Findings of Fact.

[16] See, for example, *Seagram Distillers Corp. v. New Cut Rate Liquors, Inc.* [1955 TRADE CASES ¶ 68,004], 221 F. 2d 815 (7th Cir. 1955), cert. den. 350 U. S. 828 (1955); *Sunbeam Corp. v. Marcus* [1952 TRADE CASES ¶ 67,288], 105 F. Supp. 39 (S. D. N. Y. 1952); *Eastman Kodak Co. v. Home Utilities Co.* [1956 TRADE CASES ¶ 68,294], 138 F. Supp. 670 (D. Md. 1956); *Donner v. Calvert Distillers Corp.* [1951-1952 TRADE CASES ¶ 62,740], 77 A. 2d 305 (Md. 1950). The cases make clear that reasonable and diligent enforcement does not require plaintiff to proceed against all violators immediately and simultaneously in the courts before attempting to secure compliance warnings.

[17] See plaintiff's Requests for Findings 18 and 20, adopted by paragraph 6 of the Findings of Fact.

[18] *General Electric Co. v. Federated Dept. Stores, Inc.*, CCH 1955 TRADE CASES ¶ 68,098 (E. D. Wisc. 1955), relied on by defendant, involved a specific factual situation before that court and there is no evidence of a similar situation being before this court. Further, see the affidavit of Winston H. Pickett, filed Aug. 12, 1957, which reveals that after the denial of temporary injunctive relief and before the disposition of plaintiff's motion for a permanent injunction, a consent judgment was entered into by which the Federated Dept. Stores were enjoined and restrained indefinitely from violating plaintiff's minimum fair-trade price schedules.

due to the absence of any language stating an effective date and in view of the following language of the Pennsylvania Statutory Construction Act, as amended (46 P. S. § 504):[19]

> "All laws hereafter enacted finally at a regular session of the Legislature, . . . shall be in full force and effect from and after the first day of September next following their final enactment, unless a different date is specified in the law itself . . . ."

Also, assuming the Act took effect in May 1956, the hearing judge finds that the phrase, "after at least seven days written notice given by the defendant prior to the commencement of such action," contemplates that a retailer such as this defendant cannot rely on the "complete defense" provided for in the Act unless he has given the manufacturer notice of sales below the specified minimum prices by his competitor or competitors at least seven days before suit has been instituted. (The hearing judge reaches this conclusion on the basis of the attached letter dated 8/1/57 of counsel for plaintiff). As stated above plaintiff has taken reasonable and diligent steps to enforce his price schedule and such steps need not be taken within seven days of the notices received from defendant.

[*Interpretation of Amendment*]

Since defendant disagrees with these conclusions and an appellate court may disagree with the hearing judge's conclusions on these points, the possible application of the Act to this factual situation is considered by the hearing judge in the balance of this Discussion assuming the Act took effect on the date of its approval by the Governor (May 25, 1956).

There is some doubt as to whether defendant has established the "complete defense" provided for by Act 589 of the 1955 General Assembly, which added this sentence to the Pennsylvania Fair Trade Act (73 P. S. § 7):[20]

> "It shall, however, be a complete defense to such an action for the defendant to prove that the party stipulating such price, after at least seven days written notice given by the defendant prior to the commencement of such action, has failed to take reasonable and diligent steps to prevent the continuation of such advertising, offering for sale or selling, by those in competition with the defendant, who were specified in such notice."

These principles seem pertinent in interpreting this Act:

A. Since the Governor had vetoed for other reasons a bill (H. B. 1418) passed by this session of the General Assembly, which used the phrase "effective steps to insure compliance," rather than the words "reasonable and diligent steps" contained in Act 589, the General Assembly must have intended to require plaintiff to take steps which were somewhat less than those "effective to insure compliance."

B. By creating the "complete defense," the General Assembly recognized that a violator, whose conduct a competitor thinks is important enough to call to the attention of the manufacturer, is having a significant effect on the fair trade price structure. Under such circumstances, the manufacturer fails to take effective steps to see that such violator conforms to the minimum price schedule at the risk that what he has done may not be considered reasonable and diligent.

C. The judicial definition of the phrase "reasonable and diligent" by other courts in fair trade cases is some evidence of what the General Assembly contemplated would be required under this language.

D. The legislature would not have passed this Act in order to require the manufacturer to take some action in seven days and then cease his reasonable and diligent steps. The statutory language contemplates that

[19] This bill (H. B. 2107) was finally passed on May 22, 1956, by the regular 1955 session of the General Assembly, which was convened on January 4, 1955, and recessed from time to time but did not adjourn *sine die* until May 22, 1956. This was the longest legislative session in the history of the Commonwealth of Pennsylvania. Since H. B. 2107 was passed during the 1955 regular session, the following sentence of 46 P. S. § 504 is inapplicable:

"All laws enacted finally at a special or extraordinary session of the Legislature, shall be in full force and effect immediately upon final enactment, unless a different date is specified in the law itself."

[20] Although the hearing judge agrees with plaintiff's contention that Act 589 did not become effective until September 1, 1956 (see 46 P. S. § 504), plaintiff has taken the required action, in the case of those violators of whom defendant gave it notice, within 7 days of such notice in any event (*cf.* Conclusion of Law 4 and footnote to that Conclusion), so that whether the Act became effective in May or September 1956 is immaterial.

the manufacturer should investigate and follow up vigorously violators of whom they receive notice from their retailers.[21]

[*Additional Evidence*]

Applying these principles to this record, the hearing judge believes that plaintiff should place more evidence on the record of its enforcement activities against certain violators of whom defendant gave it notice prior to institution of this action, before being entitled to a permanent injunction, as more fully explained in the attached letter [*not reproduced*] to counsel of July 22, 1957.

Defendant's motion to vacate the temporary injunction will be denied and the matter will be set down for addition of evidence to the record in September 1957, in accordance with the letter of July 22, 1957, and this Discussion.

Conclusions of Law

1. Plaintiff's requested Conclusions of Law Nos. 1-5 [22] are adopted as the Conclusions of Law of this court.

2. Act No. 589 did not take effect until September 1, 1956, and, hence, is inapplicable to this case.

3. The phrase in Act 589 "after at least seven days written notice given by the defendant prior to the commencement of such action" does not require plaintiff to take "reasonable and diligent steps to prevent" competitors from selling below plaintiff's minimum prices within seven days of receipt of notice from defendant that such competitors are making such sales.

4. In the event that Conclusions of Law Nos. 2 and 3 should be incorrect, the court makes these Conclusions of Law:

A. Where, immediately prior to notice from a department store that a retailer has made a sale below a manufacturer's minimum fair trade prices, such manufacturer has conducted three shopping attempts to determine if the retailer (Bargain Center, Allentown—see Finding of Fact No. 3)[23] is selling at less than these prices, disclosing three refusals to sell for less than such prices, and the notice is received during a well-advertised price-cutting sale by the department store, the intent of Act No. 589's requirement of taking steps, within seven days, is not violated by failure to act within the seven-day period when the department store's price cutting continued during this period.[24]

B. Under Act No. 589, plaintiff has no duty to notify a defendant of what steps it is taking from time to time against

[21] In this connection, the opinion in *General Electric Co. v. R. H. Macy & Co., supra,* concluded with this sentence at p. 452 of 103 N. Y. S. 2d:

"General Electric, as any other manufacturer or producer, should:

"(1) Keep itself informed as to price cutting activities and other trends generally known in the industry or trade.

"(2) Close scrutiny should be kept over prior violators and appropriate action taken where indicated.

"(3) Investigate and follow up complaints vigorously.

"(4) Enforce Fair Trade prices by repeated legal action if necessary.

"(5) The enforcement program must be a continuing and sustained one."

[22] See *Remington Arms Company v. Gatling* [1955 TRADE CASES ¶ 67,968], 128 F. Supp. 226, 227 (W. D. Pa. 1955), where the court stated:

"The primary purpose of state fair trade laws, including that of Pennsylvania, is the protection and preservation of the goodwill of the manufacturer's trademark or brand name by means of resale price maintenance. The sale of a trademarked commodity at less than the stipulated price constitutes an assault on this goodwill which the Pennsylvania Fair Trade Act is intended to protect."

See, also, *Lee-Wilson, Inc. v. General Electric Company* [1955 TRADE CASES ¶ 68,053], 222 F. 2d 850, 853 (1st Cir. 1955).

[23] See, also, Finding of Fact 2(f), where plaintiff did not take steps within seven days after a second notice of a separate violation, before which plaintiff had personally delivered its No. 1 warning letter as a result of a recent previous notice of violation and had conducted two shopping attempts to determine if the retailer (A. O. Gehman & Sons) was selling at less than plaintiff's minimum fair trade prices. These two shoppings disclosed two refusals to sell for less than such prices (one of these shoppings was conducted on the same day as the receipt of the second notice). Plaintiff's action did not violate the intent of Act No. 589, especially where such second notice was received during the well-advertised price-cutting sale by the defendant.

[24] Where a retailer sends a second notice to a manufacturer, repeating a complaint that a competitor has violated the minimum fair trade price and no new instance of such violation is mentioned in the repeat notice, it is clear that if the manufacturer has taken appropriate steps within seven days of receipt of the first notice and is following the matter up, he need not take action within seven days of such a repeat notice. For this reason, the failure of plaintiff to take any specific action within seven days of the July 13th repeat notice concerning Bargain Center, Freemansburg (see Finding of Fact 2(d)), does not constitute a "complete defense" under Act 589.

violators of whom defendant has given it notice, but plaintiff should inform defendant that it has received the notice and has acted within the seven-day period.

C. The plaintiff is not entitled to a permanent injunction on the record now before the court.

5. Plaintiff is entitled to a permanent injunction restraining defendant from violating its minimum fair trade price schedule.[25]

6. Neither the Pennsylvania Fair Trade Act nor the Federal enabling acts (15 U. S. C. A. §§ 1 and 45(a)), as applied to this factual situation, are in violation of the United States or Pennsylvania Constitution.

7. The exemption clause contained in plaintiff's fair trade minimum retail price schedule does not render plaintiff's minimum fair trade prices illegal or unenforceable.

All requests for Conclusions of Law which are inconsistent with the foregoing are denied.

Order

And Now, August 19, 1957, It Is Ordered that defendant's motion to vacate the preliminary injunction filed May 21, 1957, is denied, without prejudice to the right of defendant to renew this motion sixty (60) days from July 22, 1957.[26]

[¶ 68,808] Austin Theatre, Inc. v. Warner Bros. Pictures, Inc. (In Dissolution), et al.

In the United States District Court for the Southern District of New York. Civ. 96-334. Filed August 23, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Motion to Dismiss Complaint.—A motion to dismiss a motion picture theatre operator's complaint on the ground that the pleading of a nationwide and regional conspiracy was irrelevant to the gravamen of the complaint, namely, the discrimination between the plaintiff and its competitor theatres, was denied. A national conspiracy can be pleaded so long as the plaintiff claims to have suffered damage from such a conspiracy. The conspiracies, both nationwide and regional, were co-extensive in time with the injuries complained of by the plaintiff. There was no "shotgun" type of pleading which would subject the defendants to unduly burdensome discovery proceedings. The defendants can be protected from oppressiveness in discovery proceedings by appropriate orders.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.440.

Private Enforcement and Procedure—Suit for Civil Damages—Motion To Strike Allegations of Complaint.—In a motion picture theatre operator's action charging that the defendants engaged in a conspiracy and discriminated against the operator, the court sustained the defendants' motion to strike those portions of the operator's complaint concerning actions of an organization calculated "to defeat the just claims of independent exhibitors to reasonable clearance and other relief," and alleging that a national conspiracy had been proven in many cities and metropolitan areas of the United States.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.595.

For the plaintiff: Malkan & Ellner, New York, N. Y.

For the defendants: Cravath, Swaine & Moore, by Bruce Bromley, New York, N. Y.

For a prior decision of the U. S. Court of Appeals, Second Circuit, see 1955 Trade Cases ¶ 68,103, affirming a decision of the U. S. District Court, Southern District of New York, 1955 Trade Cases ¶ 68,017; for other decisions of the District Court, see 1956 Trade Cases ¶ 68,576, 68,278, and 68,277, and 1955 Trade Cases ¶ 67,967.

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[25] As explained above, under Discussion, this permanent injunction will not be issued until the parties have had an opportunity to supplement the record on or after September 20, 1957.

[26] See attached letter of July 22, 1957 [not reproduced].

[*Motions*]

JOHN M. CASHIN, District Judge [*In full text*]: In this private antitrust suit defendants move to strike the amended complaint in its entirety for failure to comply with the prior order of the Court and for noncompliance with Rules 8(a)(1), 8(a)(2) and 8(e)(1) of the Federal Rules of Civil Procedure for failure to contain a short and complete statement of plaintiff's claim. In the alternative, defendants seek an order pursuant to Rule 12(f) of the Federal Rules of Civil Procedure striking certain portions of the amended complaint.

[*Complaint*]

Plaintiff, from the year 1936, has operated a motion picture theatre in the County of Queens. All of the defendants are alleged to have engaged in an unlawful conspiracy in restraint of trade which operated to the damage of plaintiff. Specific allegations are made of discrimination in favor of a competing movie house and of conspiracy by some of the defendants to erect another competing movie house to tighten their monopoly.

[*Sufficiency*]

This is the third motion made to dismiss the complaint in its entirety. The two previous motions were successful. Concededly, many of the defects complained of previously have been corrected. The gist of defendants' objections is that the pleading of a nationwide and regional conspiracy in the form complained of is irrelevant to the gravamen of the plaintiff's complaint, namely, the discrimination between plaintiff and its competitor theatres. As a result of the "shotgun" type of pleading, contend defendants, they might well be subject to unduly burdensome discovery proceedings. The contentions of the defendants are not persuasive. Concededly, a national conspiracy can be pleaded so long as plaintiff claims to have suffered damage therefrom (*Maple-Drive-In Theatre Corp. v. Radio-Keith-Orpheum Corporation* [1955 TRADE CASES ¶ 67,972], 17 F. R. D. 226 [SDNY 1955]; *New Dyckman Theatre Corp. v. Radio-Keith-Orpheum* [1954 TRADE CASES ¶ 67,853], 16 F. R. D. 203 [SDNY 1954]; *Metropolitan Theatre Co. v. Warner Bros. Pictures, Inc.* [1952 TRADE CASES ¶ 67,304], 12 F. R. D. 516 [SDNY 1952]). The application of the term "shotgun" to the allegations is unfounded since the conspiracies, both nationwide and regional, are coextensive in time with the injuries complained of by plaintiff. Thus, the vice alluded to in the *New Dyckman* and *Maple-Drive-In* cases (*supra*) is not here present. Defendants can be protected from oppressiveness in discovery proceedings by appropriate orders under Rule 30(b) of the Federal Rules of Civil Procedure.

[*Allegations Stricken*]

Certain of defendants' objections concerning portions of the complaint are, however, meritorious. The reference in Paragraph 8 of the amended complaint to actions of N. P. A. A. calculated "to defeat the just claims of independent exhibitors to reasonable clearance and other relief" is impertinent and should be stricken. The statement in Paragraph 13 that the national conspiracy has been proven in many cities and metropolitan areas of the United States is also obviously improperly incorporated in the complaint and should be stricken. All other specific allegations sought to be stricken are merely pleadings of the national or regional conspiracies and are permitted to stand.

Except as indicated above, the motion is denied.

Settle order.

[¶ 68,809] Shuman Prescription Pharmacy, Inc. v. Isham Park Pharmacy, Inc.

In the New York Supreme Court, New York County, Special Term, Part I. 138 N. Y. L. J., No. 43, page 3. Dated August 28, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Defense—Violation by Enforcing Party—Motion for Temporary Injunction.—A retailer's motion for a temporary injunction restraining a competing retailer from violating the New York Fair Trade Act was denied on the authority of two decisions, wherein injunctions had been denied because the enforcing parties' compliance with the act was in issue.

See Fair Trade, Vol. 1, ¶ 3452.34

[*Denial of Temporary Injunction*]

TILZER, Justice [*In full text*]: The temporary injunction sought by one retailer enjoining a competing retailer from violating the provisions of the Fair Trade Laws of this state is denied (*Pordes v. Lythe* [1955 TRADE CASES ¶ 67,999], 137 N. Y. S., 2d, 422; *Frasca v. Wilson,* 2 App. Div., 2d, 762).

[¶ 68,810] Rogers-Kent, Inc. v. General Electric Company.

In the Supreme Court of the State of South Carolina. Case No. 4206. Opinion No. 17341. Filed August 26, 1957.

Appeal from Richland County. LEGARE BATES, County Judge. Affirmed.

South Carolina Fair Trade Act

Fair Trade—Constitutionality of South Carolina Fair Trade Act—Nonsigner Provision—South Carolina Constitution.—The South Carolina Fair Trade Act, insofar as it applies to nonsigners, is unconstitutional since it constitutes a deprivation of property without due process of law in violation of Article 1, Section 5 of the Constitution of South Carolina. The right of an owner of property to fix the price at which he will sell is an inherent attribute of the property itself. The Fair Trade Act can be justified only upon the theory that it constitutes a reasonable and proper exercise of the inherent police power of the state. Such power only can be exercised where it is reasonably necessary in the interests of the public order, health, safety, morals, or general welfare. There is no justification for the Act based upon considerations of the public health, safety, morals, and general welfare.

See Fair Trade, Vol. 1, ¶ 3040.40, 3085.43, 3258.

For the appellant: Boyd, Bruton & Lumpkin, and J. B. S. Lyles, Columbia, S. C.

For the respondent: Isadore Bernstein, Columbia, S. C.

Amicus Curiae: Nelson, Mullins & Grier, Columbia, S. C.

Affirming a decision of the Richland County Court, State of South Carolina, 1957 Trade Cases ¶ 68,625.

[*Declaratory Judgment Action*]

OXNER, Associate Justice [*In full text*]: This action was brought under the Uniform Declaratory Judgment Act, Volume 1, Title 10, Chapter 24 of the 1952 Code, to determine the constitutionality of our "Fair Trade Act", sections 66-91 to 66-95, inclusive, of the 1952 Code.

[*Fair Trade Act*]

This legislation was enacted in 1937. 40 St. at L. 301. It was entitled "An Act to Protect Trade Mark Owners, Distributors and the Public Against Injurious and Uneconomic Practices in the Distribution of Commodities Under a Distinguishing Trade Mark, Brand or Name."

Section 66-93, so far as material to our discussion, reads:

"No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trademark, brand or name of the producer, distributor or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not resell such commodity at less than the minimum price stipulated by the vendor or

"(2) That the producer or vendee of a commodity require upon the sale of such commodity to another that such purchaser agree that he will not, in turn, resell at less than the minimum price stipulated by such producer or vendee."

Section 66-94 is as follows:

"Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract containing either of the provisions mentioned in Section 66-93, whether the person so advertising, offering for sale or selling is or is not a party to such

contract, is unfair competition and is actionable at the suit of any person damaged thereby."

[*Trial Court Ruling*]

The Court below held the Act unconstitutional upon the grounds (1) That it was void in its inception because inconsistent with the Sherman Anti-Trust Act as it then stood and the subsequent passage of permissive Federal legislation could not impart validity to it; (2) that it violated the due process and equal protection clauses of Article 1, Section 5 of our Constitution; and (3) that it was an unlawful delegation of legislative power to private individuals contrary to Article 3, Section 1.

[*Fair Trader*]

The facts were agreed upon. General Electric Company, defendant below and appellant here, manufactures and sells on a national scale many products, including small electrical appliances such as clocks, automatic blankets, fans, heating pads and vacuum cleaners, all of which bear its trade mark "General (GE) Electric." They are shipped from the places of manufacture to wholesale distributors who in turn sell said appliances to, amongst others, retail dealers throughout the United States. They are sold in this State in free and open competition with appliances of the same general class produced by others. General Electric has expended large sums in promoting and advertising these products and has established a valuable reputation and good will for them and its trade mark. It guarantees them against defects in material and workmanship and replaces or repairs any appliances becoming defective within the time limits specified in the guarantee. Since July, 1952, pursuant to the provisions of our Fair Trade Act, General Electric has from time to time entered into written agreements with a substantial number of retail dealers in South Carolina under which it has stipulated the minimum retail sale prices for its appliances.

[*Nonsigner*]

Rogers-Kent, Incorporated, plaintiff below and respondent here, is a South Carolina corporation engaged in a general retail mercantile business. It sells numerous articles bearing nationally known trade marks, including small appliances made by General Electric. It has not entered into any contract with General Electric under the Fair Trade Act and has sold its products from time to time below the retail price specified in the contracts made by General Electric with other retail dealers in this State. Although notified in January, 1955 of the form and existence of such contracts and the minimum retail prices therein specified, it has continued to advertise, offer for sale and sell at retail appliances bearing the trade-mark of General Electric at prices lower than those stipulated in the agreements made by General Electric with other dealers.

The record does not disclose the source from which Rogers-Kent obtains General Electric products. Presumably they were purchased from recognized dealers or direct from General Electric Company. Be that as it may, there is no contention the Rogers-Kent was guilty of fraud or deception in acquiring these appliances.

[*Fair Trade Legislation*]

The depression following 1929 gave impetus to the movement for legislation which would allow the fixing of minimum resale prices. California was the first State to adopt a Fair Trade act. It did so in 1931. Originally it applied only to those who signed the agreements. In 1933 the California statute was amended, making the contracts binding on all retailers who had knowledge of same, even though they had not signed such contracts. Within a few years most other States followed suit. All the acts contain provisions substantially the same as those embodied in the California act. It appears that 45 States have now enacted Fair Trade legislation.

At the time of the passage of our Act in 1937, it was unconstitutional as applied to interstate commerce. *Old Dearborn Distributing Company v. Seagram-Distillers Corp.* [1932-1939 TRADE CASES ¶ 55,141], 299 U. S. 183, 57 S. Ct. 139, 81 L. Ed. 109. On August 17, 1937, in an attempt to change the rule announced in the above case, Congress passed the Miller-Tydings Act, 15 U. S. C. A., Section 1. In *Schwegmann Bros. v. Calvert Distillers Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384, 71 S. Ct. 745, 95 L. Ed. 1035, it was held that the Miller-Tydings Act applied only to cases where the parties litigant had entered into contracts made under State fair trade laws and had not amended the Sherman Act to such an extent as to permit an action against

non-signers. Later, in an effort to obviate the effect of the ruling in the *Schwegmann* case, the so-called McGuire Act was adopted by Congress, 15 U. S. C. A., Section 45. This had the effect of extending the Miller-Tydings Act to non-signers. The result is that it is now generally held that no Federal constitutional difficulty exists in enforcing State fair trade laws.

[*Rulings in Other States*]

The constitutionality of such legislation has been considered by approximately half the courts of last resort of the States adopting fair trade statutes. They have been upheld by a majority of these courts. *Burroughs Wellcome & Co. v. Johnson Wholesale Perfume Co.* [1940-1943 TRADE CASES ¶ 56,194], 128 Conn. 596, 24 A. (2d) 841; *Max Factor & Co. v. Kunsman* [1932-1939 TRADE CASES ¶ 55,100], 5 Cal. (2d) 446, 55 P. (2d) 177; *General Electric Co. v. Klein* [1954 TRADE CASES ¶ 67,774], — Del. —, 106 A. (2d) 206; *Goldsmith v. Mead Johnson & Co.* [1932-1939 TRADE CASES ¶ 55,232], 176 Md. 682, 7 A. (2d) 176, 125 A. L. R. 1339; *W. A. Sheaffer* [*Shaeffer*] *Pen Co. v. Barrett* [1950-1951 TRADE CASES ¶ 62,611], 209 Miss. 1, 45 So. (2d) 838; *Johnson & Johnson v. Weissbard* [1932-1939 TRADE CASES ¶ 55,159], 121 N. J. Eq. 585, 191 A. 873; *Bourjois Sales Corp. v. Dorfman* [1932-1939 TRADE CASES ¶ 55,155], 273 N. Y. 167, 7 N. E. (2d) 30, 110 A. L. R. 1411; *Eli Lilly & Co. v. Saunders* [1932-1939 TRADE CASES ¶ 55,243], 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308; *Burche Co. v. General Electric Co.* [1955 TRADE CASES ¶ 68,078], 382 Pa. 370, 115 A. (2d) 361; *Miles Laboratories, Inc. v. Owl Drug Co.* [1940-1943 TRADE CASES ¶ 56,078], 67 S. D. 523, 295 N. W. 292; *Frankfort Distillers Corp. v. Liberto* [1950-1951 TRADE CASES ¶ 62,654], 190 Tenn. 478, 230 S. W. (2d) 971; *Sears v. Western Thrift Stores of Olympia, Inc.* [1940-1943 TRADE CASES ¶ 56,152], 10 Wash. (2d) 372, 116 P. (2d) 756; *Weco Products Co. v. Reed Drug Co.* [1932-1939 TRADE CASES ¶ 55,166], 225 Wis. 474, 274 N. W. 426; *Seagram-Distillers Corp. v. Old Dearborn Distributing Co.*, 363 Ill. 610, 2 N. E. (2d) 940; *General Electric Co. v. Kimball Jewelers, Inc.* [1956 TRADE CASES ¶ 68,291], — Mass. —, 132 N. E. (2d) 652.

A number of states, admittedly a minority in number, have on various grounds stricken down such statutes. *Liquor Store, Inc. v. Continental Distilling Corp.* [1948-1949 TRADE CASES ¶ 62,396], — Fla. —, 40 So. (2d) 371; *Cox v. General Electric Co.* [1955 TRADE CASES ¶ 67,934], 211 Ga. 286, 85 S. E. (2d) 514; *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.* [1952 TRADE CASES ¶ 67,303], 334 Mich. 109, 54 N. W. (2d) 268; *McGraw Electric Co. v. Lewis & Smith Drug Co.* [1955 TRADE CASES ¶ 67,954], 159 Neb. 703, 68 N. W. (2d) 608; *Union Carbide & Carbon Corp. v. White River Distributors, Inc.* [1955 TRADE CASES ¶ 67,953], 224 Ark. 558, 275 S. W. (2d) 455; *Olin Mathieson Chemical Corp. v. Francis* [1956 TRADE CASES ¶ 68,463], — Col. —, 301 P. (2d) 139; *General Electric Co. v. Wahle* [1956 TRADE CASES ¶ 68,333], — Or. —, 296 P. (2d) 635; *Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. G. S. Mkts.* [1956 TRADE CASES ¶ 68,400], 231 La. 1, 90 So. (2d) 343.

In *General Electric Co. v. Thrifty Sales* [1956 TRADE CASES ¶ 68,482], 5 Utah (2d) 326, 301 P. (2d) 741, the Court said:

> "It is significant that after some years of experience under the acts and numerous comprehensive studies covering the economic effects, the administration, and the enforcement of such laws, the majority of the more recent decisions have declared the acts invalid. Since 1952, of the jurisdictions considering the issue for the first time, only four states have upheld them, while eight have found them unconstitutional."

[*"Due Process" Clause*]

Most of the State decisions holding the fair trade laws unconstitutional are based primarily on the ground that as applied to non-signers, such legislation constitutes a deprivation of property without due process of law. We are in accord with this view. We rest our decision upon the due process clause of Section 5, Article I of the Constitution of South Carolina.

> "Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal. Anything which destroys one or more of these elements of property to that extent destroys the property itself." *Gasque v. Town of Conway*, 194 S. C. 15, 8 S. E. (2d) 871. Also, see *Henderson v. City of Greenwood*, 172 S. C. 16, 172 S. E. 689.

The right of an owner of property to fix the price at which he will sell is an inherent attribute of the property itself. *Tyson & Bro. v. Banton*, 273 U. S. 418, 47 S. Ct. 426; *Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 43 S. Ct. 630;

Williams v. Standard Oil Co., 278 U. S. 235, 49 S. Ct. 115; *New State Ice Co. v. Leibmann*, 285 U. S. 262, 52 S. Ct. 371.

This legislation can be justified only upon the theory that it constitutes a reasonable and proper exercise of the inherent police power of the State. We have held that such power can only be exercised where it is reasonably necessary in the interests of the public order, health, safety, morals or general welfare. *Gasque, Inc. v. Nates, Commissioner*, 191 S. C. 271, 2 S. E. (2d) 36; *McCoy v. Town of York*, 193 S. C. 390, 8 S. E. (2d) 905.

[*Justification for Act*]

It is difficult to find any justification for this legislation based upon considerations of the public health, safety, morals and general welfare. It applies to every product bearing the trade-mark, brand or name of the producer. No distinction is made between commodities affected with a public interest and those that are not. Under the terms of the act, a non-signer has no voice whatsoever in fixing the price at which he may sell his property. By entering into a contract with a single retailer, the trade-mark owner may fix the price for all retailers, without regard to their interests or welfare. The manufacturer is not required to take into consideration the cost of his article. He may change the retail prices at will, or even terminate the contract and remove any article from the operation of the statute. It is solely up to him to say whether or not there shall be a law controlling the price at which his trade-marked article shall be sold. There is no review of his acts. In *Cox v. General Electric Company*, *supra* [1955 Trade Cases ¶ 67,934], 211 Ga. 286, 85 S. E. (2d) 514, the Court said:

> "We are also familiar with the modern trend to allow the government to encroach more and more upon the individual liberties and freedoms. So far as we are concerned, we will not strike down the Constitution of our State for this purpose; neither will we follow the crowd. The scheme described in the petition now under consideration permits a manufacturer, under the guise of protecting his property rights in a trade name and trade-mark, to control the price of his product down through the channels of trade into the hands of the ultimate consumer, and into the hands of persons with whom he has no contractual relation whatever. This statute clearly violates the provisions of the due-process clause of the Constitution of the State of Georgia."

[*Old Dearborn Case*]

We have not overlooked the fact that it was held in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra* [1932-1939 Trade Cases ¶ 55,141], 299 U. S. 183, 57 S. Ct. 139, 81 L. Ed. 109, that the non-signer provision of the fair trade laws did not work a denial of due process of law or the equal protection of the laws guaranteed by the Fourteenth Amendment. This apparently settles the matter in so far as the Federal Constitution is concerned but does not control us in the interpretation of our own Constitution. The *Old Dearborn* case was predicated upon the assumption that non-signers had consented to the arrangement and was based on the premise that the manufacturer has a property right in his trade-mark as distinguished from the physical thing, the product. The Court said:

> "Appellants here acquired the commodity in question with full knowledge of the then existing restriction in respect of price which the producer and wholesaler dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, * * * assent to the protective restriction, with consequent liability under section 2 of the law by which such acquisition was conditioned."
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> "We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trade-mark stands. Appellants own the commodity; they do not own the mark or the good will that the mark symbolizes."
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> * * *
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> "The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Section 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will,

and constitutes what the statute denominates 'unfair competition.' * * There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end."

Most of the State decisions upholding fair trade legislation are bottomed upon the *Old Dearborn* case but we do not think the theory upon which that case was decided is sound. We find no basis for implied consent on the part of non-signers. A trademark or brand is not in the nature of a covenant running with property. Nor do we agree with the premise that a manufacturer or producer who has sold his trademarked article for full value, completely parted with possession and title, and placed it in the channels of trade, still retains some property interest which enables him to control the selling price in perpetuity. It is difficult to see how he can sell his cake and have it, too. We are impressed with the following from the dissenting opinion of Judge Holmes in *Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co.* [1953 TRADE CASES ¶ 67,516], 205 F. (2d) 788:

"Trade-mark and good will are not synonymous terms; but the Old Dearborn opinion says: 'Appellants own the commodity; they do not own the mark or the good will that the mark symbolizes.' The court ignored the fact that the producer put its name and mark on the container (sometimes on the product) and launched it in commerce. The court said that there was nothing to prevent a purchaser from selling the commodity alone at any price, and nothing to preclude a purchaser from removing the mark or brand and then selling the commodity at his own price, with a vague proviso that the good will of the producer must not be used to aid the sale. This proviso must be distinguished from the three statutory conditions wherein sales are excepted from minimum price agreements. The statutory exceptions are not involved here, and the Old Dearborn opinion maintains that the retailer may separate the physical property, which he owns, from the good will of the manufacturer's business, which is the property of another, and then sell the commodity at his own price, provided, etc. The court says ownership of the good will 'remains unchanged, notwithstanding the commodity has been parted with'; and then it says that the fair-trade statute interferes 'only to protect that good will against injury.' Let us now ascertain what physical property was sold by the appellee, and what incorporeal property was retained by it.

"The appellants bought more than the loose, disattached, commodity; they bought the package, bottle or container, in which it was delivered, with the inscriptions on the same. This tangible property was put into the channels of trade by the producer, and title to it passed to the retailers; but the latter acquired nothing intangible, like the good will of the vendor's business, or the right to use the trade mark on other commodities sold by them. No covenants ran with the sale of the merchandise like covenants sometimes run with the land conveyed. The doctrine of *caveat emptor* did not require the buyers to beware of price-fixing agreements between the vendor and some other retailer. If the appellants made no contract, they did not need to underwrite the covenants of their competitors. A trade mark is not always evidence of good quality or symbolic of good will; but ordinarily is only representative of the origin of a commodity or the identity of its marker. Marks that simply indicate the quality of articles do not constitute a valid trade mark, and no property may be acquired therein.

"We have here sales, for the purpose of resale, of commodities in trade-marked containers; and it was not unfair competition, injurious to the producer's good will, for retailers who had agreed to no prices to resell the same commodities in the same containers at their own prices without defacing the trade mark. Without mentioning the practical impossibility of removing the trade mark from all aspirin tablets and from all containers of drugs in stock, there are state and federal statutes forbidding the obliteration or concealment of trade marks, and even requiring the display of the manufacturer's, packer's, or distributor's name on drugs."

We think the authority of the *Old Dearborn* case was somewhat weakened by the later decision of the United States Supreme Court in *Schwegmann Bros. v. Calvert Distillers Corp., supra* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384, 71 S. Ct. 745, 95 L. Ed. 1035, where the Court frankly characterized the State fair trade statutes as involving price fixing against non-signers. It was there stated:

"If a distributor and one or more retailers want to agree, combine, or con-

spire to fix a minimum price, they can do so if state law permits. * * * When they seek, however, to impose price fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different. That is not price fixing by contract or agreement; that is price fixing by compulsion. That is not following the path of consensual agreement; that is resort to coercion. * * * Contracts or agreements convey the idea of a cooperative arrangement, not a program whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing."

[*Constitutionality*]

The modern trend is to regard this legislation as a price-fixing statute. In *General Electric Company v. Wahle, supra* [1956 TRADE CASES ¶ 68,333], — Or. —, 296 P. (2d) 635, the Court said:

"Regardless of how its true nature may be camouflaged by high-sounding terms such as 'free and open competition', 'unfair competition', 'protection of good will,' etc., it is a matter of common knowledge that it is a price-fixing statute designed principally to destroy competition at the retail level. Protection of the 'good will' of the trademark owner is simply an excuse and not a reason for the law. According to eminent writers in law reviews, pressure for the passage of these Acts came not from manufacturers or other trademark owners but from distributors—first and foremost the retail druggists associations and then other retail and wholesale distributors."

Having concluded that the statute in so far as it applies to non-signers, must be declared unconstitutional upon the ground that it constitutes a deprivation of property without due process of law in violation of Article I, Section 5 of the Constitution of South Carolina, we need not pass upon the other grounds upon which the lower Court rested its decision.

Affirmed.

STUKES, C. J., TAYLOR, LEGGE and MOSS, JJ., concur.

[¶ 68,811] Central Ice Cream Company v. Golden Rod Ice Cream Company.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 56 C 1010. Dated July 22, 1957.

Robinson-Patman Price Discrimination Act

Price Discrimination—Scope of Robinson-Patman Act—Commerce Covered by Act —Discrimination in Intrastate Commerce by Intrastate Seller.—An ice cream manufacturer's complaint charging that a competing manufacturer launched a campaign to solicit away most of the plaintiff-manufacturer's customers in the Chicago area in violation of the Clayton Act, as amended by the Robinson-Patman Act, was dismissed on the ground that the complaint did not allege that the defendant-manufacturer was engaged in interstate commerce and discriminated in the course of such commerce. The defendant-manufacturer was not engaged in interstate commerce by reason of the fact that it purchased raw materials in other states. The materials came to rest in Illinois, and the finished product was not sold outside of Illinois. Also, the fact that the defendant-manufacturer made substantial sales to a restaurant chain in Illinois which in turn supplied interstate railroads did not place the defendant-manufacturer in commerce. There was no allegation that any of the acts of the defendant-manufacturer took place in the course of interstate commerce. It was merely alleged that the defendant-manufacturer launched a campaign to solicit away the customers of the plaintiff-manufacturer in the Chicago area. The plaintiff-manufacturer could not rely upon the case of *Bowman Dairy Co. v. Hedlin Dairy Co.*, 1955 TRADE CASES ¶ 67,959, to sustain its action because there was no allegation that the plaintiff-manufacturer's interstate business had suffered as a result of the defendant's conduct.

See Price Discrimination, Vol. 1, ¶ 3505.100.

Sherman Antitrust Act

Combinations and Conspiracies—Elements of Unlawful Conspiracy—Conspiracy Within Single Corporation.—In an action charging that an ice cream manufacturer violated Section 1 of the Sherman Act, the court ruled that there was merit to the manufacturer's

contention that, in order for the plaintiff to show a right to relief under the Sherman Act, it must show a combination or conspiracy between two or more persons, and that, where a defendant is a single company, it is not enough to allege a combination or conspiracy among the employees of such company.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.400.

For the plaintiff: Mortimer & Ryan, Chicago, Ill.

For the defendant: Philip A. Rose, of Rose, Burt & Pierce; and Claude A. Roth and Harry E. Smoot, of Gottlieb & Schwartz; all of Chicago, Ill.

Memorandum and Order

[*Causes of Action*]

CAMPBELL, District Judge [*In full text*]: Plaintiff, Central Ice Cream Company, an Illinois Corporation, brings this suit against Golden Rod Ice Cream Company, an Illinois Corporation, alleging conduct by defendant company damaging plaintiff's business in violation of the Sherman Anti-Trust Act (15 U. S. C. A. sec. 1), the Clayton Act (15 U. S. C. A. sec. 13), the Robinson-Patman Act (15 U. S. C. A, sec. 13(a) and 13(b)), the Civil Rights Act (42 U. S. C. A. sec. 1985(3)) and the National School Lunch Act (42 U. S. C. A. sec. 1753). The complaint prays for temporary and permanent injunctions and for damages. Defendant has filed its motion to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim.

The complaint alleges that plaintiff is an ice cream manufacturer in Illinois; that it "imports a very substantial part of its milk, cream and other ingredients from Wisconsin and other states in interstate commerce, transforms them into ice cream in Illinois and sells this ice cream very extensively both in Illinois and in other states"; that defendant is engaged in manufacture of ice cream also and obtains the raw materials from other states but that "so far as the plaintiff is informed the defendant makes no sales or deliveries of its ice cream outside Illinois." The gravamen of the complaint is that sometime in November, 1955, plaintiff and defendant submitted rival bids to the Board of Education of the City of Chicago, for the supply of ice cream for use in the Board's school lunch program, which is subsidized by the Federal Government under the National School Lunch Act; that defendant warned plaintiff that if it should persist in its bid to secure a contract with the Board, defendant would make a concentrated effort to deprive plaintiff of its customers. The complaint further alleges that the contract was awarded to plaintiff and that thereupon defendant launched a campaign to solicit away most of plaintiff's customers "in the Chicago area," offering loans, air conditioning units, deep freeze units and other items of personal property on condition that plaintiff's customers desert plaintiff and patronize defendant.

[*Motion To Dismiss*]

In support of its motion to dismiss defendant argues (1) that in order that plaintiff show a right to relief under the Sherman Anti-Trust Act it must show a combination or conspiracy between two or more persons and that where defendant is a single company it is not enough to allege a combination or conspiracy among the employees of such company; (2) that in order that plaintiff show a right to relief under the Clayton and Robinson-Patman Acts it must show that defendant committed the acts complained of "in commerce, in the course of such commerce"; (3) that section 1985(3) of the Civil Rights Act is inapplicable to the facts alleged; and (4) that the National School Lunch Act contains no provisions which would ground a right of action for civil relief.

[*Interstate Commerce*]

There is merit in all these contentions. Plaintiff, in its brief, apparently abandons its reliance purely upon the Sherman Anti-Trust Act. It attempts to meet defendant's second contention by reference to this court's decision in *Bowman Dairy Co. v. Hedlin Co.* [1955 TRADE CASES ¶ 67,959], 126 F. Supp. 749. In that case, this court, relying upon the decision of the Supreme Court in *Moore v. Mead's Fine Bread Co.* [1954 TRADE CASES ¶ 67,906], 348 U. S. 115, held that where plaintiff is engaged "in commerce" but defendant is not, plaintiff should not fail on

that account under the Clayton and Robinson-Patman Acts, it having been held in the *Moore* case, involving the converse situation (where defendant acts "in commerce, in the course of commerce" to injure plaintiff who is not engaged "in commerce"), that plaintiff is entitled to relief. This court was led to its conclusion in the *Bowman* case, by consideration of the injustice which would result from holding that the remedies of plaintiff and defendant so situated are not mutual, and of the words of Congressman Utterback, manager of the Robinson-Patman Act in the House, quoted in the opinion of the *Moore* case, that one of the purposes of the Act was "to protect interstate commerce itself from injury by influences within the state." It may be that where such influence upon the interstate commerce of plaintiff company is alleged, a right of action against a defendant engaged purely in intrastate commerce may be sufficiently stated under the Clayton and Robinson-Patman Acts. This is doubtful in view of the unambiguous language used in both the acts that "it shall be unlawful for any person engaged in commerce, in the course of such commerce, to etc." However, in this case there is no allegation whatever that plaintiff's interstate business has suffered through defendant's conduct.

Plaintiff advances the eleventh hour argument that defendant is in fact engaged in interstate commerce in that its purchase of raw materials in other states and its manufacture and sale of ice cream in Illinois, constitute an uninterrupted flow of commerce. There are many authorities to the effect that when the raw materials from other states come to rest in defendant's manufacturing plant to await processing, the flow of commerce is interrupted (*cf. Ewing-Von Allmen Dairy Co. v. C. and C. Ice Cream Co.*, 6 Cir. [1940-1943 TRADE CASES ¶ 56,005], 109 F. 2d 898, cert. den. 312 U. S. 689). Defendant points to *United States v. Employing Plasterers Assn.* [1954 TRADE CASES ¶ 67,692], 347 U. S. 186, as announcing a different rule. In that case the Supreme Court held that a complaint under the Sherman Anti-Trust Act, alleging a combination by a Chicago trade association of plastering contractors, a local union of plasterers and the union's president, to restrict and control purchase of plastering materials shipped in from other states, could not be properly dismissed on the basis that those materials come to rest before the local restraints become effective. The question whether local restraints upon purchase of materials shipped from other states, not subjected to manufacturing processes on arrival, are restraints upon commerce is not the same as the question whether sale within a state of finished products manufactured within that state from materials shipped from other states, is in commerce or out of commerce. The fact that the materials come to rest upon arrival in the state may indeed be irrelevant to the first question, it is clearly relevant and controlling in the second.

Plaintiff however relies upon its allegation that defendant makes substantial sales to a restaurant chain in Illinois which in turn supplies railroads in interstate commerce. Such sales may place defendant in commerce, if the question were one of federal power to regulate its business (*Santa Cruz Co. v. Labor Board,* 303 U. S. 453; *Hamlet Ice Co. v. Fleming,* 4 Cir. 127 F. 2d 165). But the Clayton and Robinson-Patman Acts require, for their violation, that the offending person not only "engage in commerce" but do the prohibited acts "in the course of such commerce." There is no allegation in plaintiff's complaint that defendant's sales to the restaurant chain supplying railroads involved any acts violative of the Clayton and Robinson-Patman Acts. On the contrary the allegation of plaintiff's complaint is that defendant launched a campaign to solicit away most of plaintiff's customers "in the Chicago area."

[*Civil Rights Act*]

Plaintiff cannot be sustained in its reliance upon section 1985(3) of the Civil Rights Act. The history of that section shows that it was not meant to deal with the questions here presented. As section 2 of the Act of April 20, 1871, the full title of which was "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes," it was intended as a solution to pressing problems of civil liberties following upon the Civil War. Apart from its historical context, it has been authoritatively interpreted, in the light of section 1 of the original act (now 42 U. S. C. A. sec. 1983), as applicable only to combinations or conspiracies "under color of state law" (*Collins v. Handyman,* 341 U. S. 651). It is not

alleged here that defendant's acts, in depriving plaintiff of its customers, were done under color of state law.

[*School Lunch Act*]

Plaintiff does not argue with respect to the National School Lunch Act that it has a cause of action arising under that Act, rather it argues that the existence of the Act strengthens its case under the Clayton and Robinson-Patman Acts. Since I hold that plaintiff has failed to state a claim upon which relief may be granted under those Acts, plaintiff's argument here need not be considered.

[*Complaint Dismissed*]

Defendant's motion to dismiss the complaint is hereby granted. Accordingly the complaint is dismissed.

[¶ 68,812] United States v. Ned R. Baskin.

In the United States District Court for the Northern District of Illinois, Eastern Division. Civil Action No. 55 C 47. Dated July 5, 1957.

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Unfair Practices—Violation of FTC Order to Cease and Desist—Civil Penalty Suit.—The president of a company was found to have violated a Federal Trade Commission order prohibiting him from representing that any photograph or enlargement, framed or unframed, will be made and delivered for a stipulated price, unless such photograph or enlargement will, in fact, be made and delivered for the stipulated price, without the imposition of any condition not clearly revealed in the representation. The court found that the president caused to be published in magazines, circulated in interstate commerce, advertising by which he purported to deliver a framed photograph for the total price of 29 cents when, in fact, he imposed a price of 58 cents for the framed photograph.

See Unfair Practices, Vol. 2, ¶ 5081.612, 5095.25, 5095.42, 5095.61; FTC Enforcement and Procedure, Vol. 2, ¶ 8661.50.

For the plaintiff: Robert Tieken, United States Attorney, Chicago, Ill.

For the defendant: Marshall & Marshall, Chicago, Ill.

Ruling adjudging violation of a Federal Trade Commission order in Dkt. 4902.

Findings of Fact

[*Civil Penalty Suit*]

PERRY, District Judge [*In full text*]: 1. That this action arose under Section 5(1) of the Federal Trade Commission Act (52 Stat. 114 (1938)) as amended and jurisdiction is vested in this court under the provisions of 28 United States Code Sections 1345, 1355 and 1395.

[*Defendant*]

2. That the defendant is a resident of the Northern District of Illinois and has been at all times relevant to this matter President of Hollywood Photocolor Corporation, trading as Hollywood Film Studios, a California corporation.

[*FTC Order*]

3. That on January 26, 1951, The Federal Trade Commission, after conducting hearings, receiving testimony, and examining briefs in the Matter of Ned R. Baskin, an individual, Docket No. 4902, made Findings of Fact, and resolved that the practices of the defendant were injurious to the public and constituted unfair and deceptive acts and practices within the meaning of The Federal Trade Commission Act.

4. That on January 26, 1951, The Federal Trade Commission issued an Order upon Ned R. Baskin, an individual, trading under the name of Hollywood Film Studios, or trading under any other name, to cease and desist, among other things, from:

(1) Representing directly or by implication that any photograph or enlargement, colored or black and white, framed or unframed, will be made and delivered for a stipulated price, unless such photograph or enlargement will, in fact, be made and delivered for the stipulated price, without the imposition or attempted imposition of any condition not clearly revealed in the representation.

(4) Using the name Hollywood Film Studios, together with pictures of motion picture celebrities, on letterhead or in advertising matter; or otherwise representing that the respondent has any connection whatever with the motion picture industry.

5. That on January 26, 1951, there was caused to be served upon the defendant by registered mail, at the business address of the defendant, copies of the Findings of Fact and Conclusions, issued by The Federal Trade Commission, together with the Order of the Commission to cease and desist, as hereinbefore set forth, in accordance with Section 5(f) of The Federal Trade Commission Act (15 United States Code 45(f)).

6. That the defendant did not, within the time prescribed under Section 5(c) of The Federal Trade Commission Act, file a Petition in any United States Court of Appeals to set aside the cease and desist order, and by operation of law, said cease and desist order became final on April 13, 1951.

[*Violation of Order*]

7. That the defendant caused to be published in the February, 1952 issue of *Moose Magazine,* October 1951 issue of *True Confessions,* November 1951 issue of *True Confessions,* July 1952 issue of *True Confessions,* September 1951 issue of *Motion Picture,* August 1952 issue of *Motion Picture,* March 1952 issue of *Lovers,* April 1952 issue of *Actual Romances,* March 1952 issue of *I Confess,* all of which magazines are publication of interstate circulation, advertising by which the defendant purported to deliver a framed photograph for the total of 29¢ when, in fact, the defendant imposed a price of 58¢ for said framed photograph.

Conclusion of Law

1. That the advertising matter, set forth in Counts One through Nine of the plaintiff's Complaint, violated Paragraph 1 of The Federal Trade Commission cease and desist Order of January 26, 1951, issued in the case of Fred Baskin, an individual, Docket No. 4902.

2. That this court has jurisdiction of the parties to this matter, service of process having been made upon the defendant within the Northern District of Illinois; and has jurisdiction of the subject matter, by virtue of Section 1345, Title 18 [28], United States Code, as plaintiff.

[¶ 68,813] United States v. Milk Drivers & Dairy Employees Union, Local No. 471, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America [originally "United States v. Northland Milk & Ice Cream Co., et al."].

In the United States District Court for the District of Minnesota, Fourth Division. Civil No. 4361. Dated August 30, 1957.

Case No. 1147 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Labor Unions—Price Fixing Conspiracy Between Union and Non-Labor Groups—Union Enforcement of Conspiracy.—A milk drivers' union engaged in a conspiracy violative of Section 1 of the Sherman Act when it entered into a plan with dairies and store owners to maintain the consumer price of store deliveries of milk at or near the price charged for home deliveries of milk and acted as the enforcing agency of the plan. The collective bargaining agreements between the union and the dairies established the union as the enforcing agency of the plan and gave the union the right to discontinue delivery of milk to stores that sold milk at "unfair" prices. Evidence established that the union entered into and enforced the plan. In order to establish liability under the Sherman Act, the parties need not enter into a formal legal contract. Proof of an informal understanding is sufficient to prove a conspiracy.

See Combinations and Conspiracies, Vol. 1, ¶ 2101.063.

Combinations and Conspiracies—Labor Unions—Collective Bargaining Agreement—Provision Barring Creation of New Milk Routes—Legality.—A provision of a collective bargaining agreement between a milk drivers' union and dairies which provided that "no product shall be sold for resale to peddlers or so-called independent milkmen, unless they have been working in the same capacity for two years or over with the same distributor" constituted a restraint of trade and a violation of Section 1 of the Sherman Act. Under the terms of the provision, the creation of new vendor milk routes was barred and no person could qualify as a vendor in the future. This would result in the elimination of competition and the stabilization of prices by removing from the milk business a class of employee-driver which was able to price its product as it wished. The provision constituted an agreement between a union and a non-labor group to unlawfully restrain trade and should be eliminated from the agreement.

See Combinations and Conspiracies, Vol. 1, ¶ 2101.063.

Combinations and Conspiracies—Scope of Sherman Act—Interstate Commerce—Effect of Conspiracy on Interstate Commerce.—A union's contention that, even assuming the existence of a conspiracy between it and dairies to maintain non-competitive milk prices in the Minneapolis trade area, a district court was without jurisdiction to entertain an action against it under the Sherman Act because the matter did not affect interstate commerce was rejected. Evidence established that a substantial percentage of the fluid milk which came into the trade area came from Wisconsin, and that most of the milk distributors who signed agreements with the union received some or all of their milk requirements from Wisconsin sources. Wisconsin milk was intermixed with Minnesota milk, and normally, milk was distributed within 24 hours of its receipt in Minnesota. Restraints at the retail level of a commodity originating outside of a state fall within the prohibition of the Sherman Act. Milk shipped from Wisconsin remains in interstate commerce until it reaches the ultimate consumers in the Minneapolis area. Also, the court noted that it need not be concerned with the amount of interstate commerce affected because, "large" or "small," it is covered by the Sherman Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2035.153.

Combinations and Conspiracies—Labor Unions—Injunctive Relief—Statutory Exemptions to Unions Under Clayton Act and Norris-LaGuardia Act—Conspiracy with Non-Labor Group.—A union's contention that, even though it may have engaged in a conspiracy with dairies to fix prices of milk in violation of the Sherman Act, it was immune from the issuance of an injunction because of the statutory exemptions provided for unions by the Clayton Act and the Norris-LaGuardia Act was rejected. A union operates outside the scope of its statutory immunity when it combines with a non-labor group to impose commercial restrictions such as price fixing on interstate trade, even though it be prompted by a desire to further its own interests and those of its wage-earner members. The court did not have to decide whether the union, acting alone, in what it had done was in a "labor dispute" within the immunization of the Norris-LaGuardia Act because the union acted in combination with non-labor groups to fix prices of milk.

See Combinations and Conspiracies, Vol. 1, ¶ 2101.110, 2101.265.

For the plaintiff: Earl A. Jinkinson, Chicago, Ill.

For the defendant: Thomas O. Kachelmacher, Minneapolis, Minn.

For a consent decree entered in the U. S. District Court, District of Minnesota, Fourth Division, see 1955 Trade Cases ¶ 68,091.

Memorandum

[*Nature of Action*]

DEVITT, District Judge [*In full text*]: This is an action brought by the United States against a Minneapolis Milk Drivers Union which seeks to enjoin the Union from violating the Sherman Anti-Trust Act by allegedly combining with Minneapolis milk companies, storekeepers and others, to fix the price of milk in the Minneapolis area.

The action was originally instituted against this Union, seven dairies distributing milk in the Minneapolis area, an unincorporated

association of these dairy distributors, and several individuals. On June 23, 1955, the Court approved the entry of a consent decree as against all of the defendants other than the Union.

[*Basic Issue*]

The basic issue is whether or not the Union was a party to the alleged price-fixing conspiracy and whether, as a labor union, it is subject to the terms of the Sherman Anti-Trust Act.

[*Contentions*]

The defendant generally denies that it engaged in any such conspiracy during the base period alleged, July 1946 to November 1952, or later, and also denies that there is any interstate commerce affected, and takes the position that even though acts which constitute a conspiracy in violation of the anti-trust laws are found as against it, that it is immune from the issuance of an injunction against it by virtue of certain statutory exemptions provided by the Clayton and Norris-LaGuardia Acts.

[*The Union*]

The defendant is an unincorporated union having approximately 2800 members who live in an area of up to 100 miles from Minneapolis; 1250 of those members are drivers. These drivers are divided into three categories. Approximately 675 of them are so-called "retail" drivers who service homes and small stores with milk, cream and related products. About 150 of them are "wholesale" drivers who make similar deliveries to stores, restaurants and public institutions. Both the wholesale and retail drivers work on a fixed salary plus a commission. A third class of union members are variously called "vendors," "peddlers" or "commission drivers." There are about 15 of them in the Minneapolis area. They buy their milk as private entrepreneurs from various milk companies and resell it to any customers they can secure. Their compensation is determined by the difference between what they pay for the milk and what they sell it for, less their expenses. They use company-owned trucks. The same as retail and wholesale drivers, they are covered by the Blue Cross hospital and Blue Shield surgical compensation plans, receive regular vacations, and are covered by unemployment compensation and Workmen's Compensation Insurance; they are encompassed in the union pension plan and come within Social Security coverage.

It would appear from the evidence that these vendors "own" their own routes and customers, and the practice has been for them to "sell" such routes and customers to the milk companies when they go out of business.

These three classes of union members—retail, wholesale and vendors—are apparently the exclusive deliverers of all milk and milk products in the Minneapolis area.

[*Dairy Stores*]

Some time prior to 1946, a relatively new institution arose on the retail store scene, called a "dairy store," which specializes in the sale of milk, cream, ice cream and similar dairy products. Occasionally some groceries are sold in connection with such operation. These stores, and later the independently owned grocery stores and supermarkets, particularly in the outlying or suburban areas of the city of Minneapolis, started the practice of selling dairy products, principally milk, at prices appreciably below the price at which such milk could be purchased by home delivery. Many times such milk was sold at less than its cost. Dairy stores, and particularly grocery stores, prominently advertised milk at the low cost as a "loss leader" in order to encourage patronage to the store.

This resulted in an appreciable decrease in the amount of home delivered milk and a similar decrease in the overall compensation earned by retail milk drivers who received their compensation on a fixed-salary-plus-commission basis.

[*Government Charges*]

This situation gave rise to the transmission of events which the government claims constitutes a violation of the anti-trust laws. The government contends that the milk distributors and the Union, the storekeepers, and others, agreed and combined and conspired to fix the retail price at which milk was sold in the stores at a price the same as or near the price at which such milk was sold upon home delivery. It is alleged that this is illegal and violative of Section 1 of the Sherman Act (15 U. S. C. A. 1), which provides in part that:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . ."

[*Evidence*]

It was shown by the government that the collective bargaining agreements between the dairies and the Union established the Union as a policing and enforcing agency to require stores to maintain non-competitive consumer prices on milk and milk products. The collective bargaining agreements gave the Union the right to discontinue delivery to stores that sold milk at "unfair" prices—that is, consumer prices which were substantially below the prices charged by the dairies for home deliveries. If the stores did not comply by raising their milk prices to a "fair" level, the employer-union contract provided the authority for the Union members to discontinue making deliveries until the uncooperative store manager agreed to resell at a fair price.

The provision in the Union contract which provided this authority was originally contained as Section I (see gov'ts exhibit 35):

"The Union contends that experience and factual study have established to its satisfaction that the existence of a large price differential between dairy products sold cash and carry by stores or other outlets as compared to delivery to householders direct by employer is detrimental to the employees in the industry and that it causes loss of jobs, reduction in wages, lowering of working conditions and living standards. *Accordingly, the Union and its members reserve the right to refuse to handle, deliver or assist in delivering dairy products to or for any retail store or stores or other outlets which resell to customers at a price so far below the price at which such products are sold upon direct delivery to householders as to constitute a differential harmful to the interests of milk drivers who are members of the Union.* The failure or refusal of an employee to handle, deliver, or assist in delivering dairy products to or for any such retail store or stores or other outlets under the above circumstances shall not constitute a violation of the within Agreement by the Union or employees. [Emphasis supplied]

Later, in 1948, this principle was changed in wording and became Section J, and later Section L in the 1955 contract. (See gov'ts exhibit 35). It reads as follows:

"In the event that this Union shall determine that any retail store or other retail cash and carry outlets of dairy products *is engaged in selling milk or other dairy products at such price or prices as to constitute unfair competition or an unfair trade practice,* and any employee or employees shall refuse to handle, deliver, or assist in delivering milk or other dairy products to or for such retail store or other outlet, such refusal shall not subject any such employee to any disciplinary action for such refusal. [Emphasis supplied]

In the course of 5 trial days, the government presented 38 witnesses, many of them storekeepers and dairy company executives, and introduced records of Union meetings, meetings of the Milk Producers Trade Association at which authorized Union spokesmen were present, and other documentary evidence, from all of which the finding can readily be made that the Union did engage with the dairy companies and with store owners in a plan and program to maintain the consumer price of store deliveries of milk at or near the price charged for home deliveries. It is clear from the evidence that the Union was the policeman to enforce such a program. If a milk driver found that a store was advertising in its window the sale of milk at an "unfair" price, the driver would admonish the storekeeper. If such admonition failed to bring about a higher price, the Union secretary and business manager called the storekeeper. In many instances an executive of the dairy company who furnished the milk called the storekeeper at the instance of the Union secretary for the purpose of inducing the storekeeper to raise his price.

The evidence showed that many times after this "heat" was put on, the price of milk was raised. On numerous occasions the drivers threatened to discontinue milk deliveries. On at least two occasions milk deliveries were denied to storekeepers because of their recalcitrance in refusing to raise the price.

[*Conspiracy Established*]

The Union does not deny that it participated in such a program, but claims that such conduct does not constitute a conspiracy. But the evidence convinces me, particularly the practically uncontradicted evidence of what transpired at various Union meetings and at meetings of the Dairy Producers Trade Association in the Nicollet,

Hotel, in which Union agents participated, that there was a conspiracy as is alleged in the complaint. In order to establish liability under the Sherman Act, the parties need not enter into a formal legal contract. *Federal Trade Commission v. Pacific States Paper Trade Assoc., et al.,* 273 U. S. 52, 62 (1927). Proof of an informal understanding is sufficient to prove a conspiracy. *Direct Sale Co., Inc. v. United States,* 319 U. S. 703 (1943); *Interstate Circuit Inc., et al. v. United States* [1932-1939 TRADE CASES ¶ 55,205], 306 U. S. 208, 226 (1939). The evidence in this case to prove conspiracy was bountiful.

[*Interstate Commerce*]

The Union has made some claim that, even assuming the existence of a conspiracy, this court is without jurisdiction to entertain an action under the Sherman Act because the matter does not affect interstate commerce. The evidence showed that a substantial percentage of the fluid milk which comes into the Minneapolis trade area comes from Wisconsin. Much of the milk produced in the Western Wisconsin area adjacent to the Twin Cities areas, comes to the Twin City markets. Several Minneapolis distributors have purchased all or substantially all of their milk from producers in Wisconsin. Land o'Lakes Creamery purchased all of its milk for the so-called St. Michael plant from about 10 such dairies in the State of Wisconsin. John J. Handy of the Minneapolis Health Department stated that at the present time about 15% of the milk which comes to the Minneapolis market comes from Wisconsin. He estimated that in 1951 the percentage was about 3%. In the year 1955 most of the milk distributors who signed agreements with the defendant Union received some or all of their milk requirements from Wisconsin sources.

Witnesses testified that Wisconsin milk was intermixed with Minnesota milk in the process of preparing it for delivery. Normally milk was distributed within 24 hours of its receipt in Minnesota.

It is well settled that restraints at the retail level of a commodity originating outside of the state falls within the prohibition of the Sherman Act. *Local 167, International Brotherhood of Teamsters v. United States* [1932-1939 TRADE CASES ¶ 55,043], 291 U. S. 293, 297 (1934); *United States v. Frankfort Distilleries, Inc.* [1944-1945 TRADE CASES ¶ 57,338], 324 U. S. 293, 298 (1945).

Further we need not be concerned with the *amount* of interstate commerce affected because, "large or small" it is covered by the Act. *United States v. McKesson & Robbins, Inc.* [1956 TRADE CASES ¶ 68,368], 351 U. S. 305 (1956).

Further, on the authority of the Appellate Court of this Circuit, milk shipped from Wisconsin remains in interstate commerce until it reaches the ultimate consumer in the Minneapolis area. *Pevely Dairy Co. v. United States* [1948-1949 TRADE CASES ¶ 62,526], 178 F. 2d, 363, 366, 8 Cir. (1949). I am of the view that the interstate commerce requisite is satisfied.

[*Statutory Exemptions*]

Finally, the defendant Union argues that even though it may have engaged in a conspiracy to fix prices in interstate commerce, as is prohibited by the Sherman Act, it is immune from the issuance of an injunction to restrain it because of statutory exemptions provided for it by the Clayton Act and the Norris-LaGuardia Act.

The passage of the Clayton Act (15 U. S. C. A. 17, 29 U. S. C. A. 52) in 1914 limited the area of impact of the Sherman Act on union activity by declaring that labor is neither a commodity or an article of commerce, and that the Sherman Act must not be construed to forbid the existence and activities of labor organizations instituted for the purpose of mutual help or to forbid or restrain members from "lawfully carrying out the legitimate objects therof", (Sec. 6). Section 20 of that law withheld from the courts the power to issue injunctions in cases involving or growing out of disputes "concerning terms or conditions of employment."

The Norris-LaGuardia Act of 1932 (29 U. S. C. A. 101-110, 113-115) specifically prohibited the issuance of injunctions in cases involving or growing out of a labor dispute which was defined in Section 113(c):

> "*The term 'labor dispute' includes any controversy concerning terms or conditions of employment,* or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." [Emphasis supplied]

The Union claims that it is immune from the issuance of an injunction because its conduct in this case in attempting to equalize or minimize the differential between the prices at which milk was sold at stores and at the home, was for the welfare of its members, and was a labor dispute.

We need not decide here whether the Union, acting alone, in what it did was in a "labor dispute" within the immunization clause of the Norris-LaGuardia Act because complaint is made against, and relief is sought from, the Union's acting, not alone, but in combination with milk producers, stores and others in a conspiracy to fix the price of milk. So the legal question is whether such conduct, if proved, is enjoinable. The answer is yes and the authority is contained in the United States Supreme Court's holding in *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, et al.* [1944-1945 Trade Cases ¶ 57,386], 325 U. S. 797 (1945).

That case enunciated the principle that a union operates outside the scope of its statutory immunity when it combines with a non-labor group to impose commercial restrictions such as price-fixing on interstate trade and commerce, even though it be prompted by a desire to further its own interests and that of its wage-earner members.

In *Allen Bradley* certain employers and unions combined, through the medium of collective bargaining agreements, to prevent out-of-state electrical equipment from being used locally. The union argued that this represented a "labor dispute" because the exclusion of out-of-state electrical equipment from the local market improved the employment opportunities of the members of the local union. This argument is strikingly similar in principle to that urged by the Union in this case. The Supreme Court was unimpressed by this contention, however, and stated, (see page 810):

> "For if business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futule gesture for Congress to prohibit price fixing by business groups themselves. Seldom, if ever, has it been claimed before, that by permitting labor unions to carry on their own activities, Congress intended completely to abdicate its constitutional power to regulate interstate commerce and to empower interested business groups to shift our society from a competitive to a monopolistic economy. *Finding no purpose of Congress to immunize labor unions who aid and abet manufacturers and traders in violating the Sherman Act, we hold that the district court correctly concluded that the respondents had violated the Act.*" [Emphasis added]

This principle has since been reaffirmed by the Supreme Court. See *United Brotherhood of Carpenters and Joiners, et al. v. United States* [1946-1947 Trade Cases ¶ 57,545], 330 U. S. 395 (1947) and *United States v. Employing Plasterers Assn. of Chicago, et al.* [1954 Trade Cases ¶ 67,692], 347 U. S. 186 (1954). See also a recent decision in this district, *United States v. Minneapolis Electrical Contractors Assn., et al.*, 99 F. Supp. 75 (D. C. Minn. 1951).

[*Elimination of Independent Vendors*]

One remaining facet of the case requires discussion. The government attacks a certain provision of the collective bargaining agreement relating to milk vendors or "peddlers" as violative of the Sherman Act and prays the Court's judgment eliminating the provision. This provision has been included in all of the Union contracts for many years. It reads as follows:

> "It is agreed that no product shall be sold for resale to peddlers or so-called independent milkmen, unless they have been working in the same capacity for two years or over with the same distributor; they shall pay dues and work under the same conditions as all other employees."

A literal reading of this provision effectively bars the creation of any new vendor milk routes. The evidence showed that there are only 15 of these vendors. Obviously under the terms of this provision no persons could qualify as vendors in the future.

Bergquist, secretary of the defendant Union, testified that the vendor system is not favored by the Union because it tends to break down the wages and working conditions of the regular drivers. The evidence was clear that the Union took the position that with this provision no additional peddlers could or would be allowed on the market.

On two occasions officers of the Union advised the dairies that this provision prevented the hiring of any new peddlers. In April of 1954 an officer of Land o'Lakes Creameries requested the Union to allow the creamery to sell milk and cream to persons who desired to do so as peddlers. In

the summer of 1955 an officer of Dairy Home requested the Union to permit his company to sell to peddlers. In both instances the Union officers refused the requests, stating that the Union's contract prevented such sales. A similar interpretation of the contract was made by an officer of the Superior Dairy in the summer of 1955.

This provision of the agreement between the dairies and the Union, by its plain reading and practical application, will eventually do away with all vendors in the Minneapolis area. This would result in the elimination of competition and the stabilization of prices by removing from the milk business a class of employee-driver which is able to price its product as it wishes. The provision is clearly in restraint of trade and a violation of Section 1 of the Sherman Act. It constitutes an agreement between a Union and a non-labor group to restrain trade within the prohibition of *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, et al.* [1944-1945 TRADE CASES ¶ 57,386], 325 U. S. 797 (1945).

[*Judgment*]

It follows, therefore, that the plaintiff is entitled to judgment enjoining the Union from combining with milk producers, stores and others in a conspiracy to fix the price of milk in the Minneapolis retail area, and directing the Union to eliminate from its contract with distributors all restrictive provisions with reference to vendors.

Plaintiff will please prepare appropriate findings and form of judgment and submit a copy thereof to defendant's attorney.

[¶ 68,814] Harry S. Gordon, et al. v. Robert Samuel Wasserman.

In the California District Court of Appeal, Second District, Division One. Civ. No. 22006. Dated August 19, 1957.

Appeal from a judgment of the Superior Court of Los Angeles County. BURNETT WOLFSON, Judge. Affirmed.

California Antitrust Law

Combinations and Conspiracies Under State Laws—Practices—Restrictive Covenants—Agreement Not to Solicit Customers of Former Employer.—An employment contract, wherein the employee agreed not to divulge the names of customers or to solicit customers of his employer for a period of one year after the termination of his employment, did not unlawfully restrain the employee from engaging in a profession, trade, or business within the meaning of Section 16600 of the California Business and Professions Code.

See Combinations and Conspiracies, Vol. 1, ¶ 2319.05.

For the appellant: Harry A. Franklin.

For the respondents: Joseph Stell.

Action to enjoin solicitation of customers of former employer, and for damages. Judgment for plaintiffs affirmed.

[*Nature of Action*]

DRAPEAU, Justice *pro tem.** [*In full text*]: This is a similar case to *Gordon v. Landau, ante,* [1]p. —— [—— P. 2d ——], decided this day, and to *Gordon v. Schwartz,* [2]147 Cal. App. 2d 213 [305 P. 2d 117].

There is no need to repeat in this opinion the facts as to plaintiffs' business, and their relations with their customers and employees. These may be read in the *Schwartz* and *Landau* cases.

Suffice it to say here that Robert S. Wasserman, defendant in this case, was also a collector-salesman for plaintiffs; that he quit their employ, went into the same business, and then used plaintiffs' lists to solicit customers for himself.

In this case the trial court adjudged damages for plaintiffs and enjoined any further use of their lists by defendant.

Substantial evidence supports that part of the judgment. Therefore, these matters do not require further comment in this opinion.

* Assigned by Chairman of Judicial Council.
[1] Advance Report Citation: *Ante,* p. 351.
[2] Advance Report Citation: 147 A. C. A. 265.

[*Restrictive Covenant*]

But in this case this court must determine the validity of a contract between plaintiffs and defendant, in which defendant agreed not to solicit plaintiffs' customers for a year after the termination of his employment with them. This determination was not necessary to the decision in the *Landau* case.

Defendant contends that there was no consideration for the contract; that it is too vague and uncertain to be enforceable; that no wages or conditions of employment are specified in it; and that it has an unlawful object and is therefore void.

The last objection is the only one that merits any particular consideration.

It clearly appears in the contract that there was a consideration, and that it is neither vague nor uncertain. And to be valid it did not have to state wages or conditions of employment.

The last objection presents a more debatable question: Did the contract restrain defendant from engaging in a lawful profession, trade, or business, within the meaning of section 16600 of the Business and Professions Code? (*Cf.* Civ. Code, § 1598; Bus. & Prof. Code, § 16600; and *Aetna Bldg. Maintenance Co. v. West,* 39 Cal. 2d 198 [246 P. 2d 11].)

That part of the contract necessary to a consideration of this question is as follows:

> "(8) Collector-salesman further agrees that during the period of one (1) year immediately after the termination of his employment with the employer he will not, either directly or indirectly, make known or divulge the names or addresses of any of the customers or patrons of employer at the time he entered the employ of employer or with whom he became acquainted after entering the employ of employer to any person, firm or corporation, and that he will not directly or indirectly, either for himself or for any other person, firm, company or corporation, call upon, solicit, divert, or take away or attempt to solicit, divert or take away any of the customers, business or patrons, of the employer upon whom he called or whom he solicited or to whom he catered or with whom he became acquainted, or upon whom he called or to whom he catered after his employment with said employer.
>
> "(9) Collector-salesman hereby consents and agrees that for any violation of any of the provisions of this agreement, a restraining Order and/or an injunction may issue against him in addition to any other rights the employer may have.
>
> "(10) In the event that the employer is successful in any suit or proceeding brought or instituted by the employer to enforce any of the provisions of the within agreement or on account of any damages sustained by the employer by reason of the violation by the collector-salesman of any of the terms and/or provisions of this Agreement to be performed by the collector-salesman, collector-salesman agrees to pay to the employer reasonable attorneys' fees to be fixed by the Court."

[*Validity*]

It clearly appears by the terms of the contract that it does not prevent defendant from carrying on a weekly credit, or any other business. He covenants not to use plaintiffs' confidential lists to solicit customers for himself. Similar covenants have been held valid and enforceable in *King v. Gerold,* 109 Cal. App. 2d 316 [240 P. 2d 710], and in *Handyspot Co. v. Buegeleisen* [1954 TRADE CASES ¶ 67,887], 128 Cal. App. 2d 191 [274 P. 2d 938].

[*Affirmed*]

Defendant finally contends that the complaint does not state a cause of action. Little needs to be said about this, for a reading of the complaint demonstrates that it does state a cause of action.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concurred.

[¶ 68,815] Erone Corporation, et al. v. Skouras Theatres Corporation, et al.

In the United States District Court for the Southern District of New York. Civ. 105-311. Filed September 5, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Who May Bring Suit—Non-Operating Landlords of Motion Picture Theatres—Theatre Owners and Managers.

—The owners of five different motion picture theatres, which leased their respective theatres on a minimum rental plus percentage of gross profits basis to one of the defendants named in their antitrust damage action and which alleged that they were each injured by reason of conspiracies to monopolize "preferred runs" of motion pictures and to pool competitive theatres controlled by the defendants, could maintain a treble damage action under Section 4 of the Clayton Act. A motion to dismiss the action on the ground that a non-operating owner-lessor of a theatre has no standing to sue for treble damages was denied.

However, the court ruled that the owners of two other theatres could not sue to recover damages (sustained by reason of the alleged antitrust violations) for the periods when their theatres were being operated and managed by others. The court based this ruling on a decision wherein a patentee was denied standing to sue under the antitrust statutes on the ground that his damages were too incidental when the business or property right asserted was the right to collect royalties from a licensee who was a victim of the complained of acts. In the instant case, while the two theatre-owners were merely landlords, even if their leases were on a percentage basis, their position was precisely the same as the patentee. The operators and managers of these two theatres, however, were entitled to maintain their treble damage claim.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.55.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments To State Cause of Action—Interstate Commerce.—A motion to dismiss a complaint, charging unlawful conspiracies to monopolize "preferred runs" of motion pictures and to pool competitive theatres controlled by the defendants, on the ground that the leasing and ownership of theatres is not interstate commerce was denied. The acts of owning and leasing theatres by the defendants were part of the over-all conspiracies alleged to have damaged the operator-plaintiffs. Other activities of the defendants, concededly in interstate commerce, were vitally connected with the intrastate activities complained of by the plaintiffs.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.600.

Private Enforcement and Procedure—Suit for Civil Damages—Defenses—Statute of Limitations.—A motion to dismiss a complaint on the ground that the claims were barred by the statute of limitations or to dismiss so much of the claims as accrued prior to six years before the institution of the action was denied. The complaint alleged not only a continuance of a conspiracy but a continuance of acts in furtherance of the conspiracy until the date of the complaint. The question as to what damage claims are precluded by such statutes will be decided at the trial of the action.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.200.

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Separate Statement of Claims.—A motion to dismiss an amended complaint on the ground that the plaintiffs failed to comply with an order requiring them to state the precise relationship of each of the plaintiffs to the theatres in question, to state the periods of such relationships, and to separately state and number the claims of each of the plaintiffs was denied.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.275.

For the plaintiffs: Bernard Bernstein (Milton Pollack and Stanley D. Halperin, of counsel), New York, N. Y.

For the defendants: Weisman, Allan, Spett & Sheinberg, and Zalkin & Cohen, New York, N. Y.

For a prior decision of the U. S. District Court, Southern District of New York, see 1956 Trade Cases ¶ 68,299.

Opinion

[*Motion*]

JOHN M. CASHIN, District Judge [*In full text*]: Two separate sets of defendants herein, prior to answer, move against a "Further Amended Complaint" on various grounds. Because of the numerous grounds for the motion and their inter-relation, each will be considered separately after a summary of the relevant facts as alleged in the further amended complaint.

[*Parties—Complaint*]

Plaintiffs all seek to recover treble damages and injunctive relief under the antitrust laws. Five of the plaintiffs have been, for varying periods of times covered by the complaint, the owners of five different theatres and lessors thereof on a minimum rental plus percentage of gross profits basis to one of the defendants, its predecessor in interest or an instrumentality of the defendants. The other five plaintiffs have, at various times as specified in the complaint, been either owner-operator-managers or operator-managers of two other theatres. All of the theatres are located in Nassau County, New York. Defendants are in the business of owning, leasing, managing and/or operating motion picture theatres in the same general area wherein plaintiffs' theatres are located and in surrounding areas. Defendants, since September 1, 1934, have been engaged in various unlawful conspiracies to monopolize "preferred runs" of motion pictures and to pool competitive theatres controlled by them, to the injury of the public and to the direct injury of the respective businesses and properties of each of the plaintiffs.

Motion Pursuant to Rule 41(b) of the Federal Rules of Civil Procedure to Dismiss the Further Amended Complaint for Failure to Comply with an Order of the Court Dated March 28, 1956 (Item #5 of Motion #96 and Item #1 of Motion #95) or to Dismiss the Further Amended Complaint Pursuant to Rule 8(a)(2) for Failure to State a Short and Plain Statement of each Individual Claim (Item #6 of Motion #96) or to Direct a Further Amended Complaint in Accordance with the Aforementioned Order of the Court of March 28, 1956 (Item #7 of Motion #96, Item #5 of Motion #95).

A prior amended complaint was attacked successfully by defendants resulting in an order directing the service of a further amended complaint. The first amended complaint was found defective because it did not allege the precise relationship of each of the plaintiffs to the theatres in question, nor the periods of such relationship.

Paragraph 4 of the further amended complaint clearly delineates the interest of each plaintiff and the time period covered. This is precise compliance with Judge Weinfeld's order of March 28, 1956.

Another defect in the first amended complaint was that it did not separately state and number the claims of each of the plaintiffs who were concededly asserting separate claims. Defendants now contend that plaintiffs' further amended complaint complies only formally with the direction to separately state and number but ignores its substance. The contention is, however, unsound. The conspiracies pleaded are alleged to have affected adversely all of the plaintiffs. Their incorporation by reference in the separate claims is, therefore, to be the subject of commendation rather than condemnation since needless repetition is thereby avoided. The only paragraphs in the general allegations, namely, 8 through 10, which do not have application to all plaintiffs, have been omitted from incorporation by reference in the claims stated by those plaintiffs. One contention of the defendants is technically well taken, that is, the fact that paragraph 4 of the further amended complaint, incorporated by reference in each of the separate claims, defines the status of each of the plaintiffs. However, no confusion or prejudice whatsoever can arise from this technical defect and thus does not warrant a dismissal of the complaint with prejudice or the direction of the service of another amended complaint.

The motion to dismiss the further amended complaint pursuant to Rule 8(a)(2) is equally without merit. The facts upon which plaintiffs rely, and their applicability to each of the plaintiffs, is clearly and concisely stated, at least insofar as the nature of the action permits.

Motion to Dismiss the Action as to Plaintiffs, Erone Corporation, Hempstead Theatre Corporation, Rivoli Theatre Corporation, Glen Cove School Street Corporation and Calderone Valley Stream Corporation, on the Grounds that the

Claims of these Plaintiffs Fail to State Claims upon Which Relief Can Be Granted (Rule 12(b)(6) of Federal Rules of Civil Procedure) or that the Court Lacks Jurisdiction over the Subject Matter Since the Claims Do Not Arise Under any Federal Statute (Rule 12(b)(1) of Federal Rules of Civil Procedure) (Item #2, Motion #95; Item #1, Motion #96).

Both grounds for this motion rest upon the proposition that a non-operating owner-lessor of a theatre has no standing to sue for treble damages for violation of the anti-trust acts since he is not injured in "his business or property" within the meaning of Section 4 of the Clayton Act (15 U. S. C. A. § 15) nor has he standing to seek injunctive relief under Section 16 of the Clayton Act (15 U. S. C. A. § 26) since there is no threatened loss or damage. While no direct authority exists in this circuit on the proposition involved herein, other circuits have considered the problem with varying views. Thus, the Third Circuit has denied relief to a non-operating owner-lessor (*Harrison v. Paramount Pictures, Inc.*, (DC ED Pa. 1953) [1953 Trade Cases ¶ 67,568], 115 F. Supp. 312, affd. (1954) [1954 Trade Cases ¶ 67,721], 211 F. 2d 405, cert. denied 348 U. S. 828; *Melrose Realty Co. Inc. v. Loew's Incorporated*, (1956) [1956 Trade Cases ¶ 68,358], 234 F. 2d 518, cert. denied 352 U. S. 890) while the Ninth and Seventh Circuits have allowed the relief, at least if the lessee of the theatre is engaged in the conspiracy (*Steiner v. Twentieth Century-Fox Film Corp.*, (9 Cir. 1956) [1956 Trade Cases ¶ 68,304], 232 F. 2d 190; *Congress Building Corporation v. Loew's Incorporated*, (7 Cir.) No. 11941, decided May 31, 1957 [1957 Trade Cases ¶ 68,725], rehearing denied July 29, 1957 [1957 Trade Cases ¶ 68,799], — F. 2d —). The last cited case has reviewed the authorities and their reasoning exhaustively and since I am in full agreement with the reasoning and result of the case, I shall deny the motion on the authority of that case.

Motions to Dismiss the Claims of Plaintiffs, Calderone-Mineola Theatre Corporation, Westbury Theatre Corporation, Mineola Theatre Operating Co. Inc., Calderone Rivoli Operating Corp. and Hempstead Operating Co. Inc., on the Grounds that They Fail to State a Claim upon Which Relief Can be Granted (Rule 12(b)(6) of Federal Rules of Civil Procedure) (Items #2 and #3, Motion #96; Item #3, Motion #95).

The first question involved on these motions is whether the owners of the two theatres considered can recover damages for the periods when said theatres were being operated and managed by others. On this question I am constrained to follow the decision of the Court of Appeals of the Second Circuit in the case of *Productive Inventions, Inc. v. Trico Products Corp.*, (1955) [1955 Trade Cases ¶ 68,104], 224 F. 2d 678, cert. denied 350 U. S. 936. In that case a patentee was denied standing to sue under the anti-trust statutes on the ground that his damages were too incidental when the business or property right asserted was the right to collect royalties from a licensee who was a victim of the complained of acts. While the plaintiff-owners were merely landlords, even if the leases were on a percentage basis, their position is precisely the same as the patentee in the *Productive* case and so their claims must be dismissed.

The claims of the operators and managers of the two theatres will, however, stand. Defendants' arguments that the complaint should be dismissed as to them is based on the theory that they are merely employees of the owner and thus only incidentally injured. The complaint, properly interpreted, however, makes it clear that the actions are brought by exhibitors who are clearly entitled to sue.

The argument that the leasing and ownership of theatres is not interstate commerce and thus restraint in regard thereto cannot be availed of by the operator-plaintiffs is without merit. The acts of owning and leasing theatres by the defendants are part of the over-all conspiracies alleged to have damaged the operator-plaintiffs. Other activities of the defendants, concededly in interstate commerce, are vitally connected with the intra-state activities complained of. Portions of the motions requesting dismissal of the complaint in this regard or the striking of such portions is denied.

Motion to Dismiss the Complaint on the Ground that All Injuries Suffered as Alleged Therein Are Barred by the Statute of Limitations (Item #4, Motion #96) or to Dismiss so Much of the Claims as Accrued Prior to Six Years Before the Institution of the Action (Item #4, Motion #95).

The first portion of this motion is obviously without merit since the complaint alleges not only a continuance of the conspiracy but a continuance of acts in furtherance thereof until the date of the complaint. The second portion will also be denied. Defendants may plead the statutes of limitations which they deem applicable. What damages are precluded by such statutes will be decided at the trial of the action.

Motion for a More Definite Statement (Item #8, Motion #96).

All the specifications requested by this motion may be obtained by discovery proceedings if, indeed, the specifications are necessary at all.

Motion to Strike Portions of the Complaint as Immaterial and Impertinent (Item #9, Motion #96).

A portion of Paragraph 8 of the complaint is requested to be stricken only as to certain defendants. Defendants seeking to have this portion stricken with regard to them contend that the duress was exercised only by other defendants and therefore cannot be availed of as against the moving defendants. However, Paragraph 10 of the complaint states "each of the other defendants named herein has had full knowledge of the various agreements referred to in Paragraphs 8, 9 and 10 hereof." Clearly the intendment of the quoted sentence is to allege that all of the defendants participated in the acts leading up to the agreements. Thus, the duress actively imposed by the defendants named in Paragraph 8 is also ascribed to the moving defendants. The portion of Paragraph 8 sought to be stricken will stand.

Paragraph 22 is sought to be stricken as evidentiary. Even if the allegations were merely evidentiary, defendants show no prejudice to them by their inclusion. The paragraph, therefore, will stand.

Except as set out above, the motions are denied.

Settle orders.

[¶ 68,816] Denton v. General Electric Co.

In the New York Supreme Court, New York County, Special Term, Part III. 138 N. Y. L. J., No. 50, page 6. Dated September 9, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Injunctions—Collateral Attack.—Where decrees had been entered against a dealer in two fair trade enforcement actions, an action by the dealer alleging that the fair trader's price fixing and fair trade operations were executed in such a fashion as to discriminate against him was dismissed. The matters asserted in the complaint would in each instance defeat the fair trader's claim of right to injunctive relief and destroy the prior decrees. The failure to proceed in the prior actions was fatal. The prior decrees were conclusive, even though the second decree was entered on default. The first decree was entered on consent, and the second enforcement action was commenced after the institution of the dealer's action.

See Fair Trade, Vol. 1, ¶ 3366.34, 3420.

For the plaintiff: John A. Mariano.

For the defendant: White & Case, New York, N. Y.

[*Dismissal*]

HECHT, Justice [*In full text*]: Defendant moves for dismissal of the amended complaint pursuant to Rule 107(4) of the Rules of Civil Practice. Judgments in two Feld-Crawford actions were entered against the plaintiff. The judgments are dated, respectively, April 13, 1953, and June 14, 1957. The first was entered on consent and the second in default. The second Feld-Crawford action was instituted after the commencement of this suit, in which plaintiff claims and alleges that defendant's price-fixing and fair-trade operations were executed in such a fashion as to discriminate against the plaintiff and were unlawful and improperly directed against him to produce harm and injury. The prior decrees are conclusive (*Economy Food and Liquor Co. v. Frankfort Distilleries Corp'n* [1956 TRADE CASES ¶ 68,334], 232 F. 2d, 410), even though the second decree was entered on default (*Reich v. Cochran*, 151 N. Y., 122). The matters asserted in the complaint would in each instance defeat defendant's claim of right to injunctive relief and destroy the prior decrees. The failure to proceed in the prior actions is fatal.

The motion is granted. Settle order.

[¶ 68,817] Ella Ramsburg, original plaintiff, and Earl H. C. Lurkins, Vernon Lurkins, Edward F. Mueller and Hazel F. Mueller, Ralph Rohlfing and Lillian Garnet Rohlfing, Ave L. Vico and Charlotte Vico, Frank Rille, Herbert E. Frank, Bernice Lurkins and Mary Rille, intervenors v. American Investment Company of Illinois and Domestic Finance Corporation.

In the United States Court of Appeals for the Seventh Circuit. October Term, 1955; January Session, 1956. No. 11610. Dated January 27, 1956.

Appeal from the United States District Court of the Southern District of Illinois, Southern Division.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Persons Who May Bring Suit—Stockholders—Derivative Suit.—A motion to dismiss an appeal from a trial court order denying a motion by stockholders, in their derivative antitrust action for damages and injunctive relief, for a temporary injunction to restrain a proposed merger between the corporation in which they owned stock and another corporation on the ground that the stockholders did not have the capacity to prosecute the appeal was denied. The merger was completed during the pendency of the action. The stockholders' competence to prosecute the appeal must be tested in the light of the status which obtained when their action was filed. A stockholders' derivative suit will lie under Section 7 of the Clayton Act; therefore, the stockholders were competent parties when the suit was brought and remained so throughout the pendency of the litigation.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4208; Private Enforcement and Procedure, Vol. 2, ¶ 9005.70, 9020.55.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Nature and Scope of Injunctive Relief—Mootness.—In a stockholders' derivative action to enjoin a proposed merger between the corporation in which they owned stock and another corporation on the ground that the merger would constitute a violation of Section 7 of the Clayton Act, a motion to dismiss the stockholders' appeal from a trial court order denying their motion for a temporary injunction to restrain the merger was denied. The merger was completed on or about the same day that the appealed order was entered, and the defendants claimed that the appeal was moot because the only act sought to be enjoined had been accomplished, and, therefore, no relief could be granted to the stockholders. The merger was completed during the pendency of an action to enjoin it, and was, therefore, subject to the power inherent in a court of equity to restore the status quo. If this were an appeal on the merits, the cause would not be moot. As the court has jurisdiction of the parties and the acquiring corporation has possession and control of the assets of the acquired corporation, it would have jurisdiction to compel restoration. The circumstances of the case indicated that it might be a proper case for a mandatory injunction to restore the status quo. The court's mandatory power is rendered no less effective by the fact that the appeal was taken from an interlocutory order. Also, the court rejected the contention that the stockholders lacked the capacity to prosecute the appeal because the stockholders forfeited whatever rights they had as stockholders of the acquired corporation when they filed a written demand with the merged corporate entity for payment of the full value of their shares in the acquired corporation. Under the applicable state corporation laws and rulings, the failure to demand payment for their shares would constitute a consent to the merger.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4208; Private Enforcement and Procedure, Vol. 2, ¶ 9024, 9026.15, 9027.

For the plaintiff-appellant: Harold M. Keele, Don M. Peebles, and H. O. Crews, Chicago, Ill.

For the defendants-appellees: John B. Martineau and Don H. Reuben, Chicago, Ill.; and Clayton J. Barber and Alton G. Hall, Springfield, Ill.

Before Duffy, Chief Judge, and Lindley, Circuit Judge.

[*Merger*]

LINDLEY, Circuit Judge [*In full text*]: Defendants move to dismiss the appeal from an order denying the motion of plaintiffs, for a temporary injunction which they sought as stockholders of defendant Domestic Finance Corporation, to restrain a proposed merger of that Company with defendant American Investment Company of Illinois. Both are incorporated under the laws of Delaware. The complaint averred that American had, through divers means, obtained some 80 per cent of the common stock of Domestic thereby gaining control; that American had utilized its stock to effectuate election of a board of directors of Domestic composed of officers of American, who were serving as Domestic's officers, and that American, through its control, had so operated Domestic as to reduce its effective position as a competitor of American in various cities and states where both corporations transact business. On August 17, 1955, Domestic mailed to its stockholders a notice of a special meeting to be held September 15, 1955, to consider and vote on a proposed merger of the two corporations. The complaint herein was filed September 7, 1955, charging that the merger would constitute a violation of Section 7 of the Clayton Act, in that its effect would be to lessen substantially competition in commerce. It was further averred that Domestic would be seriously injured by the proposed action.

[*Relief Sought*]

The complaint prayed a preliminary injunction restraining American from voting its Domestic stock in favor of the merger at the September 15 meeting or at any other time, and that, after hearing on the merits, the temporary injunction be made final, and a decree entered directing American to divest itself of the Domestic stock it owns and granting such other and further relief as to the court might seem just.

A second count repeated all allegations of count one and averred that Domestic had suffered injury in the amount of $2,000,000 by reason of American's allegedly illegal acts in exercising control of the former, and prayed treble damages in the amount of $6,000,000, costs and attorneys' fees.

[*Trial Court Ruling*]

On September 14, at a hearing on the motion for a preliminary injunction, the court ordered it continued to September 20 to permit filing of briefs. During the course of the September 14 hearing, the parties reached a "standstill" agreement which had the effect, in part, of amending the prayer for relief. At that time plaintiffs asserted that they had no objection to a vote being taken the following day in accord with the August 17 notice, if defendants would agree to take no further action to implement the merger until the court had ruled on the application for injunctive relief. Thus, their prayer for relief was changed to a request for an order restraining implementation of the proposed merger during the pendency of the cause.

On September 20, the court denied the motion for a temporary injunction. This appeal followed. On or about the same date, defendants completed the merger by filing certificates of approval with the Secretary of State of Delaware. Plaintiffs, on or about December 1, 1955, filed a supplemental complaint which alleged that the merger had been implemented as aforesaid, and prayed additional relief.

[*Mootness*]

The several grounds on which defendants rely for dismissal are particularized herein as each is considered. It is first urged that the cause is moot and that, accordingly, the appeal should be dismissed. The argument on this point, in essence, is that the appeal is taken from an interlocutory order denying plaintiffs' prayer for a temporary injunction restraining implementation of the merger; that the merger has been completed under the controlling provisions of Delaware law, and that, inasmuch as the only act sought to be restrained has been accomplished since the judgment was entered, no relief can be granted plaintiffs.

This argument must be examined in the light of the inherent power of a court of equity to afford mandatory relief. As stated in *Porter v. Lee,* 328 U. S. 346, at 351, "where a defendant with notice of an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the *status quo.*" *Cf. Jones v. Securities & Exchange Commission,* 298 U. S. 1, 17-18. In *Turney v. Shriver,* 269 Ill. 164, 109 N. E. 708, the rule is framed thus:

> "Where a bill for an injunction has been filed, and the court has acquired jurisdiction of both the person and the subject matter of the suit, and the defendant does

any act which the bill seeks to enjoin, such party acts at his peril and subject to the power of the court to compel a restoration of the status, or to grant such other relief as may be proper under the particular circumstances of the case." 269 Ill. at 172, 109 N. E. at 711.

This mandatory power is a useful tool frequently employed by equity courts in conjunction with a final decision on the merits. *Eg., Texas & N. O. R. Co. v. Northside Belt Ry. Co.*, 276 U. S. 475; *Welton v. Forty East Oak Street Bldg. Corp.*, 70 F. 2d 377, cert. denied *Chicago Title & Trust Co. v. Welton*, 293 U. S. 590 (C. C. A. 7); *Turney v. Shriver, supra; New Haven Clock Co. v. Kochersperger*, 175 Ill. 383, 51 N. E. 629; *Konig v. Mayor, etc. of Baltimore*, 95 A. 478 (Md.); *Ives v. Edison*, 83 N. W. 120 (Mich.).

Applying these decisions we may formulate the question for determination where, as here, a cause for injunctive relief is met by a contention of mootness because the status of the parties and of their relationship to the subject matter has changed. The decisive issue is whether the subject matter may yet be reached by the mandatory power of equity and the status quo restored. If so, the cause is not moot. *Texas & N. O. R. Co. v. Northside Belt Ry. Co., supra; Welton v. Forty East Oak Street Bldg. Corp., supra; Turney v. Shriver, supra; New Haven Clock Co. v. Kochersperger, supra; Ives v. Edison, supra.* And even where the subject matter has been so completely destroyed as to preclude restoration of the status quo, the court still has jurisdiction to grant incidental relief and the cause is not moot. *Barrett v. Denver Tramways Corp.*, 146 F. 2d 701 (C. C. A. 3); *United States v. Bates Valve Bag Corp.*, 39 F. 2d 162.

Were this an appeal on the merits, therefore, clearly the cause would not be moot. As the court has jurisdiction of the parties and American has possession and control of the assets of Domestic, we would have jurisdiction to compel restoration, if ultimately we should determine that the circumstances of the case require that result.

[*Appeal from Interlocutory Order*]

And we must conclude, we believe, that our mandatory power is rendered no less effective by the fact that the appeal is taken from an interlocutory order. In *Jones v. Securities & Exchange Commission*, 298 U. S. 1, the Court was faced with the question of the effect of a temporary stop-order against a securities registration statement on actions done pursuant to the statement while a hearing on a restraint proceeding was pending. The court said the proceeding was analogous to a suit for an injunction and held that any action taken by petitioner was subject to a restoration of the status quo, saying, 298 U. S. at pages 17-18: "The conclusion to be drawn from all the cases is that after a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided."

"All the cases" to which the court referred included the leading cases of *Daniel v. Ferguson*, L. R. (1891) 2 Ch. 27, and *Von Joel v. Hornsey*, L. R. (1895) 2 Ch. 774. In *Daniel*, defendant, after notice of a motion for a temporary injunction forbidding construction of a building, hurried the work to near completion before the injunction could be entered. Without considering the merits of the case, the court entered a mandatory injunction to restore the status quo until the action could be finally decided. Likewise in *Von Joel*, the court, without regard to the ultimate rights of the parties, by mandatory injunction, ordered a building to be pulled down, it appearing that defendant had successfully dodged service of summons and had rushed the structure to completion after notice that plaintiff had filed a bill for an injunction.

State courts have frequently applied the rule. *Clark v. Martin*, 49 Pa. 289, 298-299; *Easton Passenger Ry. Co. v. Easton*, 133 Pa. 505, 19 A. 486; *Cooke v. Boynton*, 135 Pa. 102, 19 A. 944; *Whitman v. Fayette Fuel Gas Co.*, 139 Pa. 492, 20 A. 1062; *Meigs v. Milligan*, 177 Pa. 66, 35 A. 600. In *Easton*, the court reinstated a dissolved preliminary injunction to restore the status quo, it appearing that while the proceeding was pending the City of Easton had forcibly removed certain streetcar rails laid by plaintiff. In *Boynton* it was sought to enjoin defendant from interfering with a tramway used by plaintiff. After notice of the action, defendant demolished the structure minutes before a preliminary injunction was served

on him. Plaintiff appealed from an order dissolving the injunction as moot. The court reversed, reinstating the preliminary injunction. And in *Whitman,* plaintiff's action for injunctive relief to restrain defendant from shutting off the gas flow to plaintiff's factory was dismissed on defendant's agreement not to interfere with plaintiff's gas supply. After a year had elapsed, defendant, without warning, shut off the gas. Plaintiff then filed a complaint for a temporary injunction which was dismissed on the ground that the act sought to be enjoined had already been committed. This judgment was reversed, the court entering a mandatory interlocutory injunction to restore the status quo as of the date when the gas supply had been turned off. It should be observed that the court issued the injunction in each of these cases without considering the ultimate rights of the parties in the controversy. *Cf. Turney v. Shriver,* 269 Ill. 164, 109 N. E. 708, 711; *Fredericks v. Huber,* 180 Pa. 572, 37 A. 90, 91.

The last case we shall mention is *Ives v. Edison,* 83 N. W. 120 (Mich.) which bears a close analogy to the situation here. There plaintiff owned an easement in a stairway located on the property of defendant's lessor. Defendant sought permission to remove the stairway and replace it with a different type in a different location. Consent was denied, and, on defendant's threat to proceed with the project without consent, plaintiff filed suit to enjoin the removal. The bill was dismissed and plaintiff appealed. While the review was pending, defendant tore down the old stairway and erected a new one. The court entered a mandatory injunction commanding restoration of the stairway, saying 83 N. W. at page 122:

> "While the case was awaiting a final determination, the defendant saw fit to ignore the rights of the complainant, and to ignore the legal proceeding, and proceeded to remove the stairway and to substitute another in the place of it. To accomplish this wrong has cost the defendant a large sum of money. To restore the easement * * * will cost another large sum * * *, the aggregate of which sums is so large that it is now said it will be entirely disproportionate to the injury done the complainant, and for that reason the court should not grant relief. * * * If this doctrine is to be sanctioned, the person engaged in large enterprises may seize upon rights of less magnitude than his own, and, if an appeal is made to the law for protection, he may ignore the right of the injured and the pendency of the legal proceeding; and if he will put money enough into the new enterprise before a final decree is entered, so that it will cost him much more to restore the right he has wrongfully taken than a jury may regard the right as worth, he may prevent the entering of any decree whatever against himself, and may mulct the person who has appealed to the courts to protect his rights, in costs. This does not appeal to our sense of justice."

The chronology of the circumstances involved in the case at bar indicates that this may be a proper case for a mandatory injunction to restore the status quo. The order denying the temporary injunction was subject to plaintiffs' right to perfect a timely appeal. This they have done. It now appears that defendants completed the merger against which the injunction was sought on, or about, the same day the appealed order was entered. We have jurisdiction of the parties and of the subject matter, *i. e.,* the assets of Domestic, which are in the possession and control of American as the surviving corporation; and we have the power to compel a restoration should our ultimate determination be that the circumstances of the case require that result. The appeal, therefore, is not moot.

[*Cases Distinguished*]

The cases upon which defendants rely are inapposite. In each it appears either that the controversy had been finally settled while the appeal was pending, *e. g., Amalgamated Ass'n, Etc. v. Wisconsin Board,* 340 U. S. 416; *St. Pierre v. United States,* 319 U. S. 41; *Harris v. Texas & P. Ry. Co.,* 196 F. 2d 88 (C. A. 7); *Selected Products Corp. v. Humphreys,* 86 F. 2d 821 (C. C. A. 7); or that no injunctive relief had been sought in the trial court and the subject matter in controversy had been sold to a stranger pursuant to a court order while an appeal therefrom was pending, *Taylor v. Austrian,* 154 F. 2d 107 (C. C. A. 4). The only cases which fall without those categories are otherwise distinguishable on their facts. In *Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club,* 97 F. 2d 223 (C. C. A. 7), we dismissed an appeal as moot when it appeared that the injunction from which the appeal was taken affected only a single football game which had already been

played and had assumed its niche in sports history. The decision in *Wingert v. Kieffer*, 29 F. 2d 59 (C. C. A. 4), rests on a unique set of circumstances not parallel to those presented here. In a bankruptcy proceeding, appellant had obtained an order restraining the receivers from selling certain securities held by a bank as pledgee. Notwithstanding this order, the lienor sold the securities to a stranger. A contempt proceeding was then instituted against the pledgee. A hearing was had, and an order entered dismissing the contempt proceeding and dissolving the restraining order. On appeal, the court held that, inasmuch as the proceeding was one for criminal contempt, the order of exoneration was not reviewable. Then, faced with the lower court's determination that the sale had been effected and title to the securities conveyed to a stranger without constituting a violation of the injunction, the court held that, since the sale had been completed, there was no subject matter which could be reached by its decree, and that the question as to whether the order was properly dissolved had become moot. Obviously, the determinative question was the contempt issue, which the lower court had finally resolved adversely to appellants' contentions, holding, in effect, that a circumvention of its injunction was not a violation of that order.

[*Capacity to Prosecute Appeal*]

As a second ground for dismissal defendants urge that plaintiffs lack the capacity to prosecute the appeal. They argue that the challenged merger is now an established fact which can be undone only by a dissolution proceeding brought by the United States. Alternatively, they assert that plaintiffs have relinquished their position as shareholders of Domestic by filing a written demand with the merged corporate entity for payment of the full value of their shares in Domestic, and have, as a result, forfeited whatever rights they may have had as stockholders of Domestic.

When defendants' principal contention is placed in its proper perspective, we think it apparent that it is without merit. We are not concerned with an attack by private persons on a merger of two corporations after the merged status has been attained; we express no opinion as to whether persons other than the United States may prosecute an action for dissolution in the assumed case. A statement of the question before us must be predicated on the circumstances of this case, namely, that the merger was achieved during the pendency of an action to enjoin it, and is, therefore subject to the power inherent in a court of equity to restore the status quo. In other words, plaintiffs' competence to prosecute this appeal must be tested in the light of the status which obtained when their action was filed, *i. e.*, "the last actual, peaceable, noncontested status which preceded the pending controversy." *Fredericks v. Huber*, 37 A. 90, 91 (Pa.).

[*Stockholders' Derivative Suit*]

With this back-ground comment the question before us is reduced to an inquiry as to whether a stockholders' derivative suit will lie under Section 7 of the Clayton Act. We frame our answer to that question on the teachings contained in a recent opinion by the Court of Appeals for the Second Circuit in *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.* [1953 TRADE CASES ¶ 67,452], 202 F. 2d 731, which involved an appeal from a judgment dismissing a stockholders' derivative, antitrust suit for treble damages and injunctive relief. The court held that the action would lie and reversed the judgment of dismissal, saying, 202 F. 2d at page 734:

> "Now there does not seem real doubt but that an antitrust derivative suit will lie; indeed, that seems to follow from the nature of such suits. '* * * Equity * * * traditionally entertains the derivative or secondary action by which a single stockholder may sue in the corporation's right when he shows that the corporation on proper demand has refused to pursue a remedy, or show facts that demonstrate the futility of such a request. * * * The cause of action which such a plaintiff brings before the court is not his own but the corporation's. * * *' Mr. Justice Jackson in *Koster v. (American) Lumbermen's Mutual Casualty Co.*, 330 U. S. 518, 522, 67 S. Ct. 828, 91 L. Ed. 1067."

After discussing the applicable authorities, the court continued, at page 735:

> "There is an occasional flat statement * * * that no derivative antitrust suit will lie, as in *Kalmanash v. Smith* [1940-1943 TRADE CASES ¶ 56,296], 291 N. Y. 142, 157, 51 N. E. 2d 681, 688; but, as indicated, the precedents actually look the

other way and we can see no reason for such a view."

We agree with this reasoning and hold that plaintiffs were competent parties when this suit was brought and have remained so throughout pendency of the litigation.

[*Demand for Payment*]

Defendants' alternative argument is likewise unconvincing. After the certificate of merger had been filed with the Delaware authorities, each plaintiff submitted a written request to the merged corporation for payment of the full value of Domestic shares held by him. Could this be construed as voluntary action, defendants' assertion that they thereby elected to forfeit the status of stockholders might be persuasive. However, when that argument is considered in the light of the applicable Delaware statutes and decisions, defendants are in the position of asserting that "we, by actions committed while your case was pending, have placed you in a position where you must elect to demand payment for the value of your holdings and surrender your stock or else remain silent, in which case your silence will constitute your consent to the merger." That argument does not appeal to the conscience of a court of equity. Section 262 of Title 8 of the Delaware Code of 1953 provides that a dissenting stockholder may, "within 20 days after the mailing of the notice" of merger, demand payment for his stock. "[D]issenting stockholders are thus put to an election by the statute." *Cole v. National Cash Credit Ass'n,* 18 Del. Ch. 47, 56, 156 A. 183, 187, and failure to demand payment for their shares constitutes consent to the merger. *Federal United Corp. v. Havender,* 24 Del. Ch. 318, 11 A. 2d 331, at 343; *Porges v. Vadsco Sales Corp.,* 32 A. 2d 148, at 150 (Del. Ch.); *Cole v. National Cash Credit Ass'n, supra.* Plaintiffs' action in this respect is not inconsistent with their diligent prosecution of this appeal and their complaint, which is still pending. We shall not permit defendants to enforce upon plaintiffs the task of anticipating the ultimate decision in their suit at their peril. They were entitled to take any action necessary to protect their rights, regardless of the final outcome of this litigation.

The motion to dismiss is denied.

[¶ 68,818] Bertha Building Corporation v. National Theatres Corporation.

Gumbiner Theatrical Enterprises, Inc. v. National Theatres Corporation.

In the United States Court of Appeals for the Second Circuit. October Term, 1956. Nos. 329 and 330, respectively. Docket Nos. 24253 and 24254, respectively. Argued May 9, 1957. Decided September 10, 1957.

Appeals from two judgments of the United States District Court for the Eastern District of New York, CLARENCE G. GALSTON, Judge, dismissing the plaintiffs' complaints in actions of treble damages for violation of the Sherman Act, § 1-33 of Title 15, U. S. Code, on an opinion reported at [1956 TRADE CASES ¶ 68,308] 140 F. Supp. 909. Reversed and remanded.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Defenses—Statute of Limitations—State Tolling Provision—Factual Issues—Right to Jury Trial.—Where a trial court held that a California three-year statute of limitations was applicable to treble damage actions brought in a Federal District Court in New York by reason of a New York borrowing provision, and that the running of the California statute of limitations was not tolled by a California statute which prevents the running of a statute of limitations against a plaintiff who is unable to present his cause of action in California because the defendant is not amenable to process of the California courts, the court's dismissal of the treble damage actions on the grounds that the California statute of limitations barred the actions and that the California tolling provision was not applicable because the defendant was amenable to suit in California under Section 12 of the Clayton Act was reversed because a jury rather than the trial court should have decided whether or not the defendant was amenable to suit in California. If venue were the issue in the actions, no jury question would have been presented. However, the critical issue in the actions

was whether or not the California statute barred the actions, although this issue depended upon the question of whether or not the defendant was amenable to suit in California. The defendant's affirmative defense based on the California statute tendered genuine issues of fact which, as a matter of right, were triable by a jury.

Also, the dismissal could not be sustained as one properly ordered on the pleadings. Apparently, the trial court thought that proof that the defendant was a member of an alleged conspiracy which was injuring the plaintiffs in California would necessarily mean that the defendant was transacting business in California within the meaning of Section 12 of the Clayton Act, and, therefore, was entitled to prevail in its defense of the statute of limitations. However, co-conspirators "as such" are not agents for the purposes of venue.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.210, 9010, 9010.100, 9014.

For the appellants: Boris Kostelanetz (Corcoran, Kostelanetz & Gladstone, Arthur Karger, Theodore E. Gladstone, and Francis J. Mulderig, on the brief), New York, N. Y.

For the appellee: Frederick W. R. Pride (Dwight, Royall, Harris, Koegel & Caskey, Charles F. Young, and Stanley Godofsky, on the brief), New York, N. Y.

Reversing a decision of the U. S. District Court, Eastern District of New York, 1956 Trade Cases ¶ 68,308; for prior opinions of the Court, see 1954 Trade Cases ¶ 67,897 and 67,793, and 1952 Trade Cases ¶ 67,271.

Before: HAND, CHASE and HINCKS, Circuit Judges.

[*Issue on Appeal*]

HINCKS, Circuit Judge [*In full text*]: These are appeals by the plaintiffs from judgments of Judge Galston, dismissing the complaints in two actions to recover treble damages under the Sherman Act. The only question presented is whether the actions were barred by the Statute of Limitations. In that connection, the crucial question is this: Was it proper for the judge instead of a jury to decide whether the defendant could have been sued in the Southern District of California between July 20, 1935 and July 20, 1938? This is critical because upon it depends the question whether the actions were barred by the Statute of Limitations when they were commenced in the Eastern District of New York on September 5, 1951; and why this is true appears from the following facts.

[*Applicable Laws*]

The Sherman Act, even after its amendment by the Clayton Act in 1914, deals with the Statute of Limitations only in § 5 of the second Act, which provides that the period during which a suit in equity, brought by the United States, shall be pending shall toll the running of the statute as to "every private right of action * * * based * * * on matter complained of in said suit." Concededly such a suit was pending from July 20, 1938, until September 5, 1951, when these actions were begun. Except for this the law of New York controlled, and § 48(2) of the Civil Practice Act of that state fixes six years as the period of limitation for an action "to recover upon a liability created by statute." Were this the only relevant section, the action of Gumbiner Co., in which the alleged damages were all suffered before Dec. 8, 1931, would have been barred in spite of § 5 of the Clayton Act, but the action of the Bertha Building Corporation in which the damages did not end before July 4, 1935, would not have been. However, § 13 of the New York Civil Practice Act provides that when a claim "arises outside this state an action cannot be brought in this state to enforce" it "after the expiration of the time limited" by the law of the state where the claim arose, and since the claims at bar arose in California, the law of that state controls: *i.e.*, § 351 of the California Code of Civil Procedure. This provides that, if the obligor of a liability is "out of the state" when it "accrues * * * the time of his absence is not part of the time limited for the commencement of the action." It is the defendant's position that it was not "out of the state" during the three years (the period of limitation in California), before July 20, 1938, because during all that time the plaintiffs could have sued it in the Southern District of California. If this was an issue properly tried to a judge, instead of to a jury, we all agree that Judge Galston's findings were not "clearly erroneous," so that at long last the outcome turns upon the answer to the

crucial question posed in the opening paragraph of this opinion.

[*Jury Question*]

If the issue were one of whether the venue in each, or either, of the instant suits was proper, we should agree that no jury question was presented; for it is clear that a judge may take that issue from a jury when it arises at a trial and decide it himself just as he might have done had it been raised before trial. But though decision as to whether these suits are barred by the statute depends upon whether National could have been sued by these plaintiffs in California before the California statute of limitations had run, and so comes down to a question of venue in respect to each of such supposititious suits, the critical issue in the instant actions remains whether the statute bars the suits. That issue is not to be treated as merely one of venue. A determination of this defense has a reach and a finality not inhering in any decision as to venue. For if the defense of the statutory bar is sustained, the resulting judgment of dismissal operates as a final adjudication of the merits of the controversy: a decision as to venue, however, of course leaves the plaintiff free thereafter to seek an adjudication on the merits of his claim. F. R. C. P. 41(b).

Inherent in that issue is the resolution of disputed questions of fact involving decision as to the credibility of witnesses and the need to weigh the evidence of National to the effect that it was doing business in the Southern District of California, now that it is to its advantage to take such a position, against its repeated allegations to the contrary in prior suits brought against it when it was to its advantage to take a stand diametrically opposed to what it is now attempting to prove. And it should not be forgotten that decision must be made in the light of fact findings as to many matters peculiarly within the knowledge of those in charge of the affairs of National during the critical period; and as to many occurrences which may seem to have chameleonic attributes when interpreted, or explained.

[*Burden of Proof*]

The burden is, of course, on National to establish its affirmative defense of the limitation statute. *Pieczonka v. Pullman Co.*, 2 Cir., 102 F. 2d 432. And when the plaintiff has made out a prima facie case of absence from the jurisdiction the burden is on the defendant to show that such absence has not tolled the running of the statute. *Banister v. Solomon*, 2 Cir., 126 F. 2d 740.

[*Right to Jury Trial*]

Antitrust suits like these are triable as of right by jury if a party demands one. *Ring v. Spina*, 2 Cir. [1948-1949 TRADE CASES ¶ 62,224], 166 F. 2d 546. And if National's affirmative defense based on the statute of limitations tendered genuine issues of fact, they were also as of right triable by jury. *Jelliffe v. Thaw*, 2 Cir., 67 F. 2d 880; *Chambliss v. Simmons*, 5 Cir., 165 Fed. 419. Applicable, to be sure, is the rule that when the evidence is so one-sided that reasonable men would not differ as to the facts proved, the judge may take the issue from the jury, but we do not regard the evidence in this record in that category even without the admissions of National. However that may be, its admissions that it did no business in California and had no agents there during the relevant period should, we think, make it perfectly clear that there were genuine issues of fact which could not properly be taken from the jury: that it was erroneous to refer such issues to Judge Galston for trial without a jury.

[*Dismissal on Pleadings*]

We would hold further that the dismissal below cannot be sustained as one properly ordered on the pleadings. This was an alternative ground on which the order appealed from was based.

Apparently Judge Galston thought that proof that National prior to 1938 was a member of a conspiracy which was injuring the plaintiffs within California (proof essential to a recovery) would necessarily mean that National was "transacting business" in California within the meaning of § 12 of the Clayton Act and hence was entitled to prevail in its defense of the statute of limitations. In other words, he apparently thought that a fact essential to the proof of the claim also proved a defense to the claim. That analysis has indeed a superficial plausibility.

Admittedly, it is hard to see how a finding that National was not transacting business in California (without such a finding the plaintiffs cannot escape the defense of the statute) can square with a finding that

National was part of a conspiracy which caused injury to the plaintiffs in California (without which no recovery can be had on the complaint). However, the apparent conflict between those findings can perhaps be solved by ascertaining which of the numerous alleged co-conspirators are proven to be such, if any, and the relationship which exists between each of them and the plaintiffs. Not until this is done, do the cases interpreting § 12 of the Clayton Act [15 U. S. C. A. § 22] become relevant. The most recent Supreme Court discussion of this problem occurs in dictum in *Bankers Life & Casualty Co. v. Holland* [1953 TRADE CASES ¶ 67,626], 346 U. S. 379, where Justice Frankfurter dissenting on another point observes that co-conspirators "as such" are not "agents" for purposes of venue.

We cannot bring ourselves to accept the suggestion in *Giusti v. Pyrotechnic Industries,* 9 Cir. [1946-1947 TRADE CASES ¶ 57,504], 156 F. 2d 351, that because of the presence within the jurisdiction of one co-conspirator all foreign corporations which are alleged to be co-conspirators are amenable to process. We think such doctrine inherently unsound and in conflict with the later pronouncement in *Bankers Life, supra.* The best discussion of the problem is in *Independent Productions Corporation v. Loew's Inc.* (S. D. N. Y. 1957) [1957 TRADE CASES ¶ 68,615], 148 F. Supp. 460. We agree fully with the rationale and holding of Judge McGohey's opinion in that case. Thus it is conceivable that the proofs may be such that a finding that National had no agents in California and acting independently had transacted no business there, and thus has not sustained its statutory defense, is not necessarily in conflict with a finding that it conspired with others to cause injury to the plaintiffs in California. The validity of a plaintiff's verdict, if one shall be returned, cannot be assessed until all the evidence is in.

[*Reversed*]

Reversed and remanded for a jury trial of the issue raised by the defendant's plea.

[Dissenting Opinion]

HAND, Circuit Judge (dissenting): If these plaintiffs had sued the defendant within the period from July 20, 1935 and July 20, 1938, and the defendant had moved to dismiss the actions, as it did move on several other occasions, although the judge who heard the motion might have himself decided all issues of fact, he would have been free in his discretion to refer them to a jury, either upon a trial of that issue alone, or of the whole case. Rule 12(b) of the Federal Rules of Civil Procedure provides that among the defenses that a defendant may raise by motion is "improper venue," and Rule 43(c) provides that on any motion the court may hear the matter on affidavits, or "may direct that the matter be heard wholly or partly on oral testimony or depositions"; and there can be no doubt that this provision is constitutional. In a case depending upon the party's residence, the Supreme Court said: "* * * while the court might have submitted the question to the jury, it was not bound to do so, the parties having adduced their testimony, pro and con, it was the privilege of the court, if it saw fit, to dispose of the issue upon the testimony which was fully heard upon that subject." *Gilbert v. David,* 235 U. S. 561, 568. Earlier in *Wetmore v. Rymer,* 169 U. S. 115, 121, where jurisdiction depended upon the amount in controversy, it said: "* * * it would appear to have been the intention of Congress to leave the mode of raising and trying such issues to the discretion of the trial judge." See also *Lehigh Valley Coal Co. v. Washko,* 231 Fed. 42, 46 (C. C. A. 2). However, although the judge in an action during the critical period would have been free to dispense with a jury, I do not see how we can say that he would have done so, and since the defendant has the burden of proof on the issue of the statute of limitations, it failed to prove that the issue whether the defendant was "transacting business" in California would have been tried to a judge. I agree, therefore, with my brothers that Judge Rayfiel's order was wrong. Hence it follows that, if on the evidence before Judge Galston, a jury in an action brought in California might have found that the defendant had not "transacted business" in that state, the plaintiffs at bar were entitled to a verdict.

However, it seems to me that as on the evidence here at bar Judge Galston would have been bound to direct a verdict for the defendant if the case had been tried to a jury, Judge Rayfiel's error is immaterial. In short, I think that the defendant proved beyond dispute that it had been "transacting business" in California throughout the critical period. It will be necessary as a preliminary to deal with the plaintiff's agreement

that, regardless of whether the defendant had in fact been "transacting business," its denials that it had been in at least ten actions brought against it in both state and federal courts constituted a "judicial estoppel" against its present contradictory position. It is of course true that upon the trial in the actions at bar any statements made by the defendant in its pleadings and affidavits in other actions were competent evidence in favor of the plaintiffs; but I can find no warrant for the theory that they created a "judicial estoppel," except suggestions in one or two law reviews. Moreover, since such a doctrine is plainly contary to the underlying basis of the whole doctrine of estoppel by judgment it is plainly without foundation. Judgment by estoppel is not designed as a moral sanction against inconsistency: it does not visit penalties upon those who take one position today and deny it tomorrow; it is designed only to prevent a party who has, or has not, prevailed upon an issue in an earlier action to vex the same antagonist with the same dispute in a later one. The plaintiffs cite *Houghton v. Thomas*, 220 App. Div. 415, to the contrary, but Mack, the party against whom the estoppel there prevailed, although not a party to the earlier action, had been the attorney of one of the parties, which the court held to be the equivalent—itself a very doubtful extension of the doctrine.

The only issue therefore is whether the evidence before Judge Galston was in enough conflict to entitle the plaintiffs to a trial by jury. That makes it necessary to decide what § 12 of the Anti-Trust Act means by "transacting business." Section 7 had allowed an action to be brought in any district in which the "defendant resides or is found" and in the case of corporations this became "often an insuperable obstacle to" any remedy. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 374. The Supreme Court there held that in § 12 Congress added the clause, "transacts business," in order to assist the enforcement of the act by ridding actions of the web of refined decisions that had been woven about the word "found." It made no attempt, however, to state in general terms what constituted "transacting business" beyond saying (p. 373), that a corporation did so in any district "if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character." However, the Court discussed the issue at length in *United States v. Scophony Corporation*, [1948-1949 TRADE CASES ¶ 62,238], 333 U. S. 795, 807, 808. In that case the defendant, a foreign corporation, had, as here, "transacted business" by means of a subsidiary corporation whose conduct it reserved the right to supervise and regulate. It is true that the issue was whether that made the defendant "found" within the district where it was sued, but since the Court held that it did, *a fortiori*, it was a ruling that the defendant had been "transacting business" there. Therefore, it seems to me that we can, and indeed must, take what was said as an authoritative gloss upon §12. The Court declared that the statute meant the "practical everyday business or commercial concept of doing or carrying on business 'of any substantial character' "; and that the amendment had substituted "practical business conceptions" in place of "the previous hair-splitting legal technicalities encrusted upon the 'found'—'present'—'carrying-on-business' sequence."

Judge Galston made very detailed findings that are too long and too many, to quote, but I append numbers 10, 11 and 12, because these succinctly state the facts that appear to me to be controlling. The plaintiffs object that these improperly imputed to the defendant such of the described activities as took place after the organization of a corporation, which the findings speak of as "Agency":—a wholly owned subsidiary whose officers were "in the main" the defendant's officers. I rely upon the following language in *United States v. Scophony Co., supra* (pp. 814, 815), which seems to me to make "Agency's" business "business transacted" by the defendant: "The contracts created controls in Scophony, and in the American interests as well, which taken in conjunction with the stock controls called for continuing exercise of supervision over and intervention in American Scophony's affairs. We need not decide whether, in view of the agreements' continuing and persuasive effects, they could be considered as sufficing in themselves to make Scophony 'found' within the New York district. Whether so or not, they set the pattern for a regular and continuing program of patent exploitation requiring, as we have said, Scophony's constant supervision and intervention."

I cannot see why this language does not apply almost literally, *mutatis mutandis*, to the contract of December 2, 1935, between

the defendant and "Agency" along with which the defendant assigned to "Agency" the contract of Skouras Brothers of June 13. Of course it is true that a jury might not have believed the testimony offered by the defendant as to what was done under these contracts, although they did not put in any evidence to contradict it. Moreover, there might be a difficulty, if there had been no evidence that "Agency" had ever acted under the contract. However, that the plaintiffs may not assert, for it would cut the ground from under the complaints, which are based upon acts of the defendant after the contracts had been made. Hence, if the jury disbelieved the testimony of the defendant's witnesses as to what they had done, they must assume that other persons committed the wrongs charged in the complaints, and yet that they did not do so in performance of the contract with "Agency," for that contract, if once in effect, set up a "program" of "constant supervision and intervention"; and made the defendant "transact business." Surely we are not warranted in treating seriously such a web of dialectical fantasy.

The only evidence that the plaintiffs produced was the defendant's repeated assertions that it did not do any business in California, and had no agents there. Although, as I have said, these were indeed admissible against it, they amounted to no more than statements of the legal result of whatever the defendant had done, and they raised no issue as to the authority vested in the Skouras Brothers by the contract of June 13, 1935, and in "Agency" thereafter. Any conduct in California in performance of those contracts *ipso facto* made the defendant "transact business" in that state, no matter how often the defendant chose to deny that that had been the legal effect of what was done. I need not therefore answer the argument that all parties to a conspiracy are not mutual agents in the sense that what any one of them does is a "transaction of business" of all the rest.

In conclusion it seems to me worth while to observe that, although the result of my brothers' reasoning will indeed require the defendant to defend on the merits actions arising under the Anti-Trust Acts, toward which the Supreme Court, especially of late, has shown particular favor, it does so at the expense of a precedent of the greatest value to large corporations doing a wide interstate business. I cannot see why, if what we are deciding is right, a corporation by doing its local business through subsidiary corporations over whom it retains supervisory control, will not compel those whom it may damage to sue in some district where it can be "found," as distinct from any one in which it "transacts business." If so, the whole purpose of the amendment to § 12 will be defeated.

Appendix

"10. National Agency Corporation, a wholly-owned subsidiary of National, is a Delaware corporation which was organized in 1935. The name of this company was changed to National Theatres Amusement Co., Inc., and it was referred to at the trial by both names. It is referred to in these findings as 'Agency.' Agency was organized to render certain services and perform certain activities for National, which prior to the organization of Agency had been rendered and performed by National. Agency qualified to do business in New York in February, 1936, and in California in August, 1942. The same individuals were, in the main, the officers of National and of Agency. The two companies occupied the same premises.

"11. Agency entered into a contract with National on December 2, 1935, under which Agency agreed to perform extensive services for National and its subsidiaries. Under that contract Agency agreed to keep National fully informed of all matters relating to the affairs and business of National and its subsidiaries, including, with respect to the operating subsidiaries, the daily results of theatre operations, profits and losses, cash position, nature of the properties owned and changes therein and the general corporate set-up of all such subsidiaries. Agency agreed to maintain National's books of account and furnish other acccounting services such as preparation of statistical information, tax returns and similar matters. National agreed to pay Agency $3,000 per week for the services rendered to and for it. Throughout all of the period from the date of the contract in 1935 until the institution of these actions in 1951, Agency performed services for National and its subsidiaries as provided in that contract. Such services were performed in California and in New York and elsewhere.

"12. The contract of June 13, 1935, between the Skouras brothers and National was assigned to Agency on December 2, 1933. The assignment provided that National, however, retained all its rights under its contract with the Managers. The assignment contained the following provision:

'It is understood that notwithstanding such assignment to you, we retain all our rights and privileges under said contract, including, without limitation, the right to terminate the same, and that by such assignment you receive only the rights to the services of the Managers above referred to and the right to enforce performance thereof in any way not inconsistent with our rights in such connection * * *.'

"Under the employment contracts with the Skouras brothers, National paid their salaries until Agency was formed. After the organization of Agency, the fixed salaries were paid by that company pursuant to the assignment from National to Agency, but the portion of their compensation which was based upon the profits of National was paid by National. The payments made by Agency were made by it as the agent for National and for all purposes here were the same as though made directly by National."

[¶ 68,819] Eagle Lion Studios, Inc., Eagle Lion Films, Inc., PRC Productions, Inc., Chesapeake Industries, Inc. v. Loew's, Inc., RKO Theatres, Inc., and RKO Film Booking Corp.

In the United States Court of Appeals for the Second Circuit. October Term, 1956. No. 96. Docket No. 24224. Argued November 15, 1956. Decided September 9, 1957.

Plaintiffs appeal from a judgment dismissing their action on the merits following a trial without jury before Honorable ARCHIE O. DAWSON in the United States District Court for the Southern District of New York. Reported below [1956 TRADE CASES ¶ 68,374] 141 F. Supp. 658. Affirmed.

Clayton and Sherman Antitrust Acts

Combinations and Conspiracies—Exclusion of Motion Pictures from Subsequent Run Theatres—Concerted Discrimination—Sufficiency of Evidence.—A trial court ruling that two motion picture theatre circuits and a film booking company did not combine and conspire to exclude companies, engaged in the production and distribution of motion pictures, from the opportunity of licensing, on a competitive basis, their feature motion pictures to the circuits' theatres, which exhibited fetaure motion pictures in the New York metropolitan area on runs subsequent to the first run, was affirmed. The companies did not offer any direct proof of a combination or conspiracy to deprive them of an equal competitive opportunity to license their films. Many of their films were licensed for exhibition in the circuits' theatres, but the companies failed to prove that the theatre circuits concertedly discriminated against the companies in the licensing of films. A decree entered in a Government antitrust action against the circuits; a comparison of the ratio of the income received by the companies from the subsequent run theatres in the New York metropolitan area to the income received nationally, as compared to the ratio of the income received by major distributors from the subsequent run theatres in the area to the income which such distributors received nationally; and other statistics did not establish the existence of a conspiracy. There was nothing in the record to support the claim that the treatment accorded any specific film distributed by the companies was dictated by any consideration other than independent business judgment. The presidents of both of the circuits denied that there was any agreement between the circuits relating to the licensing of the companies' films, and there was testimony that the poor returns on the companies' films were attributable to their quality.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.540, 2005.660.

Combinations and Conspiracies—Proof of Conspiracy—Statistical Comparisons.—A trial court correctly ruled that detailed statistics comparing film rentals earned by affiliated companies, engaged in the production and distribution of motion picture films, with those earned by certain major film distributors did not establish the existence of a

conspiracy by two theatre circuits and a film booking company to exclude the companies from the opportunity of licensing, on a competitive basis, their feature motion pictures to the circuits' theatres, which exhibited feature motion pictures in the New York metropolitan area on runs subsequent to the first run. The companies had contended that if they did not receive as large a proportion of their national film rentals from the New York subsequent run theatres as did the major distributors, the difference was attributable to discrimination against their films resulting from the concerted action of the theatre circuits, who were the dominant exhibitors in the New York first subsequent run market. Nothing contained in the statistics, however, supported an inference that the theatre circuits agreed with each other to discriminate against the exhibition of the companies' films. The statistics relating to the above contention and other statistics compiled by the companies were susceptible of conflicting interpretations, helpful alike to the theatre circuits' position as well as the companies' position.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.410.

Private Enforcement and Procedure—Suit for Civil Damages—Evidence Admissible to Prove Antitrust Law Violations—Government Decree—Identity of Issues.—A trial court correctly ruled that findings of fact and conclusions of law contained in a final decree entered against two motion picture theatre circuits in a Government antitrust action did not constitute prima facie evidence of a conspiracy by the theatre circuits to exclude companies, engaged in the production and distribution of motion pictures, from the opportunity of licensing, on a competitive basis, their feature motion pictures to the circuits' theatres, which exhibited feature motion pictures in the New York metropolitan area on runs subsequent to the first run. In determining, under Section 5 of the Clayton Act, the effect of a judgment in a prior antitrust suit, it is not the court's function to consider inferences, whether reasonable or not, that might be drawn from the language of the prior judgment. In construing a prior judgment, the court in the subsequent action does not sit as a trier of fact, that is, it does not have wide license to draw inferences from the judgment and record in the prior litigation. The court is circumscribed by the relatively narrow limits of the doctrine of estoppel. It must be guided by the well-established principles of collateral estoppel. A "judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action." The issue in the instant suit was not "distinctly determined" in the Government litigation. The Government suit involved action directed at other theatre exhibitors, and the instant suit involved action directed at independent motion picture distributors.

See Private Enforcement and Procedure, Vol. 2, ¶ 9012.410.

For the appellants: James L. O'Connor (William L. McGovern, Robert L. Wright, Seymour Krieger, and Arnold, Fortas & Porter, Washington, D. C., of counsel), New York, N. Y.

For the appellees: Davis, Polk, Wardwell, Sunderland & Kiendl (S. Hazard Gillespie, Jr., Francis W. Phillips, and Robert B. Fiske, Jr., of counsel), New York, N. Y., for Loew's, Inc.; and O'Brien, Driscoll & Raftery (Edward C. Raftery, George A. Raftery, and William F. Whitman, of counsel), New York, N. Y., for RKO Theatres, Inc., and RKO Film Booking Corp.

Affirming a decision of the U. S. District Court, Southern District of New York, 1956 Trade Cases ¶ 68,374; for a prior opinion of the U. S. Court of Appeals, Second Circuit, see 1955 Trade Cases ¶ 67,957, reversing in part and affirming in part a decision of the U. S. District Court, Southern District of New York, 1954 Trade Cases ¶ 67,763.

Before: CLARK, Chief Judge, and HINCKS and WATERMAN,[1] Circuit Judges.

[*Nature of Action*]

WATERMAN, Circuit Judge [*In full text*]: The appellants, four affiliated corporations formerly engaged in the production and distribution of motion pictures, appeal from a judgment dismissing their complaint after

[1] This appeal was argued before a panel composed of Chief Judge Clark and Judges Frank and Hincks. Judge Frank died before any opinion had been prepared. Thereafter Judge Waterman was substituted.

a trial before the Court without a jury. [1956 TRADE CASES ¶ 68,374] 141 F. Supp. 658 (S. D. N. Y. 1956). The appellants had brought suit against Loew's, Inc., RKO Theares, Inc., and RKO Film Booking Corp., the appellees, to recover treble damages under the anti-trust laws, 15 U. S. C. A. §§ 1, 2, 15. These defendants, during the period in issue, were engaged in the exhibition of motion pictures. The complaint, insofar as it concerned the appellees, set forth a claim for damages for losses allegedly resulting from a conspiracy to exclude the plaintiffs during the period 1946-1950 from licensing their films on a competitive basis to the "first subsequent run" theatres of Loew's and RKO in the metropolitan area of New York City.[2]

Since the facts pertinent to this litigation were set forth in detail by Judge Dawson in his comprehensive opinion below, see [1956 TRADE CASES ¶ 68,374] 141 F. Supp. 658, we will mention only those facts necessary to the disposition of this appeal.

The plaintiffs and their predecessor organizations produced and distributed motion pictures from 1943 to 1951. During this period they also distributed the films of certain other domestic and foreign producers made either in this country or abroad. The defendants, at the times material to this action, operated motion picture theatres in metropolitan New York, which were known, respectively, as the Loew's and RKO circuits. During the years 1946 to 1950, the years involved in this suit, the Loew's circuit in the metropolitan area comprised approximately 60 "subsequent run" theatres, and the RKO circuit between 30 and 40 such theatres. The term "subsequent run" applies to all theatres in the New York area except the 40 or more "first run" theatres concentrated in the Broadway midtown area of New York City. During this period in suit there were at least 600 subsequent run theatres in metropolitan New York, as that area was defined by the pleadings. However, these theatres fell into an elaborate hierarchy of *"first* subsequent run," *"second* subsequent run," and so forth. Approximately 45 of the Loew's theatres were in the "first subsequent run" category, whereas from 31 to 36 of the RKO theatres (depending on the year in question) were so designated.

Although no findings were made below as to the total number of "first subsequent run" theatres in the New York metropolitan area, it is apparently undisputed that the defendants occupied a dominant position in the "first subsequent run" exhibition market. The evidence at trial also tended to show that this market was the crucial one in the entire New York metropolitan subsequent run exhibition field, because the rental rates, billings, and playing positions of individual films throughout their subsequent run history were substantially influenced, if not determined, by the treatment they received from the "first subsequent run" theatres.

Each of the two defendant circuits exhibited about 208 pictures a year—or approximately 4 a week. Generally the same program, comprised of a double feature, would be played simultaneously throughout the first subsequent run theatres of an entire circuit. The playing engagements were typically for the "long half" of the week (Thursday through Sunday) or for the "short half" of the week (Monday through Wednesday). An individual film could receive "top" or "equal" billing, or could be placed as the "second" feature, during either the long or short half of the week.

From 1946 to 1950, the plaintiffs distributed 195 films, which earned total gross film rentals of $39,107,800 in this country, of which $2,362,200 was received from subsequent run theatres in the New York metropolitan area. The trial court found, 141 F. Supp. at 663, that

> "of the 195 pictures distributed by the plaintiffs during the period in question, the defendants exhibited 85 pictures on one or the other of its circuits in the New York metropolitan area * * * Each of the defendants exhibited certain other pictures distributed by the plaintiffs in one or more theatres amounting to less than the full circuit. Loew's played some 39 additional pictures in addition to the 50 which it played on the entire circuit. RKO exhibited in one or more of its theatres during the period in question some 55 additional pictures."

[2] The metropolitan area was defined in the complaint as "the five boroughs of greater New York City, southern portion of Westchester County and western portion of Nassau County, New York State." No part of the State of New Jersey was included.

[*Trial Court Issues*]

Thus the plaintiffs did not attempt to prove below, nor do they contend on appeal, that the defendants conspired to totally exclude their pictures from exhibition in the defendants' theatres. Rather, the issues in controversy were framed in a pretrial order as follows:

"1. Did the defendants combine and conspire in violation of the anti-trust laws of the United States to exclude the plaintiffs from the opportunity of licensing *on a competitive basis* their feature motion pictures to Loew and RKO theatres which exhibit feature motion pictures in the New York metropolitan area on runs subsequent to first run Broadway? (Emphasis added.)

"2. If so, were the plaintiffs directly damaged in their business or property as the result of the said illegal combination and conspiracy, and, if so, in what amount?"

[*Ruling*]

The trial court answered both questions in the negative, and, dismissing the complaint, entered judgment for the defendants. On appeal, we affirm that judgment, since we discern no error of law in the proceedings below, and we do not believe that the trial court's findings of fact were "clearly erroneous." Fed. R. Civ. P. 52(a).

[*Evidence*]

At trial, in order to sustain their burden of proof on both issues, the plaintiffs relied primarily upon (1) the findings of fact and conclusions of law contained in the final decree of the *Paramount* case, *United States v. Loew's Inc. et al.,* Equity No. 87-273, S. D. N. Y., filed Feb. 8, 1950 [1950-1951 TRADE CASES ¶ 62,573], *aff'd,* 339 U. S. 974 (1950) (for prior history, see *United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323 [1946-1947 TRADE CASES ¶ 57,470], 70 F. Supp. 53 [1946-1947 TRADE CASES ¶ 57,526] (1946), *reversed and remanded in part,* 334 U. S. 131 [1948-1949 TRADE CASES ¶ 62,244] (1948); 85 F. Supp. 881 [1948-1949 TRADE CASES ¶ 62,473] (1949)); (2) detailed statistics comparing film rentals earned by the plaintiffs during the period in question with those earned by the eight major distributors in the *Paramount* case; (3) the testimony of the president of one of the plaintiffs; (4) a letter written by the president of another of the plaintiffs to the president of Loew's.

[*Contentions on Appeal*]

On appeal, the plaintiffs urged two principal grounds for reversal: (1) that the trial court erred in its construction of the *Paramount* judgment; and (2) that the trial court did not properly evaluate the comparative film rental statistics.[8] We find both of these contentions without merit.

1. The Paramount Judgment

[*Clayton Act*]

"A government [anti-trust] suit, while primarily in the public interest, if successful, also accrues to the immediate benefit of those injured by the wrongful conduct." *T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.* [1953 TRADE CASES ¶ 67,500], 113 F. Supp. 265, 269 (S. D. N. Y. 1953). Under section 5 of the Clayton Act, 15 U. S. C. A. § 16,

"A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties * * *"

Relying on section 5, the appellants have strenuously contended throughout this litigation that the judgment in the *Paramount* case constitutes *prima facie* evidence of a conspiracy by the appellees to deny the plaintiffs competitive access to the appellees' theatres in metropolitan New York.

[*Prior Government Judgment*]

The *Paramount* judgment embodied findings of fact and conclusions of law based on the situation in the motion picture industry as it existed in 1945. The plaintiffs argue, however, that the conditions found to exist at that time continued until 1950, the date of the final order in the *Paramount* case.

[8] The plaintiffs on appeal do not appear to rely to any real extent on the testimony and correspondence of their officers that was introduced at trial. Nevertheless, we shall advert briefly to that evidence later in the opinion.

As the trial court pointed out, "the primary issue in that [the *Paramount*] case related to the effect under the anti-trust laws of a combination between the large producers of motion pictures who also controlled, to a substantial extent, the places of exhibition of those motion pictures." The great bulk of the many findings of fact and conclusions of law contained in the final *Paramount* decree do not touch upon the narrow issue here at bar. See *United States v. Loew's Inc. et al.*, Equity No. 87-273, S. D. N. Y., filed Feb. 8, 1950 [1950-1951 TRADE CASES ¶ 62,573], *aff'd*, 339 U. S. 974 (1950). The appellants direct our attention, however, to several findings and conclusions, particularly Finding No. 154(d) and Conclusion No. 16, which they contend are evidence of the alleged conspiracy set forth in their complaint. Especial emphasis is placed on the following sentence of Finding No. 154(d):[4]

> "In New York City Loew and RKO divided the neighborhood prior run product of the various defendant distributors under a continuing arrangement so that there was no competition between them in obtaining pictures."

Conclusion of Law No. 16 in the *Paramount* case reads as follows:

> "Loew's, Incorporated, has violated the Sherman Act by conspiring with RKO to monopolize and monopolizing the first neighborhood run in New York City, and by the dividing of that market between itself and RKO."

[*Trial Court Ruling*]

After examining Finding No. 154(d) and Conclusion No. 16, as well as the other portions of the *Paramount* record that were relied upon by plaintiffs,[5] the trial court, see 141 F. Supp. at 667, concluded that

> "while the findings may perhaps constitute evidence * * * that Loew's and RKO had no competition between themselves in obtaining pictures from the defendant distributors who were parties to the *Paramount* case and had monopolized between themselves the first neighborhood run in New York City, the findings, standing by themselves, are certainly not evidence that there was no competition between Loew's and RKO in obtaining and distributing pictures of so-called 'independents' such as the plaintiffs in the present case."

[*Appellants' Contention*]

The appellants would have us believe that this was a niggardly construction of the *Paramount* judgment and that the only fair import of that judgment, as applied to the issue at bar, was that the plaintiffs were denied the opportunity to compete on an equal basis with the eight major distributors in the sale and licensing of their films to the defendants. Their argument appears to be: The defendants not only agreed not to compete with each other for the films of the eight major distributors, but each defendant also agreed to give preferential treatment to the films of those distributors that were allocated to it, provided that the films of those distributors met the particular defendant's minimal exhibition standards and were obtainable by it on satisfactory terms. That is, according to the appellants, the finding in *Paramount* of a concerted assignment by the defendants here of certain distributors necessarily implied a finding that there was an affirmative duty on the

[4] Finding No. 154(d), in its entirety, reads as follows:
"154(d). In New York City Loew and RKO divided the neighborhood prior run products of the various defendant distributors under a continuing arrangement so that there was no competition between them in obtaining pictures. On one occasion where Paramount was having a long dispute with Loew's as to rental terms for Paramount films to be shown in Loew's New York neighborhood circuit of theatres, no attempt was made by Paramount to lease its films to RKO for exhibition in the latter's circuit, nor was any effort made by RKO to procure Paramount films as they both evidently preferred to adhere to the existing arrangement, under which Loew's circuit consistently exhibited the films of itself, Paramount, United Artists, Columbia and half of Universal, while RKO exhibited the films of itself, Fox, Warner, and half of Universal. Accordingly, the showing that 85% of Loew's theatres are in competition with theatres of other defendants is misleading and may properly be reduced by the exclusion of its New York neighborhood theatres. If this is done, it would give Loew a percentage of approximately 42% of its theatres in competition with other defendants in cities over 100,000."

[5] In addition to Finding No. 154(d) and Conclusion No. 16, the appellants call our attention to Findings No. 84, 99, 100, 127, 147(c), 156(b), and 158, and Conclusions No. 7 and 12 of the final decree in the *Paramount* case, Equity No. 87-273, S. D. N. Y., filed Feb. 8, 1950 [1950-1951 TRADE CASES ¶ 62,573], *aff'd*, 339 U. S. 974 (1950). We have examined these findings and conclusions, as well as the many other findings and conclusions embodied in that decree. We conclude that their relevance to the issues here in suit is even less than that of Finding No. 154(d) and Conclusion No. 16, which are discussed in detail in our opinion *infra*.

part of each defendant to use, whenever possible, the product of the distributors assigned to it, in addition to the negative duty not to compete for the product of those distributors that were assigned to the other defendant. The impact of such a conspiracy upon the plaintiffs would be to deny them truly competitive access to the defendants' theatres, inasmuch as their product would be purchased by each defendant only to fill marginal needs that were not satisfactorily met by the *Paramount* distributors assigned to it.

[*Scope of Clayton Act*]

The appellants contend that the construction they argue for is the only reasonable inference to be drawn from the *Paramount* finding and conclusion quoted above. In so doing, however, they misconceive the import and applicability of section 5. In determining, under that section, the effect of a judgment in a prior anti-trust suit it is not our function to consider inferences, whether reasonable ones or not, that might be drawn from the language of the prior judgment. Under section 5 a judgment in a prior suit is *prima facie* evidence "as to all matters respecting which said judgment * * * would be an *estoppel as between the parties thereto* * * *" (Emphasis added.) Thus, in construing a prior judgment for purposes of this statute, the court in the subsequent action does not sit as a trier of fact, *i.e.,* it does not have wide license to draw inferences from the judgment and record in the prior litigation. Rather, the court is circumscribed by the relatively narrow limits of the doctrine of estoppel:

> "The evidentiary use which may be made under § 5 of the prior conviction of respondents is * * * to be determined by reference to the general doctrine of estoppel * * * Such estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution." *Emich Motors Corp. v. General Motors Corp.* [1950-1951 Trade Cases ¶ 62,778], 340 U. S. 558, 568-69 (1951).

See also *Partmar Corp. v. Paramount Pictures Theatres Corp.* [1954 Trade Cases ¶ 67,674], 347 U. S. 89, 102 (1954); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.* [1954 Trade Cases ¶ 67,640], 346 U. S. 537, 542 (1954); *Paramount Film Distributing Corp. v. Village Theatre* [1955 Trade Cases ¶ 68,239], 228 F. 2d 721, 727 (10 Cir. 1955); *Loew's, Inc. v. Cinema Amusements, Inc.* [1954 Trade Cases ¶ 67,648], 210 F. 2d 86, 90 (10 Cir. 1954), *cert. denied,* 347 U. S. 976; *Monticello Tobacco Co. v. American Tobacco Co.* [1952 Trade Cases ¶ 67,300], 197 F. 2d 629, 631-32 (2 Cir. 1952), *cert. denied,* 344 U. S. 875; *T. C. Theatre Corp. v. Warner Bros. Pictures* [1953 Trade Cases ¶ 67,500], 113 F. Supp. 265, 269-70 (S. D. N. Y. 1953).

Subsequent to the *Emich* decision, this court stated in *Monticello Tobacco Co. v. American Tobacco Co.* [1952 Trade Cases ¶ 67,300], 197 F. 2d 629, 631-32 (2 Cir. 1952) (per Judge Clark):

> "* * * whatever is crucial to the treble-damage case and is not *distinctly determined* in the previous government suit must be proven by direct evidence. *Dipson Theatres v. Buffalo Theatres,* 2 Cir. 190 F. 2d 951, 958, certiorari denied 342 U. S. 926, 72 S. Ct. 363. Section 5 does not permit a haphazard use of a criminal judgment merely for its aura of guilt, or 'to imply new wrongdoing from past wrongdoing.' Hastie, C. J., dissenting in *Milgram v. Loew's, Inc.,* 3 Cir., 192 F. 2d 579, 595. See also Note, 65 Harv. L. Rev. 1400, 1404-1407." (Emphasis added.)

Hence, in determining the import of the *Paramount* judgment, we must be guided by the well-established principles of collateral estoppel. It is true that where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action. But "a judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact *not actually litigated and determined in the first action.*" *Restatement, Judgments* § 68 (1942). (Emphasis added.)

[*Government Decree Not Evidence*]

Applying these principles to the *Paramount* judgment we conclude that the issue here in suit was not "distinctly determined" in the *Paramount* litigation. In that case the court found that these defendants had agreed not to compete with each other for the films of the eight major distributors. The aim, and apparent effect, of that conspiracy was the monopolization by the defendants of the first subsequent run exhibition market in metropolitan New York, to the detriment of other theatre *exhibitors* in that area. Thus the court in *Paramount* did not address itself to the different issue now before us, *i.e.,*

whether these defendants conspired together to exclude these plaintiffs, who were independent *distributors,* from the opportunity of licensing their pictures on a competitive basis to the defendants' theatres in metropolitan New York.

Nor was there any finding in the *Paramount* case to the effect that the defendants had agreed with each other to impose upon themselves an affirmative duty to give preference to the motion pictures of those major distributors that were assigned to them, thereby foreclosing the plaintiffs from access to all but the marginal exhibition needs of the defendants. In short, we must look elsewhere if we are to find any evidence of the conspiracy that the plaintiffs here charge.

2. Comparative Film Rental Statistics

[*Purpose of Statistics*]

At the trial the plaintiffs relied on certain statistical data both as evidence of the conspiracy charged in their complaint and as evidence of the amount of damages allegedly suffered by them as a result of that conspiracy. On appeal, they advance these statistics for the primary purpose of showing injury; secondarily, as proof the existence of the conspiracy. We shall first consider them in the latter context, however, since it is necessary to find a conspiracy by the defendants adversely affecting these plaintiffs before we reach the question of damages. And, of course, if no conspiracy is found, all evidence admitted on the question of damage becomes of no moment.

[*The Statistics*]

At trial the plaintiffs introduced, as their Exhibit 10, a chart entitled "Ratio of Subsequent Run Rental from Metropolitan New York to National Film Rental Less Such Subsequent Run Rental." This chart indicated that the plaintiffs had received 6.4% of their film rentals on the 195 pictures distributed by them during the years 1946 to 1950 from subsequent run theatres in the metropolitan area of New York. The chart also showed that, on the basis of 96 "representative" pictures, the eight major distributors earned 8.9% of their film rentals from New York subsequent run theatres during the period of the alleged conspiracy.

The 96 "representative" pictures of the eight major distributors were selected by the following method: All films of each distributor for each of the years from September 1, 1946, to August 31, 1950, were put in 32 separate lists in the order of the total gross national revenue each earned. Three median rentals were then selected from each list: (1) the median rental for the entire list; (2) the median rental from the top quarter of the pictures; and (3) the median rental from the lowest quarter of the pictures.

These statistics were introduced in support of the following evidentiary hypothesis advanced by the plaintiffs: If the plaintiffs did not receive as large a proportion of their national film rentals from the New York subsequent run theatres as did the major distributors, the difference was attributable to discrimination against the plaintiffs' pictures resulting from the concerted action of the defendants, who were the dominant exhibitors in the New York first subsequent run market.[6]

Using the difference between 6.4% and 8.9% (2.5%), the plaintiffs calculated that by reason of the defendants' concerted discrimination, they lost at least $417,000 in net rentals on the films distributed by them during the four years in suit. The figure of $417,000 was arrived at by first taking 2.5% of the difference between the plaintiffs' total domestic gross film rentals and their New York neighborhood gross film rentals. The resulting sum, $919,000, was then reduced by subtracting 54.6% therefrom, an amount representing the average share of the gross rental that was passed on to the producer.[7]

The trial court made the following breakdown of the plaintiffs' statistics:

[6] It would seem that, in order for this hypothesis to have any color of validity, it must be assumed that the plaintiffs were not discriminated against elsewhere, or at least not to the extent that they were discriminated against in metropolitan New York.

[7] Apparently no allowance was made for any other expenses incident to the earning of film rentals.

EAGLE LION

No. of Pictures	Pictures with National Film Rental	Ratio of Metropolitan Sub-run Rent to National Less Metropolitan Sub-run Rent
97	Under $100,000	6.9%
51	100,000 to 200,000	5.4%
10	200,000 to 300,000	6.7%
16	300,000 to 400,000	5.9%
3	400,000 to 500,000	8.6%
18	Over 500,000	6.7%
195		6.4%

8 DISTRIBUTORS

No. of Pictures	Pictures with National Film Rental	Ratio of Metropolitan Sub-run Rent to National Less Metropolitan Sub-run Rent
7	Under $100,000	5.2%
10	100,000 to 200,000	4.9%
7	200,000 to 300,000	6.6%
6	300,000 to 400,000	5.1%
5	400,000 to 500,000	7.1%
61	Over 500,000	9.2%
96		8.9%

As is clearly revealed by this analysis, only the 18 pictures distributed by the plaintiffs that earned national rentals in excess of $500,000 drew proportionally less revenue from the New York subsequent run market than did comparable box office attractions distributed by the eight major distributors. Indeed, on films earning less than $500,000 nationally, the plaintiffs received a slightly higher proportion of national rental from the metropolitan subsequent run market than did the eight majors. On appeal, the plaintiffs attempt to explain this latter phenomenon by pointing out that many of their lower-earning pictures were foreign made, and thus were films that traditionally earn a higher percentage of their total national rentals in the New York area than domestic productions. Be that as it may, nothing contained in the statistics applicable to the great bulk of plaintiffs' pictures (177 out of 195 earned less than $500,000 nationally) supports an inference that the defendants agreed with each other to discriminate in any way against the exhibition of the plaintiffs' films.

[*Concerted Discrimination*]

Nor did the court below find any evidence of concerted discrimination with respect to those 18 pictures distributed by the plaintiffs that earned over $500,000 nationally.

> "All 18 of these films each had a first neighborhood run in the entire Loew's or the entire RKO circuit in metropolitan New York. Seventeen of the pictures played the long half of the week, and six had top billing." 141 F. Supp. at 670.

The accuracy of these findings has not been attacked on appeal. Any further meaningful comparison between the New York rentals of these films and those of the major distributors in the $500,000-plus bracket is complicated by the fact that 61 out of the 96 "representative" pictures of the majors are in this high-earning category, whereas only 18 out of the 195 films distributed by the plaintiffs were comparably successful in their national performances.

The plaintiffs maintain, however, that even though many of their films were exhibited in the defendants' theatres, they were shown on discriminatory terms, *i. e.*, pictures distributed by the plaintiffs allegedly were forced to endure longer "clearances" between first and subsequent runs, and were obliged to accept less favorable rental terms than comparable box office attractions distributed by the eight majors. We can find nothing in the record to support the claim that the treatment accorded any specific film distributed by the plaintiffs was dictated by any consideration other than the independent business judgment of the defendants' officers. The trial judge was unimpressed by the plaintiffs' attempts to show concerted discriminatory treatment of certain individual pictures distributed by the plaintiffs. See 141 F. Supp. at 672-73. We accept his conclusion that no proof of a conspiracy to discriminate against any of these films was established by the testimony and statistics adduced by the plaintiffs.

[*Clearances*]

In support of the claim that their pictures, when considered collectively, were forced to endure unwarrantedly long clearances between first and subsequent runs, and low flat rentals rather than a percentage of the box office receipts, the plaintiffs

introduced the following compilation of statistics:

	Average Circuit Rental	Average New York Metropolitan Rental Less First-Run Broadway
Long Half—Top or Equal Billing		
Eight Majors	$97,500	$190,000
Eagle Lion	55,200	101,000
Long Half Second		
Eight Majors	15,300	40,000
Eagle Lion	15,200	30,000
Short Half		
Eight Majors	7,500	16,000
Eagle Lion	2,700	7,500

The plaintiffs point out that the average circuit rental ($55,200) for their pictures that played "Long Half—Top or Equal Billing" in the defendants' circuits was substantially less than the average circuit rental ($97,500) for films distributed by the eight majors that were accorded comparable playing positions. The plaintiffs also call our attention to the disparity between the average circuit rental ($7,500) for pictures of the majors that were exhibited during the "short half" of the week in the defendants' circuits and the average rental ($2,700) for films distributed by the plaintiffs and shown during the "short half." No significant difference for films playing the "Long —Second" was revealed by this chart. ($15,300 for the majors as against $15,200 for the plaintiffs.)

The defendants, on the other hand, emphasize the second column in this chart—the figures representing the "Average New York Metropolitan Rental Less First-Run Broadway." These figures take into account revenue from *all* subsequent run theatres in the New York area, not just those owned or operated by the defendants. Using the figures in both the first and second columns to compute comparative ratios, we find that on pictures shown during the long half of the week, top or equal billing, the plaintiffs received 54.6% of their New York subsequent run film rental from the defendants' theatres, whereas the eight majors received only 51.3% of their metropolitan subsequent run rental on pictures playing those positions from the Loew's and RKO circuits. A similar computation reveals that on pictures given second billing on the long half of the week, the plaintiffs received 50.6% of their New York subsequent run film rental from the defendants, whereas the eight majors derived only 38.3% from this source. Thus on pictures falling into these two categories, the plaintiffs fared proportionally better in the defendants' circuits, as compared with other New York neighborhood theatres, than did the eight majors—a fact clearly tending to rebut the plaintiffs' claims of discrimination against their pictures by the defendants.

It is only on pictures playing the short half of the week that the plaintiffs received a smaller proportion (36%) of their total New York subsequent run rental from the defendants than did the eight major distributors (47%). However, as we noted above, the plaintiffs received a higher proportion of their total domestic film rental from the New York subsequent run theatres on pictures nationally grossing less than $500,000 than did the majors on comparable box office attractions. In general, pictures playing the "short half" fell into this low revenue category.

[*No Evidence of Conspiracy*]

Thus, once again, the plaintiffs' statistics are susceptible of conflicting interpretations, helpful alike to the defendants' position as well as the plaintiffs'. We therefore find that the comparative film rental statistics, in and of themselves are not reliable proof of the existence of the alleged conspiracy.

3. Other Evidence

[*Plaintiffs' Testimony*]

The only testimony of an officer of the plaintiffs was that of Mr. MacMillan, the president of Chesapeake Industries, the parent corporation. He testified that sometime in 1950, after the decree had been entered in the *Paramount* case, he went to the offices of the defendants and complained about discrimination against the plaintiffs' films, saying to the president of RKO "that unless we got competitive access to the circuit we would have no alternative but to bring a suit for damages under the antitrust laws." [8]

[8] The plaintiffs introduced a letter written in August 1948 by Arthur Krim, the President of Eagle Lion Studios, to Joseph Vogel, the President of Loew's, and the latter's reply. Krim complained that Loew's was unjustifiably discriminating against the plaintiffs' pictures. Vogel answered to the effect that Loew's had shown "ninety per cent" of the pictures offered to it by the plaintiffs, and that the terms on which those pictures were licensed were influenced solely by business considerations.

The trial judge properly gave little weight to this self-serving declaration, particularly since MacMillan admitted that he "personally had nothing to do with the sale or distribution of pictures to the exhibitors." The other witnesses called by the plaintiffs contributed no independent competent testimony tending to establish the existence of the alleged conspiracy.

[*Defendants' Testimony*]

The presidents of both defendant corporations took the stand and stoutly denied that there was any agreement between the defendants relating to the licensing of the plaintiffs' pictures. They each also disclaimed knowledge of licensing negotiations that the other defendant had with the plaintiffs. Additionally the defendants called as a witness one Max Youngstein, who had been in charge of "advertising, publicity and exploitation" for plaintiff Eagle Lion Films from 1946 to 1948. He testified that he was not aware of any conspiracy by the defendants to discriminate against the plaintiffs' pictures. In his opinion, the poor returns on the plaintiffs' films were attributable to their quality, since, from the basis of box office appeal, they were at "the very bottom rung of the ladder" and "much inferior" to films contemporaneously offered by other distributors.

Also introduced by the defendants was the testimony of Russell Downing, the president and managing director of Radio City Music Hall, a large first run New York theatre that was not affiliated or connected with any producer or distributor. Downing testified that out of the 195 pictures distributed by the plaintiffs, only four were submitted to his theatre for "screening" and consideration, and that not one of these four was accepted because, in the opinion of the witness, they did not meet the standards of quality—at least as measured by potential box office drawing power —required by the Music Hall.

[*Absence of Evidence*]

Perhaps significantly, the plaintiffs did not put on the stand any individuals who had been engaged in negotiating for the distribution of their pictures during the period of the alleged conspiracy, and who would have had first hand knowledge of conspiratorial discrimination, if any, experienced by the plaintiffs.

[*Dismissal Affirmed*]

Thus an examination of the entire trial record, as well as an analysis of the *Paramount* judgment, supports the findings of the trial judge and his ultimate conclusion that the plaintiffs failed to prove the existence of the alleged conspiracy. Since the conspiracy was not proven, we do not examine the questions plaintiffs raise relating to the elements of alleged damages they claim to have suffered, and with respect to which much of their expert testimony was directed.[9]

Judgment affirmed.

[Dissenting Opinion]

[*Applicability of Government Decree*]

CHARLES E. CLARK, Chief Judge (dissenting): The trial judge in my view gave the *Paramount* judgment not only "a niggardly construction," but one quite opposite to its intended meaning as to the issues here involved. By so doing he deprived the plaintiffs of its effect as "prima facie evidence" against these defendants as provided in the statute, 15 U. S. C. § 16. For the judgment found specifically that in New York City these defendants divided the neighborhood prior run product of the distributor defendants under continuing arrangement, "so that there was no competition between them in obtaining pictures." *Paramount* Finding No. 154(d). It also held that they conspired to and did monopolize the first neighborhood run in New York City and *divided* that market between them. *Paramount* Conclusion No. 16. The judge here construed all this as not including the independent distributors and as saying only that Loew's and RKO merely divided the market for their coconspirators' films. He read the major holding of "no competition between them in obtaining pictures" as though it had added at the end, "of the major distributors." This curiously narrow and unrealistic reading is belied by the words precisely used, by the findings and conclusions in other parts of the judgment, and by the background against which the words must be read.

[9] Among these elements was a claim that the plaintiffs were forced to liquidate under unfavorable conditions with a resulting "out-of-pocket liquidating loss" of $146,400.

With deference I submit that the quoted provisions are clearly intended to express the broader deduction that there was no real competition between these defendants in obtaining any pictures, whether distributed by independents or by the major distributors. Unless this were so, they would not be actually dividing the New York City market between them. This reading moreover accords with other Paramount findings and conclusions which expressly include independent exhibitors and distributors. Thus *Paramount* Finding No. 84 states that both independent exhibitors and independent distributors had to conform to the fixed scale of clearance, runs, and admission prices set by defendants if they wished to get satisfactory runs for their pictures or to compete in exhibition with defendants' theatres or those to which they had licensed their pictures. And Finding No. 147(c) is an express determination of "lessened competition among defendants and between them and independents." Similar holdings appear elsewhere in the judgment, as in Finding 156(b) and Conclusions 7 and 12.

Moreover, this reading alone is consistent with the general broad findings of the *Paramount* decision that these defendants and the major film companies effectuated a conspiracy on a national scale to restrain trade by monopolizing the distribution of motion pictures through various unfair practices, such as block booking, imposition of fixed runs and fixed admission prices on independent distributors, exclusion of independents as desired, use of vertical integration to further their business of exhibiting pictures, and so on. To hold that this gigantic and complete monopoly does not reach the independent distributors, but leaves them free to compete with the big companies, does not make sense. And, as we have seen, it is disproved by the findings and conclusions actually stated and the relief finally granted.

Here the defendants have adroitly supplied a backdrop for the narrowing construction they support by urging that "the *Paramount* case was for exhibitors, not distributors." And this case has been somewhat heralded as a novel treble-damage claim, since it is brought not by independent movie theatres damaged by discrimination in procuring pictures to exhibit, but by the film producers and distributors themselves. It is of course true that the private cases previously before us have been brought by exhibitors, and this may indeed be the first case of other independents. But this atmosphere of novelty is not enough to justify denial of relief to plaintiffs. No such limitation is stated in the *Paramount* judgment itself; and various deductions which the parties draw from attempts at expansion or contraction of its form, as rejected by the then sitting judges, seem to me but the more to support the adequacy of what they did and thought they were doing. The statute, 15 U. S. C. § 16, *supra,* gives the benefit of the prima facie evidence rule in any action "by any party" under the antitrust laws. And that would seem to be conclusive to reach and benefit these plaintiffs. Obviously the findings concerning independent exhibitors and distributors were quite within the direct issues in the case, and the extensive discussion here of the "doctrine of estoppel" appears to be only another way of saying that the findings did not mean what plaintiffs claim and I believe to be their fair and common-sense interpretation.

The *Paramount* findings pertain to the year 1945. But the plaintiffs showed by quite adequate evidence that the same conditions continued in the period 1946 through 1950. And as the plaintiffs point out, the judges in the *Paramount* case at a later stage heard evidence as to conditions in 1948 without finding the need of making changes. The findings quoted were actually dated February 8, 1950. Moreover, plaintiffs point out that Eagle Lion Studios succeeded in 1946 to the business of PRC Pictures, Inc., one of the three nationwide independent film distributors found in the *Paramount* case to be adversely affected by the defendants' conspiracy.

I conclude that the plaintiffs thus presented a prima facie case which it became the duty of the defendants to rebut. The error of the court in denying this position to the plaintiffs was actually somewhat compounded by its ruling denigrating the *Paramount* judgment to the force only of some "evidence" in the case—an inconsistent approach not at all justified under the statute, and one which could only confuse. For if that judgment was no more inclusive in its terms than the judge ruled, then it was not evidence here at all.

[Damages]

Thus dismissal below was unwarranted. Possibly we could proceed to final judgment on the basis that the prima facie case had not been rebutted. The preferable course, however, would appear to be a remand for reexamination by the trial court of the evidence in the light of the statutory command. This seems to me particularly desirable because the trial judge found this evidence of damage inadequate to justify a plaintiffs' judgment. Actually considerable evidence involving statistical comparisons was introduced; although some of the deductions doubtless contained fallacies of the kind the judge criticized, yet a more sympathetic approach might have contributed some constructive suggestions and deductions for the assaying of this evidence. Thus a comparison of the reactions of New York City and national audiences or of Eagle Lion's successful films with other selected films of the major distributors seems perfectly possible to yield something more nearly factual than general conclusions based on what is supposed to be the degree of cultural sophistication of New Yorkers over others. In the present posture of the case I deem it hardly worthwhile to document these suggestions in detail, but I must call attention—for fear that it has been overlooked—of the well established principle casting upon the wrongdoers the risk of uncertainty as to the damages that flow from a wrong. *William H. Rankin Co. v. Associated Bill Posters of United States and Canada,* 2 Cir., 42 F. 2d 152, certiorari denied *Associated Bill Posters of United States and Canada v. Wm. H. Rankin Co.,* 282 U. S. 864; *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U. S. 555, 561-564; *Bigelow v. RKO Radio Pictures* [1946-1947 TRADE CASES ¶ 57,445], 327 U. S. 251, 264; *Package Closure Corp. v. Sealright Co.,* 2 Cir. [1944-1945 TRADE CASES ¶ 57,227], 141 F. 2d 972, 979. Of course plaintiffs' films do not all stand on the same level. Some were successful and some were not. Some quite probably deserved the low artistic and box-office-appeal rating given them by defendants. But there appeared to have been some fairly conspicuous expectations. It does not seem an impossible task for the trier to discriminate fairly between these elements of damage and to achieve a just over-all result.

[Congressional Policy]

There seems to be a developing trend in some of our trial courts of hostility toward the "big" antitrust case and of discovering obstacles—going even back to matters of pleading and pre-trial—in the way of a free showing of the need of remedial relief. Humanly speaking we can well sympathize, for these trials are a burden, if not a bore, to a busy, overworked court. But we are dealing with settled and cherished Congressional policy which is not for us to change or hamper. I suggest that these judicially formed limitations are a definite infringement of legislative policy. However serious the load, I do not believe our able trial judges desire to take any permanent course thus opposed to legislative purposes. But here, while doubtless not contemplated, the course of trial has had that consequence. I think, therefore, it requires and deserves a new start at the trial level.

[Vote of Deceased Judge]

I feel the greater confidence in the views I have expressed because Judge Frank, who originally heard the appeal, voted to reverse, and set forth similar conclusions in a tentative memorandum he had prepared before he died.

[¶ 68,820] Frank I. Gordon and Marion V. Gordon v. Loew's Incorporated, et al. John C. Gordon, Helen Gordon and Joseph Gordon v. Loew's Incorporated, et al.

In the United States Court of Appeals for the Third Circuit. Nos. 12,214 and 12,215, respectively. Filed September 16, 1957.

On Petition for Rehearing.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Defenses—Statute of Limitations—Applicable Statute—Tolling of Statute.—A United States Court of Appeals, on a petition for rehearing, adhered to its ruling that a New Jersey two-year statute of limitations was applicable to, and barred, a treble damage action brought under Section 4 of the

Clayton Act. On rehearing, the court held that the two-year statute barred another treble damage action which had been before the court for review, and that it was not necessary to consider whether the pendency of a Government antitrust suit suspended the running of the statute of limitations since the Government suit had terminated more than two years before either of the treble damage actions had been commenced.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.05, 9010, 9010.100, 9010.275.

For the appellants: Richard Orlikoff, Chicago, Ill.

For the appellees: Willard G. Woelper, Newark, N. J.

Denying a petition for rehearing of a decision of the U. S. Court of Appeals, Third Circuit, 1957 Trade Cases ¶ 68,783, affirming judgments of the U. S. District Court, District of New Jersey, 1956 Trade Cases ¶ 68,573.

Before MARIS, STALEY and HASTIE, Circuit Judges.

Opinion of the Court

[*Petition for Rehearing*]

By MARIS, Circuit Judge [*In full text*]: The plaintiffs in these two cases have filed a petition for rehearing. So far as they seek a reargument of the question of the applicability to a federal antitrust suit of the two years limitation imposed by section 2A:14-10 of the Revised Statutes of New Jersey, the petition presents nothing which has not heretofore been fully presented to and considered by the court. We, therefore, merely state that we adhere to the conclusion expressed in the opinion heretofore filed that this statute is applicable to bar the suit of Frank and Marion Gordon.

[*Clayton Act, Section 5*]

For the first time in this court the plaintiffs John, Helen and Joseph Gordon now state in the petition for rehearing that the six years limitation of section 2A:14-1 of the Revised Statutes of New Jersey is not applicable to bar their suit because a Government antitrust suit, entitled *United States v. Paramount Pictures, Inc. et al.*, was pending against the present defendants in the District Court for the Southern District of New York during a portion of the period of six years before they brought their suit. It is true, as these plaintiffs state, that under section 5 of the Clayton Act, 15 U. S. C. A. § 16, the running of the New Jersey statute of limitations would have been suspended during the pendency of this Government antitrust suit as to every private right of action on any matter complained of in said suit. It is unnecessary for us to consider whether such a suspension actually occurred, however, since it is conceded that the Government antitrust suit in question had terminated as against all the defendants in both the present suits more than two years before either of these suits was begun.

[*Second Suit Barred*]

Since, as we have held, the two years statute of limitations of New Jersey was applicable to bar the suit brought by Frank and Marion Gordon, that statute was also applicable to bar the similar suit brought by John, Helen and Joseph Gordon even if the six years statute was suspended by the pendency of the Government suit. Accordingly the question of the applicability of the six years statute to the suit of John, Helen and Joseph Gordon is wholly academic.

The petition for rehearing will be denied.

Order

Upon consideration of the petition for rehearing filed by the appellants and the appellees' brief in opposition thereto it is ordered:

(1) That the opinion filed in these cases on July 31, 1957 [1957 TRADE CASES ¶ 68,783] is amended by striking out the last sentence of the opinion, prior to the direction for the entry of judgment, reading as follows: "It is worth noting also that if the federal statute of limitations of four years which now applies to antitrust cases had been applicable to the cases before us it would have barred both of them."; and

(2) That the petition for rehearing is denied.

[¶ 68,821] Johny E. McCarroll, Willie J. McCarroll and Thomas L. Hall, a copartnership doing business as McCarroll & Hall Construction Co., also known as McCarroll & Hall v. Los Angeles County District Council of Carpenters, et al.

In the Supreme Court of the State of California, in Bank. L. A. 24470. Filed September 13, 1957.

Appeal from an order of the Superior Court of Los Angeles County PHILBRICK MCCOY, Judge.

California Cartwright Act

Combinations and Conspiracies Under State Laws—Labor Unions—Application of Antitrust Laws.—In affirming the issuance of a preliminary injunction restraining a union from calling or continuing a strike against a contracting company, the reviewing court held that, in view of its conclusion that the issuance of the injunction was justified by the breach of a collective bargaining agreement, it was not necessary to consider the contracting company's claim that the union violated the California Cartwright Act by restraining trade without any legitimate labor objective.

See Combinations and Conspiracies, Vol. 1, ¶ 2441.05.

For the appellants: Arthur Garrett and James M. Nicoson, Los Angeles, Cal.

For the respondents: Hill, Farrer & Burrill, by Ray L. Johnson, Jr., Los Angeles, Cal.

For a prior opinion of the California District Court of Appeal, Second District, Division One, see 1956 Trade Cases ¶ 68,582.

[*Strikes—Relief Sought*]

TRAYNOR, Justice [*In full text except for omissions indicated by asterisks*]: Plaintiffs are engaged in the contracting business in the Los Angeles area. They brought the present action against defendant labor unions and their officers for damages and injunctive relief against strikes allegedly called by defendants.

[*Complaint*]

In their second amended complaint plaintiffs allege that plaintiffs and defendants are parties to a collective bargaining agreement known as the BCA-AF of L Master Labor Agreement. This agreement provides that a contractor shall have complete freedom in hiring workmen, except that he must first call on the local union having jurisdiction over the area in which the contracting work is to be done to satisfy his need for labor. The local union must immediately furnish the required number of competent and skilled workmen, and if after forty-eight hours notice it has failed to do so, the contractor is free to obtain workmen from any available source. Furthermore, the contractor is permitted to transfer workmen up to ten per cent of his current requirements in any craft from the jurisdiction of one local union to the jurisdiction of another local union. He may transfer more than ten per cent if permitted by the constitution and by-laws of the craft at the time the collective bargaining agreement was entered into. The by-laws of the Los Angeles County District Council of Carpenters permit such a transfer up to fifty per cent of a contractor's requirements, and also require a local union to honor a contractor's request for specific workmen. The agreement also provides that the unions will not call a strike against a contractor during the life of the agreement, but that all grievances or disputes over the interpretation or application of the terms of the agreement will be settled by a specified grievance procedure and by arbitration.

The complaint further alleges that plaintiffs entered into contracts to do the carpentry work on various construction projects in the Los Angeles area. Pursuant to the collective bargaining agreement, plaintiffs called on defendant local unions to supply them with workmen. The workmen sent to plaintiffs were, however, unskilled and incompetent, and furthermore defendants informed plaintiffs that they would not be permitted to transfer workmen from the jurisdiction of one local union to the jurisdiction of another local union in excess of ten per cent of their current requirements. Defendants also refused to honor plaintiffs' requests for named workmen or to permit plaintiffs to transfer their regular workmen from different parts of Los Angeles County to specific construction projects. Defendants ordered strikes of plaintiffs' employees on specific construction projects, and finally brought about a strike of all plaintiffs' employees.

The complaint alleges that the only reasons defendants gave for their conduct were

that plaintiffs are labor contractors and are violating state safety regulations; that in fact plaintiffs are not labor contractors since they undertake to do complete carpentry jobs and not merely to furnish workmen, and that in any event labor contracting is prohibited neither by law nor by the collective bargaining agreement; that a state safety inspector found that plaintiffs were not violating any state safety regulations; and that defendants' purpose in calling strikes was to harass plaintiffs and totally destroy their business.

[*Causes of Action*]

Plaintiffs seek to state three causes of action: breach of the collective bargaining agreement through a violation of the no-strike clause, a tortious attempt to destroy plaintiffs' business without any legitimate labor objective, and a violation of the Cartwright Act (Bus. & Prof. Code, §§ 16700-16758) by restraining trade without any legitimate labor objective. On the basis of the complaint, testimony, and numerous affidavits, the trial court issued a preliminary injunction against defendants' calling or continuing a strike against plaintiffs, and it is from this order that defendants appeal. In view of our conclusion that the issuance of the injunction was justified by the breach of the collective bargaining agreement, we do not find it necessary to consider the second and third causes of action stated in the complaint.

* * *

[*Affirmed*]

The order is affirmed.

We concur: GIBSON, C. J., SPENCE, J., and McCOMB, J.

We concur in the judgment: SHENK, J., and SCHAUER, J.

Dissent: CARTER, J. [Dissenting Opinion not reproduced.]

[¶ 68,822] United States v. Pittsburgh Plate Glass Company, et al.

In the United States District Court for the Western District of Virginia, at Roanoke. Criminal Action No. 5790. Dated August 6, 1957.

Case No. 1327 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Indictment—Defendants' Plea of *Nolo Contendere*.—A motion by defendants to change their pleas of "not guilty" to pleas of *nolo contendere* was denied on the ground that the defendants offered nothing to indicate that their case was a proper one for the acceptance of such pleas. Whether or not a plea of *nolo contendere* should be accepted depends upon the gravity of the offense and whether or not the violation of the law was knowing and intentional. If the latter conditions exist, the proper plea is a plea of "guilty." Where the facts indicate an inadvertent violation of the law or one that is accompanied by no wrongful intent, a plea of *nolo contendere* may be accepted. The defendants were, however, given the opportunity to renew their motion in the future.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.860.

For the plaintiff: Herbert Brownell, Jr., Attorney General of the United States, Washington, D. C.; Victor R. Hansen, Asst. Attorney General of the United States, Washington, D. C.; John Strickler, United States Attorney, Roanoke, Va.; and Samuel Karp and Robert Brown, Jr., Attorneys, Department of Justice, Washington, D. C.

For the defendants: J. H. Whicker, Jr., of Whicker and Whicker, North Wilkesboro, N. C., and Gilmer, Harman and Sadler, Pulaski, Va., for Carolina Mirror Corp. and Edd F. Gardner; W. P. Sandridge, Winston-Salem, N. C., and R. Linwood Holton, Jr., Roanoke, Va., for Stroupe Mirror Co.; and Patrick A. Gibson, of Hunton, Williams, Gay, Moore and Powell, Richmond, Va., and Hannibal N. Joyce, of Joyce and Stone, Martinsville, Va., for Virginia Mirror Co.

Memorandum by the Court

[*Change of Pleas*]

JOHN PAUL, District Judge [*In full text*]: This matter comes on upon the motion of several of the defendants [1] to be allowed to change their pleas of not guilty, which they have heretofore entered, to pleas of *nolo contendere.*

The court has heard the arguments of counsel in support of said motion and has considered also a written memorandum filed by counsel for these defendants in support of said motion. After full consideration of the matter, I am of opinion that these defendants should not be allowed to plead *nolo contendere,* at least at the present time.

[*Plea of Nolo Contendere*]

During the oral argument I stated from the bench my general disinclination to accept pleas of *nolo contendere* for the reasons that I thought they were in the nature of "face-saving" pleas and were tendered because the defendants did not wish to bear the supposed odium of pleading guilty, although they might in fact be guilty of the offense charged and know that they were guilty. At the same time I indicated that I recognized that the plea of *nolo contendere* could well be accepted in a proper case.

[*Relevant Considerations*]

The difficulty in the present case is that these defendants have offered nothing to indicate to the court that this is a proper case for the acceptance of a plea of *nolo contendere.* In the argument and in the written briefs submitted, counsel for the defendants cite numerous cases in which pleas of *nolo contendere* have been accepted in cases involving violation of the anti-trust laws. But numerous as these cases are they represent nothing more than instances where the court has seen fit, in its discretion, to accept the plea. Whether or not a plea of *nolo contendere* should be accepted depends, in my opinion, upon the gravity of the offense and whether or not the violation of the law was knowing and intentional. If these latter conditions exist, then the proper plea is a plea of guilty. Where the facts indicate an inadvertent violation of the law or one that is accompanied by no wrongful intent, a plea of *nolo contendere* may well be accepted. However, nothing has been laid before this court which sufficiently acquaints it with the facts in the case to know whether a plea of *nolo contendere* would be proper.

In the concluding paragraph of the brief submitted by the defendants it refers to the "value of a *nolo* plea in a case like this where any violation is necessarily of a technical non-aggravated nature." I do not doubt the sincerity of counsel in holding the opinion that the offense here is of a technical and non-aggravated nature, but the court does not have sufficient information of the facts in order to determine whether in its opinion this is an accurate description of the nature of the offense committed here.

[*Renewal of Motion*]

If it is possible for counsel to submit a statement of the facts on which this indictment is based, of which facts there is no material contradiction, so that the court may be better informed as to the conditions under which the charged violation of the law occurred then the court will be in better position to determine whether or not it is a proper case for the acceptance of a plea of *nolo contendere.* In other words, it is my present opinion that nothing has been shown to justify the court in accepting such a plea, but that the matter is not foreclosed if counsel choose at some future time to renew their motion, supported by a statement of facts which would justify the court in giving it further consideration.

[[1] Carolina Mirror Corp., Edd F. Gardner, Stroupe Mirror Co., and Virginia Mirror Co., Inc.]

[¶ 68,823] Skaggs Drug Center v. General Electric Company.

Miles Laboratories, Inc. v. Skaggs Drug Center.

In the Supreme Court of the State of New Mexico. No. 6204. Filed September 27, 1957.

Appeal from the District Court of Bernalillo County. REIDY, Judge.

New Mexico Fair Trade Act

Fair Trade—Constitutionality of New Mexico Fair Trade Act—Nonsigner Provision—New Mexico Constitution.—Section 2 of the New Mexico Fair Trade Act (the nonsigner provision) "is unconstitutional and void as an arbitrary and unreasonable exercise of the police power without any substantial relation to the public health, safety, or general welfare insofar as it concerns persons who are not parties to" fair trade contracts. The Fair Trade Act is a price fixing statute, designed primarily to destroy competition at the retail level. However, it was held that the Fair Trade Act does not violate Article 4, Section 38 of the New Mexico Constitution, which provides that the "legislature shall enact laws to prevent trusts, monopolies, and combinations in restraint of trade."

See Fair Trade, Vol. 1, ¶ 3040.20, 3085.33, 3258.

For the appellant: W. A. Keleher, John B. Tittmann, and T. B. Keleher, Albuquerque, N. M.

For the appellees: Simms, Modrall, Seymour, Sperling & Roehl, and George T. Harris, Jr., Albuquerque, N. M., for General Electric Co.; and Rodey, Dickason, Sloan, Mims & Akin, Albuquerque, N. M., and Cawley & Byron, Elkhart, Ind., for Miles Laboratories, Inc.

Reversing a judgment of the New Mexico District Court, County of Bernalillo, 1956 Trade Cases ¶ 68,471.

Opinion

[*Constitutionality*]

DAVID W. CARMODY, District Judge [*In full text*]: This case involves the questioned constitutionality of the New Mexico Fair Trade Act, being Chapter 44 of the Session Laws of 1937, which now appears as Article 49-2-1 *et seq.,* N. M. S. A., 1953. Actually, there are two consolidated cases which were consolidated by the court below and heard as one appeal in this court.

[*Parties—Stipulated Facts*]

Originally the Skaggs Drug Center as plaintiff brought suit in Bernalillo County against the General Electric Company, seeking a declaratory judgment with respect to the Fair Trade Act. The General Electric Company answered and by way of counterclaim sought an injunction against Skaggs Drug Center to prevent it from further sales of General Electric fair traded products at a price below that fixed by the General Electric Company. At about the same time Miles Laboratories, Inc., brought suit against Skaggs Drug Center, seeking an injunction to prevent Skaggs from selling Alka Seltzer and One-A-Day vitamin tablets at a price less than those established by Miles Laboratories. The two cases were consolidated for the purpose of argument, the facts having been stipulated to, and the lower court found the Fair Trade Act to be constitutional and entered injunction on behalf of both General Electric and Miles Laboratories as against Skaggs Drug Center. It was stipulated below that both General Electric and Miles Laboratories had engaged in extensive national and local advertising and had built up and established a valuable goodwill in their respective trade-marked products, that the products are in fair and open competition in the state of New Mexico with commodities of the same general class manufactured and sold by others, that Skaggs had sold products of both of the corporations at less than the retail prices fixed by them with knowledge of the existing so-called fair trade agreement and the prices fixed thereby, and that Skaggs had advertised in the local newspapers in Albuquerque extensively, calling to the public's attention the fact that the products are available at certain prices which are less than established minimum retail prices.

For the purpose of this opinion, Skaggs Drug Center will be referred to as appellant and both General Electric Company and Miles Laboratories, Inc., will be referred to jointly as appellee.

[*Background of Fair Trade*]

A brief background of the fair trade acts is necessary in order to give a clear understanding of the situation which now faces the court. In the early days of the 1930 depression the state of California passed the first fair trade act. The purpose of the California act, and the others passed subsequently, was to "protect trade-mark owners, distributors, and the public against injurious and uneconomic practices in the distribution of the articles of standard quality under a distinguished trade-mark or name", Cal. Sta. 1931, c. 278, p. 583. The basic theory of this legislation was that there would be injury to the producer in cut-rate sales of his trade-marked goods where the consumer would associate a reduced price with a cheapening of brand quality, or where a distributor, in an effort to attract customers into his store at little or no profit, forces other distributors to match the price reduction and thereby makes it unprofitable for other distributors to carry the other trade-marked brand. The California act as finally amended was sustained by the Supreme Court of California in the frequently cited case of *Max Factor and Company v. Kunsman,* 5 Cal. 2d 466, 55 P. 2d 177, affirmed 299 U. S. 198, and it should be noted that a great many of the subsequent cases from other jurisdictions which sustain the fair trade laws adopt the language of the above case to a very large extent.

[*Survey of Rulings*]

Subsequent to the original California enactment and principally during the depression years, most of the other states in the Union adopted a similar or identical law, until at the present time 45 states have enacted this type of legislation, only Texas, Missouri, and Vermont having resisted such an enactment, by reason of constitutional provision or otherwise. It is of interest to note that the so-called fair trade acts have been before the highest appellate courts of 27 states, and in 16 of the states the legislation has been sustained as constitutional, and in 11 as unconstitutional; however, these figures by themselves are almost meaningless because of the varying constitutional provisions in the different states and also by reason of the fact that the various courts have ruled either favorably or unfavorably, as the case may be, on widely differing theories. In addition to state decisions, the Supreme Court of the United States has been called upon on several occasions to rule upon these laws and the principal case relied upon by the proponents of the laws is the *Old Dearborn Distributing Company v. Seagram Distillers Corporation* [1932-1939 TRADE CASES ¶ 55,141], 299 U. S. 183, 81 L. Ed. 109. This was an opinion by Mr. Justice Sutherland, which was the unanimous opinion of the court. Basically, the court's decision in this case is that the ownership of a trade-mark and goodwill constitutes property in a real sense, and injury to which, as with other species of property, is subject to litigation; that price cutting by retail dealers is injurious to the goodwill and business of the producer and distributor and injurious to the general public as well. It is interesting to note that the New York Court of Appeals which originally held the fair trade acts unconstitutional, *Doubleday D. and Co. v. R. H. Macy and Co.,* 269 N. Y. 272, 199 N. E. 409, 108 A. L. R. 1325, one year later, following the *Old Dearborn* decision, *supra,* ruled the fair trade laws constitutional in a very short opinion, *Bourjois Sales Corp. v. Dorfman* [1932-1939 TRADE CASES ¶ 55,155], 273 N. Y. 167, 7 N. E. 2d 30, 110 A. L. R. 1411, in effect merely adopting the ruling of the Supreme Court of the United States. Actually, most of the states whose highest courts affirmed the constitutionality of the statutes did so in the 1930 and early 1940 era. Conversely, the greater bulk of the decisions declaring the statute unconstitutional have been by rulings of appellate courts in more recent years, although, of course, there are exceptions to both of the above statements.

[*Nonsigner Provision*]

The section of the statute involved appearing in the N. M. S. Annotated (1953) Compilation, § 49-2-2, is as follows:

> "Sale below stipulated price declared unfair competition—Liability of vendor, —Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the

> provisions of section 1 (49-2-1) of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

The basic attack on the statute over the years in practically all courts has been upon the theory that § 2 of the acts provides that the sale of the trade-marked items at a price less than that stipulated to is a violation of the act, whether the seller is a party to the stipulated price contract or not. This is referred to throughout the various decisions as a "vertical agreement," fixing the resale prices of a commodity. Thus, in theory at least, if a manufacturer of a trade-marked article has a contract with one retailer in a state which fixes the minimum price, then all other retailers in that state selling the same product are bound thereby. It can be readily seen that such a provision is readily amenable to considerable litigation, the manufacturer or distributor contending that it is valid in order to protect his property interest in the trade-mark or goodwill, and the retailer who wishes to sell the same for less contending that he is the owner of the property and should be able to sell it at whatever price he desires. The above is a very great simplification of the problem. It should be mentioned that the socalled non-signer or vertical provision of the Fair Trade Act has been determined by the Supreme Court of the United States as in violation of the Sherman Anti-Trust Act. (See *Schwegmann Brothers v. Calvert Distilleries Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384, 95 L. Ed. 1045 and prior cases cited therein.) Shortly after this decision in 1951 Congress passed the McGuire Act, 15 U. S. C. A. § 45, 66 Statute 652, for the specific purpose of exempting the non-signer provision from the prohibition of the Sherman Act. So much for the background of the present controversy.

[*Restraint of Trade*]

Appellant contends, in the first instance, that the Fair Trade Act violates Article 4, § 38 of the New Mexico Constitution, this being the restraint-of-trade provision, which is as follows:

> "The legislature shall enact laws to prevent trusts, monopolies, and combinations in restraint of trade."

Appellant's argument is that at the time this provision was written into the New Mexico Constitution in 1911 the Sherman Anti-Trust Act had been in effect for twenty years, and that the Supreme Court of the United States had ruled that the Sherman Act prohibited as an illegal combination in restraint of trade the type of price-fixing scheme which is provided for in the Fair Trade Act, *Dr. Miles Medical Co. v. John D. Park and Sons Co.*, 220 U. S. 373, 55 L. Ed. 502, and that, therefore, the members of the Constitutional Convention in writing the Constitution had in mind the Sherman Act and the decision of the Supreme Court of the United States with respect thereto.

This argument, which at first blush would appear sound, were it not for the fact that the Territorial Legislature in 1891 had passed a law which provided in part as follows:

> "Every contract or combination between individuals, associations, or corporations having as its object, or which shall operate to restrict trade or commerce or control the quantity, price, or exchange of any article of manufacture or product of the soil or mine is hereby declared to be illegal."

Chapter 10, Laws of 1891. It should be noted that the 1891 law which was passed a year after the Sherman Act specifically contained the word "price," which is neither in the Sherman Act nor in our constitutional provision; therefore, it would seem to follow that, if the makers of the Constitution were cognizant of the provisions and decisions with respect to the Sherman Act, they were certainly familiar with or knew the contents of the acts of the Territorial Legislature which were in effect at the time of the Constitutional Convention. It does not sound reasonable that the members of the Constitutional Convention failed to consider the verbiage of the law of 1891 so as to include the same in the Constitution and yet considered decisions under the Sherman Act. We cannot agree with counsel that in 1911 the makers of our Constitution intended to include the words, "price control", in our Constitution, nor do we see why the same should be placed therein by implication. To us it is obvious that the constitutional prohibition contained in Article IV, § 38 is aimed at preventing such monopolies and combinations

as would, in effect, result in a practically complete destruction of competition. To our view, the act in question does not have that prohibitive effect and it is, therefore, determined that the so-called Fair Trade Act does not violate the afore-mentioned section of our Constitution.

[*Due Process of Law*]

Appellant next contends that the Fair Trade Act deprives the appellant of property without due process of law, in violation of Article II, §§ 4 and 18 of the Constitution of the State of New Mexico. These particular sections are as follows:

> "All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness."
>
> "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied the equal protection of the law."

This, to our view, raises a much more serious question than that above disposed of. It is on this point particularly that the courts of so many of our sister states have announced rulings diametrically opposed to each other, some courts ruling that the general welfare of the public would be served by such statutes and other courts ruling absolutely adversely and contrarywise.

Some of the more outstanding cases sustaining the constitutionality of the acts are *Max Factor and Company v. Kunsman, supra; Burroughs, Wellcome and Co. v. Johnson Whole Perfume Co.*, [1940-1943 TRADE CASES ¶ 56,194], 128 Conn. 596, 24 A. 2d 841; *Johnson and Johnson v. Weissbard* [1932-1939 TRADE CASES ¶ 55,159], 131 [121] N. J. Eq. 585, 191 Atl. 873; *Sears v. Western Thrift Stores of Olympia, Inc.* [1940-1943 TRADE CASES ¶ 56,152], 10 Wash. 2d 372, 116 P. 2d 756; *Burche Co. v. General Electric Company* [1955 TRADE CASES ¶ 68,078], 382 Pa. 370, 115 A. 2d 361.

So also some, but not all, of the decisions of the states holding to the contrary are *Miles Laboratories, Inc., v. Eckerdy* [1954 TRADE CASES ¶ 67,700] 73 S. 2d 680; *Cox v. General Electric Company* [1955 TRADE CASES ¶ 67,934], 211 Ga. 286, 85 S. E. 2d 514; *General Elecrtic Co. v. Wahle* [1956 TRADE CASES ¶ 68,333], 207 Ore. 302, 296 P. 2d 635; *Olin Mathieson Chemical Corp. v. Francis* [1956 TRADE CASES ¶ 68,463], 134 Colo. 160, 301 P. 2d 139.

In addition, there are extensive annotations in A. L. R., the two latest of which are to be found at 125 A. L. R. 1335 and 19 A. L. R. 2d 1139.

[*Economic Philosophy*]

A great deal of the conflict arises by reason of the fact that court after court, regardless of its final holding, mentions, the question of the economic philosophy of the fair trade acts. The courts which have sustained the same generally state that it is a question for the legislature to determine as to whether the economic policy as set out by the acts is wise or unwise, and that it is not a judicial function to determine this policy. Many courts and many of the individual judges will disagree as to the economic theory and it is our feeling that almost every court which has ruled upon this problem has had to draw the line between judicial responsibility and legislative policy, as stated by the Supreme Court of California in the *Max Factor and Co.*, case, *supra:*

> "The power of the court is limited to determining whether the subject of the legislation is within the state's power and if so, to determine whether the means adopted to accomplish the result are reasonably designed for that purpose and have a real and substantial relation to the objects sought to be attained."

The California court in this case also stated:

> "Neither the state nor the federal constitution guarantee any personal absolute liberty of action. The liberty guaranteed by our law is a liberty subject to regulation in the public good . . . an equal liberty rather than an absolute liberty."

Finally, in this case the court said:

> "The police power is no longer limited to measures designed to protect life, safety, health, and morals of the citizens, but extends to measures designed to promote the public convenience and the general prosperity . . . and includes economic measures regulating competition . . ."

Diametrically opposed to this is the decision of the Supreme Court of Florida, which, in *Miles Laboratories, Inc. v. Eckerd, supra*, stated the following:

"As we have stated before, the real effect of the non-signer clause is anti-competitive price fixing; not the protecting of the good will of trade marked products as other courts have held. Goodwill, it has been said, should be determined by the price which the goods can command in a competitive market, and not by the ability of the manufacturer to sell at a pegged retail price which he himself selects. Corey, Fair Trade Pricing: A reappraisal, 30 Harv. Bus. Rev. 47, 60. Except in times of economic emergency such inflexible price arrangements which the act sanction are not in line with our traditional concepts of free competition, which have traditionally been the 'yard stick' for protection of the consuming public. The real vice of the non-signer clause is the absence of that standard, and the decisions of this Court cited herein so hold. In removing the said standard the non-signer clause must fail as an invalid use of the police power foı a private, not a public purpose."

Numerous decisions coud be cited giving both sides of the argument, but with such a wealth of conflicting authorities, it is felt that no useful purpose would be gained by the citation and quotation from many of the cases from our sister states.

[*Police Power*]

It is contended by appellees that *Arnold v. Board of Bar Examiners,* 45 N. M. 57, 107 P. 2d 799, places this court in the class of those courts which have refused to strike down the fair trade acts, in which this court said:

"Obviously the question of monopolies in restraint of trade as respects such matters as are now under discussion (price fixing) yields to a more important consideration, that of reasonably exercising the police power over a business or profession having a vital relation to public welfare and health."

It should also be mentioned that in the *Arnold* case this Court quoted the Supreme Court of Minnesota with approval as to the following statement:

"The police power is not limited to the protection of the public health, morals, and safety. It extends also to economic needs."

It should be born in mind, with respect to the *Arnold* case, that there this court determined that the business concerned directly affected public health and it is, therefore, not directly analogous to the present case and is not authority upon which the court should rule in the instant case. It should not require any argument whatsoever to point out that the sale of electric irons having a General Electric label can in no sense affect the public health. Of course, it might be claimed that the sale of vitamin pills or alkaline tablet could in a sense affect public health, but it is not believed that they do in the sense intended by the framers of our Constitution. In fact, a great many of the articles which come under the Fair Trade Act have little or no relation to the public health in any sense. (See *Shakespeare Co. v. Lippmann's Tool Shop Sporting Goods Co.* [1952 TRADE CASES ¶ 67,303], 334 Mich. 109, 54 N. W. 2d 268), in which the article in question was a trademarked line of fishing tackle and in which case the Michigan court in a very well reasoned opinion concluded that the sale of fishing tackle was not in anywise affected with the public interest.

[*Georgia*]

The Supreme Court of Georgia in *Cox v. General Electric Company, supra,* in commenting upon the decisions of other states as to the fair trade acts, made the following very pertinent statement:

"It is earnestly argued that a number of the supreme courts have upheld the validity of their Fair Trade Acts, which were almost, if not entirely, identical with the Georgia statute under consideration, and our attention is called to a number of decisions by the Supreme Court of the United States. We are aware of the fact that a number of the State Suprme Courts have upheld these acts, a number have not passed upon them, and others have held them invalid, We are also familiar with the conflicting decisions on this question by the Supreme Court of the United States, as pointed out in the special concurring opinion of Chief Justice Duckworth in *Harris v. Duncan, supra.* We are here, however, dealing with the statutes of this state and with the question of whether or not they violate the Constitution of the State of Georgia. What the courts of other States have decided is not controlling, and this is one of the few powers left to States to decide for themselves regardless of what the Supreme Court of the United States may or may not have decided. We are also familiar with the modern trend to allow the government to encroach more and

more upon the individual liberties and freedom. So far as we are concerned, we will not strike down the Constitution of our State for this purpose; neither will we follow the crowd. The scheme described in the petition now under consideration permits a manufacturer, under the guise of protecting his property rights in a trade name and trademark, to control the price of his product down through the channels of trade into the hands of the ultimate consumer, and into the hands of persons with whom he has no contractual relation whatever. This statute clearly violates the provisions of the due process clause of the Constitution of the State of Georgia."

[*Oregon*]

So also the Supreme Court of Oregon in *General Electric Co., v. Wahle, supra,* in an extremely well considered opinion held that the Fair Trade Act was void as an arbitrary and unreasonable interference with private property rights beyond the police power of the state, having no reasonable relation to public morals, health, safety or general welfare. Particularly on the issue of the police power, the Court stated at pages 644 and 645 of the Pacific Reporter opinion, the following:

"Viewed from a realistic standpoint, it is difficult to find any justification for the Fair Trade Act based upon considerations of the public health, safety, morals, and welfare. We can see no real and substantial connection between the nebulous theory that fixed minimum resale prices are necessary to protect the good will of the trademark owner and the welfare of the public.

* * *

"In 49 Yale L. J. 607 and in 21 Chicago L. Rev. 175, are to be found exhaustive and well-written articles concerning the Fair Trade statutes by two eminent scholars, viz., Harry Shulman, Sterling Prof. of Law, Yale Law School, and Carl H. Fulda, Prof. of Law, Rutgers University, respectively. From the facts and statistics given, the accuracy of which seem beyond question, it is plainly apparent that the consumer is not benefited, but on the contrary is harmed by the operation of the Fair Trade Act. The consumer is the public. He is compelled to pay a higher price for a given commodity in order that the retailer may be guaranteed a higher fixed, and often unreasonable, profit. If Professors Shulman and Fulda are correct in their observations, and we have no reason to believe otherwise, it is obvious that the whole scheme of the Fair Trade Acts is one for private, rather than public, gain, a scheme fathered by highly organized groups of distributors and retailers, interested not in the public weal, but only in their own selfish ends. Manifestly, such a scheme bears no relation whatever to the public morals, health, safety, or general welfare."

[*Colorado*]

A very recent decision by the Supreme Court of the State of Colorado, which to our view states the modern trend with respect to the holdings of courts on this subject and contains language the reasoning of which we feel should be adopted in New Mexico, in *Olin Mathieson Chemical Corp. v. Francis, supra,* at page 152 of the Pacific Reporter, the court said:

"Any act of the General Assembly which arbitrarily destroys or impairs the right of the individual to the free use and enjoyment of his property, lawfully acquired, and permits the fixing of prices for the benefit of a special group, is opposed to the constitutional concept of a free people and should not be allowed to stand. Legislation of this kind evidences the ability of organized minorities to induce legislation for their special benefit at the expense of the unorganized purchasing masses. During a recent decade numerous attempts were made to regiment the general public and in each instance they were struck down as violative of constitutional rights of a free people. We have not yet arrived at the place in America where the many must yield to the few, so that the latter may make ever increasing profits at the expense of those who still believe in the principle of free and competitive trade and commerce, untrammeled by legislative fiats.

"The Colorado Fair Trade Act does not necessarily apply to all trademark owners, producers and distributors. It becomes operative only as to those who elect and attempt to bind non-contracting retailers dealing in the same commodities. What today may be invalid as restraint of trade, may under our Act at the whim of the manufacturer be perfectly lawful next week. What we are saying is that such restraint of trade and destruction of price competition may thus vary from time to time at the will of the manufacturer or distributor. The Act is primarily and essentially a price-fixing statute, and unless authorized under the police power, offends

against the constitution. The defendant has not obligated himself to fix reseale prices at the stipulated minimum by virtue of any contract he has entered into. He is compelled to do so by the terms of this Act. We must look not to the statute, but to the contract between plaintiff and Fisher to determine the minimum price, below which the defendant shall not sell."

[*Price Fixing Statute*]

This case is a suit in equity, and it should always be born in mind that equity regards the substance, rather than the form. In substance, therefore, what is the real purpose of the Fair Trade Act? No matter what high-sounding terms are used, such as "free and open competition," "unfair competition," and "protection of good will," it is a matter of common knowledge that it is a price-fixing statute, designed primarily to destroy competition at the retail level. The high-sounding phrases used with respect to the trademark owners are simply excuses and not a reason for the law.

In the *Old Dearborn* case, *supra,* the court's final conclusion was that a non-signer was subject to the price-fixing provisions of the act, upon the theory that such individual, such as the appellant here, by purchasing the trade-marked goods with knowledge of the fair trade contract, impliedly assented to the contract and by such implied assent ratified, became a party to, and was bound by, the contract. This theory has been adopted by the courts which sustain the constitutionality of the statutes. In other words, they say that this is not a price-fixing statute. To us, this is an unrealistic view and to say that it is not a price-fixing statute is to deny the obvious. Once the price is fixed by contract or contracts between the manufacturer and the retailer or retailers, the non-signer is bound and the price becomes a fixed price to the non-signer. If this power of the owner of trade-marked goods to set the price at which the non-signer must sell is not the power to fix prices, then what is it? However, the courts sustaining the acts, including the Supreme Court of the United States, in effect, have been adhering to the form of the statute and overlooking the substance. This we do not feel is a proper view.

Although we fully realize the fact that several courts are not in complete accord upon the questions discussed in this opinion, nevertheless, we are of the opinion that the better reasoning and logic are to be found in those decisions above quoted at some length which have declared the Fair Trade Acts unconstitutional and void.

[*Line of Authority*]

It should be noted that this particular statute is in no wise a revenue producing measure, nor does the state, as such, become a party to its effect in any way. If such were the case, an entirely different line of authority would have to be considered, but, inasmuch as this is not true, there is no necessity in lengthening this opinion by a discussion of this subject.

[*Nonsigner Provision Invalid*]

In view of the above, it will be determined that § 2, Chapter 44 of the Laws of 1937: (49-2-2 N. M. S. A. 1953) is unconstitutional and void as an arbitrary and unreasonable exercise of the police power without any susbtantial relation to the public health, safety, or general welfare insofar as it concerns persons who are not parties to contracts provided for in § 1, Chapter 44, Laws of 1937 (49-2-1 N. M. S. A. 1953).

[*Other Questions*]

Appellants have raised several additional questions, particularly with respect to the contention that the statute is unconstitutional by reason of being an unconstitutional delegation of legislative power to individuals, as establishing special-class legislation and granting special privileges and immunities and as having a defective title. These points not being necessary for this decision, they are specifically not ruled upon by the court. Neither will the court rule upon the appellant's contention that the statute is violative of the Sherman Act, either before or as amended by the McGuire Act.

[*Reversed*]

The District Court of Bernalillo County will be reversed with directions to vacate its judgments heretofore entered and to enter a judgment in conformity with thiis opinion.

It is so ordered.

We concur: EUGENE D. LUJAN, C. J., DANIEL K. SADLER, J., and J. C. COMPTON.

KIKER, J., absent from the state not participating.

[¶ 68,824] **Francis J. Curtis, Trustee in Bankruptcy of B. P. R. Corporation v. Loew's Incorporated, et al.**

In the United States District Court for the District of New Jersey. Civil Action File No. C-203-55. Filed June 10, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Interrogatories—Relevancy—Opinions and Conclusions—Unnamed Entities.—In a bankrupt theatre corporation's treble damage action, interrogatories seeking information required by the corporation to support its charges of monopolization, discrimination, restraint of competition, and conspiracy were relevant. The information sought would either constitute evidence or might be reasonably expected to lead to evidence. Interrogatories seeking information as to activities and transactions antedating the commencement of the operation of the corporation's theatres were proper because they might reasonably be expected to lead to evidence indicating intent, course of dealing, plan, concert of action, development of monopoly, effect on competition, and numerous other elements which the corporation must establish. An objection to certain interrogatories on the ground that they sought opinions and conclusions, some of them from a corporation or corporations, was overruled, and an objection to interrogatories directed to "affiliated, associated, subsidiary and predecessor companies and corporations" of the defendants was sustained because they related to unnamed entities.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.875.

For the plaintiff: Stein, Stein & Engel by Howard Engel and Richard Orlikoff (Illinois Bar).

For the defendants: Toner, Crowley, Woelper & Vanderbilt by Willard G. Woelper.

For a prior opinion of the U. S. District Court, District of New Jersey, see 1956 Trade Cases ¶ 68,573.

Opinion

[*Interrogatories*]

REYNIER J. WORTENDYKE, JR., District Judge [*In full text*]: This opinion is evoked by defendants' motion on objections to plaintiff's interrogatories. The action is for treble damages under Section 4 of the Clayton Act (15 U. S. C. A. § 15), and an epitome of the allegations of the complaint is afforded in an earlier opinion of this Court in the same litigation, reported in [1956 TRADE CASES ¶ 68,573] 147 F. Supp. 398.

[*Plaintiff—Damage Period*]

The indicated bankrupt corporation is alleged to have been lessee and operator of three motion picture theaters in the City of Chicago, viz.: Royal Theater, 1453 Milwaukee Avenue, Banner Theater, 1611-13 North Damen Avenue and Paulina Theater, 1339 North Paulina Street. The period of claimed damage charged as resulting from the actions of the defendants complained of is designated as that extending from March 1, 1944 to June 10, 1951.

In arriving at the following conclusions the Court has considered the oral arguments of counsel and filed briefs; also, the letter from plaintiff's attorney dated May 14, 1957, the documents enclosed therewith, and the letter of defendants' attorneys of June 5, 1957 relating to the foregoing.

Defendants' Objections to Plaintiff's Interrogatories Dated April 16, 1956.

[*General Objection*]

1. Defendants' comprehensive objection to all of plaintiff's interrogatories is overruled. *Leonia Amusement Corp. v. Loew's Incorporated* (D. C. N. Y. 1955) [1955 TRADE CASES ¶ 68,134] 18 F. R. D. 503; *New Dyckman Theater Corp. v. Radio-Keith-Orpheum Corp.* (D. C. N. Y. 1954) [1954 TRADE CASES ¶ 67,853] 16 F. R. D. 203, 207.

[*Relevancy*]

2. Defendants impugn the relevancy of the following groups of plaintiff's interrogatories, viz.:

Nos. 2 through 20	50	86
22	51	88
23	61 through 63	89 and
26	65 through 71	92.
35 through 38	80 through 84	
44 through 47	85a	

"In passing upon interrogatories, it is customary for the Court to inquire whether they are relevant and material, but to determine from the complaint itself their relevancy and materiality." *New Dyckman Theater Corp. v. Radio-Keith-Orpheum Corp.* (*supra*) at p. 207.

The presently objecting defendants have not moved to strike the complaint. They may not collaterally attack it by way of objections to interrogatories. The complaint remains as part of the frame-work of issues from which the relevancy of the interrogatories may be appraised. Plaintiff's burden in a case of this kind, and the appropriate judicial attitude toward his efforts to discharge that burden, are clearly expressed by Judge Yankwich in *Fanchon & Marco v. Paramount Pictures* (D. C. Cal. 1951, [1950-1951 TRADE CASES ¶ 62,909] 100 F. Supp. 84, affd. (9 Cir. 1954) [1954 TRADE CASES ¶ 67,843] 215 F. 2d 167, cert. den. 348 U. S. 912 (1955), where he says (at p. 89):

"So he who claims to have been injured by such preference must show (a) that the preference was the result of concert of action between the defendants, (b) that it was unreasonable and not based upon the various factors which courts have considered as reasonable considerations entering into the determination,—such as admission price, showing of double features, gift night and other exploitation methods, the rental terms, the extent to which comparative theaters compete with each other,—and (c) that he has been damaged by such action.

"As to the manner of proof, the Courts have adopted a liberal attitude and have permitted inferences of *joint* action to be drawn from *parallel* action."

See also *Stanzler v. Loew's Theater and Realty Corporation,* (D. C. R. I. 1955) [1956 TRADE CASES ¶ 68,439] 19 F. R. D. 286.

[*Information as to Charges*]

The interrogatories in the first of the foregoing groups seek answers which will disclose facts required by the plaintiff to support his charges of monopolization, discrimination, restraint of competition, and conspiracy which are clearly set forth in the complaint. Information sought will either constitute evidence for the plaintiff or may be reasonably expected to lead to evidence required by the plaintiff to support the charges. The situation presented by the issues framed by the pleadings in the present case is, in numerous aspects, similar to that recognized as supporting a cause of action for treble damages in *United States v. Paramount Pictures* (1947) [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131. Most, if not all of the violations of the anti-trust laws found to exist in *Paramount* are charged to have taken place in the case at bar. While it is true that the present plaintiff's bankrupt, hereinafter referred to as B. P. R., did not commence to operate its three theaters until March 1, 1944, and that its termination of the operation of Paulina Theater took place on June 10, 1951, the pleaded so-called "Chicago System" of film licensing, with all the criticized phases of participation therein by the defendants, renders clearly relevant to the present issues the series and background of negotiations, agreements, practices, understandings, conspiracies and acquiescence and participation in concerted conduct claimed to have adversely affected B. P. R. despite their origin prior to the commencement of theater operation by B. P. R. As the plaintiff properly points out in his memorandum, the incorporation in Rule 33 of the Rules of Civil Procedure of the provisions of Rule 26(b) thereof enunciates the criterion determinative of the propriety of a discovery interrogatory that the matter inquired into must be relevant to the issues in the action *or* must appear reasonably calculated to lead to the discovery of admissible evidence. *Vilastor Kent Theater Corp. v. Brandt* (D. C. N. Y. 1955) [1955 TRADE CASES ¶ 68,102] 18 F. R. D. 199. More specifically, even though an agreement among the defendants may have been originally entered into prior to the commencement by B. P. R. of its theater operations, the terms of that agreement, if adhered to by the defendants during the period of the bankrupt's theater operations, are not only relevant but may, in themselves, be evidential of some of the anti-trust violations charged in the complaint. In any event, they would seem to afford a likely avenue to discovery of relevant, and therefore admissible, evidence of the motives, reasons and objects of the conduct complained of. The complaint in the case at bar is not "notice pleading,"

but a very comprehensive narrative and catalog of acts, conditions and consequences extending over a period of time commencing prior to the entry of B. P. R. into theater operation in Chicago. Viewed against the allegations of the complaint, as elaborated by the testimony of Ben Eisenberg, given in his pretrial deposition, the number and scope of the charges upon which the plaintiff bases his claim to recovery renders relevant and proper the group of interrogatories immediately under discussion.

This Court does not feel that it can properly decide any of the ultimate issues in this case as a means of determining at this stage of the proceedings the propriety of the interrogatories under attack. The general principles stated in the various authorities cited by the objecting defendants in their brief on the present motion are, of course, sound, but are not of controlling application here.

Passing to interrogatory No. 22, while the period of time therein referred to commences prior to the commencement of bankrupt's theater operations, that period terminates well within the period of such operation and the question asks for changes effected in the exhibition run for each theater, the motive, reason and objective behind each of which changes may only appear from facts surrounding the inception of the system of runs to which the question relates. A similar situation is implicit in the inquiry in interrogatory No. 23. I therefore find both of these two interrogatories proper.

[*"Clearances"*]

Counsel for defendants emphasizes the necessity for "clearances" in the allocation of licenses for motion picture film exhibition, but one of the questions which must arise in the present case involves the determination of the reasonableness of the "clearance" granted by defendants under licenses to favored theaters, for the purpose of concluding whether such "clearance" grants were discriminatory, or tended to restrain competition. *Cf. Chorak v. RKO Radio Pictures* (9 Cir. 1952) [1952 TRADE CASES ¶ 67,267] 196 F. 2d 225, cert. den. 344 U. S. 887. I therefore find interrogatory No. 26 proper.

[*Admission Prices*]

The next group (Nos. 35 through 38) comprises inquiries into the identity of exhibiting theaters paying defendant distributors differing rates for film rentals; whether minimum admission prices were imposed by the distributors at any time on exhibiting theaters since January 1, 1942; the relationship, if any, between the minimum admission price requirement and a particular feature picture; and knowledge (for the purpose of determining acquiescence or concert) on the part of any defendant that minimum admission prices had been designated by others. These interrogatories I also consider proper.

[*"Favored" Theatres*]

Interrogatories numbered 44 and 45 refer to licenses by the defendants of feature pictures to B & K and Essaness theaters, who are charged with having been favored over those of B. P. R. Interrogatories numbered 46 and 47 refer to specifically named theaters of which the ownership and control may be shown to have resided in one or more of the defendants, or which may have been the beneficiaries of defendants' discrimination. I see nothing in the interrogatories themselves, when viewed in the light of the allegations of the complaint and the testimony of Eisenberg, which render these interrogatories objectionable, and I therefore sustain them.

[*Price Allocations*]

Interrogatories numbered 50 and 51 make inquiry respecting price allocations in licensing feature pictures for outlying runs in Chicago. I see no basis for criticizing these interrogatories and they are sustained.

[*Advantageous Playing Periods*]

Interrogatories numbered 61 through 63 evidently relate to the Eisenberg deposition and seek to bring home to defendants' knowledge, through their employees, the desire of the three therein named theaters for more advantageous playing periods. Defendants have not satisfied me that these interrogatories are improper. While I cannot visualize exactly how the plaintiff will fit the information secured through answers to these interrogatories into its proof picture on the trial, the broad scope of the complaint, supplemented by the deposition testimony of Eisenberg, induces me to feel that the inquiries in the criticized interrogatories are justified. They are therefore sustained.

[*Discrimination*]

I cannot concur in defendants' contention that interrogatories numbered 65 through 71 seek information which is irrelevant. Each of them points directly to specific charges of discrimination frequently reiterated in the testimony of Eisenberg. These questions also relate the asserted discriminations to the charge of consequent restraint of competition. The objections to the questions are over-ruled.

[*Dealings and Operations*]

It seems apparent that interrogatories numbered 80 through 84 relate (1) to the general course of dealing (concededly over a period of time commencing prior to the operation of the B. P. R. theaters) tending to support the charge of discrimination in favor of B & K theaters; (2) to the operation by any of the defendants of the Palace Theater; and (3) to the receipt by any of the defendants of requests from any theater in Chicago for leave to bid or negotiate for the first or second outlying run in any zone established by the defendants. One cannot read the *Paramount* case (*supra*) in the Supreme Court without being forced to the conclusion that the scope of inquiry apparent from the group of interrogatories presently discussed does not exceed the bounds of relevancy in the light of the charges in the complaint and the testimony of Eisenberg. These interrogatories are sustained.

[*"Substantial Competition"*]

Because two successive interrogatories put by the plaintiff are numbered 85, the defendants refer to the second of these two as No. 85a. The emphasis in interrogatory referred to as 85a seems to be on the words "substantial competition" and the answer to the inquiry may reasonably be expected to be offered in behalf of the plaintiff to show that there may have been some restraint of competition even though not substantial in character. The inquiry is therefore relevant and is sustained.

[*Other Rulings*]

Interrogatory No. 86 is supportable upon the same theory as that which leads me to sustain its immediate predecessor, and it will be similarly treated.

Interrogatories numbered 88 and 89 go directly to the crux of this case as I understand it from the pleadings and the depositions, in view of the principles enunciated by our Supreme Court in the *Paramount* case above cited. They are therefore sustained as relevant.

Interrogatory No. 92 is also sustained for similar reasons.

[*Transactions Antedating Operations*]

3. Included in paragraph numbered 3 of defendants' objections to plaintiff's interrogatories are those which I have already dealt with and some others. The essence of the defendants' objection set forth in paragraph numbered 3 is the relation of the interrogatories therein enumerated to a period of time antedating March 1, 1944 when B. P. R. Corp. commenced operating the Banner, Paulina and Royal Theaters. An examination of all of the interrogatories criticized on this ground convinces me that they are proper because they may reasonably be expected to lead to evidence indicating intent, course of dealing, plan, concert of action, development of monopoly, effect on competition, and the numerous other elements which will be required to support some or all of the grounds of liability on which the plaintiff bases his right to recover in this action.

To be more specific, interrogatory numbered 1 seeks information regarding the relationships between the defendants on the one hand and Balaban & Katz and Essaness on the other, respecting the licensing of feature pictures for exhibition in Chicago. Although the commencement of the period of dealing between these parties in this connection is designated as January 1, 1940, the development of the ultimate relationship, which persisted when B. P. R. entered the situation, and which is alleged to have adversely affected its competitive opportunities, renders relevant the circumstances surrounding the inception of the arrangement, as well as the successive steps preceding and leading up to the commencement of the alleged adverse impact upon the theaters of the plaintiff. For similar reasons, the other interrogatories which relate to periods of time commencing before March 1, 1944, when tested by the appropriate criteria, seem to me to be entirely proper, and are therefore sustained. *Milgram v. Loew's Inc.*, (3 Cir. 1951) [1950-1951 Trade Cases ¶ 62,938], 192 F. 2d 579, 584. Defendants' objections to the

interrogatories listed in paragraph numbered 3 of their statement of objections are overruled.

[*Opinions and Conclusions Not Sought*]

4. and 5. Defendants criticize certain of plaintiff's interrogatories for the reason that they seek opinions and conclusions, some of them from a corporation or corporations. Of course, it is obvious that the individual mind may express a conclusion; while a corporation, having no mind, cannot do so except as one of its officers or agents may be authorized and competent to speak for the corporation.

Typical of the interrogatories criticized on this ground is that numbered 20, which reads as follows:

> "20. During the period from January 1, 1942 to November 1, 1947, were your pictures available to the Southtown Theater to play immediately following the Tivoli Theater? If so, state why they were made available to the Southtown Theater to play immediately following the Tivoli, and if not, why not."

This interrogatory comprehends three inquiries,—the first may be answered yes or no. It must, of course, be read in conjunction with the charges in the complaint and the inquiries in the other interrogatories from which the connotation of the adjective "available" will readily appear. Simply paraphrased, the first portion of the interrogatory seeks to learn whether Southtown was permitted to play pictures of the defendants immediately after the run at the Tivoli. That inquiry calls not for a conclusion, but for a positive or negative answer. The next subdivision of the interrogatory assumes an affirmative answer to the first part and seeks the reason for such availability; and the final query, against the possibility of a negative answer to the first part, seeks the reason for nonavailability. Certainly the defendant whose picture is referred to should know better than anyone else whether it was available to a specified exhibiting theater at any particular time, and if so, why, and if not, why not.

Defendants cite Judge Rodney's opinion in *United States v. Columbia Steel Co.* (D. C. Del. 1947) 7 F. R. D. 183, as authority for the claimed impropriety of the interrogatories for seking a conclusion. The principle in *Columbia Steel* is well recognized. But it seems to me to be inapplicable to the interrogatories presently under consideration. Defendants say in their brief, page 34:

> "Plaintiff's interrogatories 18, 19 and 20 are of the 'Why not?' type. That is, they ask whether the defendants licensed certain theaters in certain ways, and, if not, why they did not do so."

Certainly the inquiry whether the defendants licensed certain theaters in certain ways does not call for an opinion or a conclusion, but merely seeks to extract information respecting the intent, the motives and the objectives of the defendants in acting as they did, and this is sought for the purpose of determining the relationship of their actions (or acquiescence) to monopolization, discrimination, and restraint of competition, allegedly adversely affecting B. P. R. As far as the "Why not" phase of the interrogation is concerned, the answer would not be an opinion, nor would it be a contention; but rather a reason, the relevancy of which to the question of the legality or illegality of the criticized action seems perfectly obvious. Because I do not find that the interrogatories in this group (enumerated in paragraph 4 of the defendants' objections) are argumentative in nature and call for answers in the nature of opinions or conclusions, I over-rule the objections to them.

The same interrogatories which are criticized in objection number 4 of the defendant are also criticized in the objection numbered 5 on the ground that because the defendants are bodies corporate, and therefore artificial persons, the interrogatories cannot be answered because only a natural person can give an opinion. Because I have ruled that these interrogatories do not call for opinions, and because Rule 33 directs that interrogatories to a private corporation shall be answered by any officer or agent who shall furnish such information as is available to the party, I adhere to my decision to over-rule the objections to these interrogatories enumerated respectively in paragraphs 4 and 5 of the defendants' statement of objections.

[*Unnamed Entities*]

6. Finally, defendants object to such of the interrogatories as purport to be directed to "'affiliated, associated, subsidiary and predecessor companies and corporations'" of the defendants. This objection is well taken. To so much of such interrogatories

as purport to relate to such *unnamed* entities, I sustain the defendants' objections upon the authority of *Stanzler v. Loew's Theater and Realty Corp.* (D. C. R. I. 1955) [1956 TRADE CASES ¶ 68,439] 19 F. R. D. 286, and *Savannah Theater Co. v. Lucas & Jenkins* (D. C. Ga. 1943) 10 F. R. D. 46.

[*Order*]

An order may be presented in conformity with the views hereinabove expressed.

[¶ 68,825] United States v. Edward Lowenthal.

In the United States Court of Appeals for the Seventh Circuit. September Term, 1957—September Session, 1957. No. 12034. Dated October 2, 1957.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. LABUY, District Judge.

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Violation of Cease and Desist Order—Civil Penalty Suit—Appeal.—A judgment imposing penalties on an individual for two violations of a Federal Trade Commission order prohibiting him from representing that his business is other than that of obtaining information for use in the collection of debts was affirmed. The trial court's refusal to grant the individual's motion for a directed verdict was not error since a motion for a directed verdict is not applicable to nor proper in a nonjury trial. A registered mail return receipt, relating to the service of the Commission's order upon the individual was properly admitted in evidence pursuant to Section 5(f) of the Federal Trade Commission Act, which provides in part, that a return post office receipt shall be proof of service of a Commission order.

See Unfair Practices, Vol. 2, ¶ 5089.16; FTC Enforcement and Procedure, Vol. 2, ¶ 8641, 8661.50.

For the plaintiff-appellee: Robert Tieken and John Peter Lulinski.

For the defendant-appellant: Robert J. Downing and John F. Neylan.

Affirming a judgment affixing penalties for violations of a Federal Trade Commission cease and desist order in Dkt. 4832.

Before MAJOR, FINNEGAN and PARKINSON, Circuit Judges.

[*Appeal*]

PARKINSON, Circuit Judge [*In full text*]: In this appeal the defendant seeks reversal of a judgment of the District Court affixing penalties for two violations of a cease and desist order of the Federal Trade Commission entered on April 27, 1944.

[*Trial Court*]

Trial was to the court and upon the conclusion of the Government's case the defendant filed a written motion for a directed verdict "pursuant to Rule 50(a) of the Federal Rules of Civil Procedure," which was overruled, and the defendant then rested without offering any evidence in defense.

[*Claimed Errors*]

The only errors relied on for reversal by the defendant are rulings on the evidence and the failure to grant his motion for a directed verdict.

[*Directed Verdict*]

Rule 50 of the Federal Rules of Civil Procedure applies to trials by jury only and a motion for a directed verdict is not applicable to nor proper in a nonjury trial. *Morris v. Prefabrication Engineering Co.*, 5 Cir., 1947, 160 F. 2d 779.

[*Evidence*]

The defendant complains of the admission in evidence of the last page of Gov-

-rnment's Exhibit 1. This exhibit was a certified copy of the findings and conclusions, the cease and desist order of April 27, 1944, the registered mail return receipts of the Respondents and the certificate of the Secretary of the Federal Trade Commission certifying that no petition was served upon the Commission to set aside the cease and desist order of April 27, 1944 "issued and served by the Federal Trade Commission." It was admitted in evidence without objection with the exception of the last page consisting of the registered mail return receipts to which the defendant objected for the reason that they had nothing to do with the cease and desist order and the signatures thereon had not been identified.

Title 15 U. S. C. § 45(f) provides, in applicable part, that

> "the return post office receipt for said * * * order * * * registered and mailed as aforesaid shall be proof of the service of the same."

Substantiated by the certificate of the Federal Trade Commission, the testimony of the witness Equi and the presumption of regularity which supports the official acts of public officials, *U. S. v. Chemical Foundation*, 1926, 272 U. S. 1, 14, the return registered mail receipt of Edward Lowenthal was properly admitted pursuant to this statute.

The undisputed evidence is that the cease and desist order against Edward Lowenthal was entered by the Federal Trade Commission on April 27, 1944 and was served on him by registered mail on May 1, 1944 and became final on June 30, 1944; that the witness, Philip Equi, an attorney-examiner for the Federal Trade Commission, interviewed Edward Lowenthal in his office on North Dearborn Street in Chicago, Illinois on more than one occasion, and on or about December 28, 1951 he visited a building on North Dearborn Street in Chicago, Illinois to see Edward Lowenthal and when he entered the building he looked on the directory in the lobby and saw Edward Lowenthal's name listed together with Retailers Service Bureau and Thomas Webster at room number 800; that he went to room number 800, on the door of which was printed the inscription of Retailers Service Bureau; that he entered the door and found a man who identified himself as Edward Lowenthal; that he had a conversation with Edward Lowenthal and told him he was investigating his compliance or non-compliance with the cease and desist order of April 27, 1944; that Edward Lowenthal admitted to him that he was the Edward Lowenthal named in Government's Exhibit 1, and they discussed the order and Edward Lowenthal indicated he wished to co-operate with the Federal Trade Commission and would be willing to discuss entering into a stipulation with the Commission; and that he was the owner or was trading or doing business as Thomas Webster and Retailers Service Bureau.

This was sufficient evidence to support the findings of the District Court.

The requests for admissions and the responses thereto were not introduced in evidence and in this case the District Court was not required to give any consideration thereto on the trial on the merits.

There having been sufficient evidence, exclusive of Government's Exhibit 6, to support the findings of the District Court, the admission in evidence of Government's Exhibit 6 was not reversible error. *Herlihy Mid-Continent Company v. Northern Indiana Public Service Company*, 7 Cir., 1957, 245 F. 2d 440.

[*Affirmed*]

Finding no reversible error, the judgment is affirmed.

[¶ 68,826] **State of Minnesota by J. W. Clark, Commissioner of Department of Business Development, Appellant v. Harry K. Wolkoff and Max Levin, trustees of Halpern Family Trust, et al., Respondents; Minnesota Council of Retail Trade Associations, intervenor, Appellant.**

In the Minnesota Supreme Court. No. 37025. No. 60, Ramsey County. Filed October 4, 1957.

Minnesota Unfair Trade Practices Act

Sales Below Cost—Unlawful Purpose or Effect of Injuring Competitors and Destroying Competition—Sufficiency of Evidence.—The dismissal of an action to enjoin operators of a retail grocery chain from offering and selling merchandise at less than

cost in violation of the Minnesota sales below cost law was affirmed. The evidence supported the trial court's finding that advertisements and sales at less than cost were not made for the purpose or with the effect of injuring competitors and destroying competition. Under the Minnesota law, both injury to competitors and the destroying of competition must be established as either the purpose or the effect of such advertisements or sales. The law provides that any sale by a retailer below an eight per cent mark-up, for the purpose or with the effect of injuring competitors or destroying competition, shall be prima facie evidence of a violation. Therefore, by showing such a sale with the purpose or effect of either injuring competitors or destroying competition, a plaintiff makes a prima facie showing of both elements. However, the establishment of a prima facie case is by no means conclusive.

The trial court did not err in admitting in evidence advertisements showing that the defendants' competitors were charging the same or lower prices. Such evidence was reasonably corroborative of the defendants' contentions that it was customary to set prices on the basis of what competitors were charging and that their purpose in setting these prices was not injury to competitors or destruction of competition. The fact that competitors were charging the same or lower prices for a reasonable time before and after the alleged violations was valid evidence that the defendants' prices did not, and even could not, have the effect of injuring such competitors or destroying competition. Evidence supported the trial court's finding that the advertisements and sales did not destroy or even diminish competition and had no effect whatever in the direction of destroying competition. The phrase "destroying competition" requires, at the very least some substantial damage to the competitive atmosphere of the defendants' trade area or to a competitor.

See Sales Below Cost, Vol. 2, ¶ 7151.25.

Sales Below Cost—Defense—Meeting of Competition—Good Faith—Legal Prices. —A merchant who, in good faith, sets the price of an article on the basis of a competitor's price, which price he in good faith believes to be a legal one, does not violate the Minnesota sales below cost law. The statutory exemption to sales below cost made in good faith to meet the legal prices of a competitor does not require a person charged with selling below cost to establish the absolute legality of the competitors' prices. In an action charging that operators of a retail grocery chain sold merchandise at less than cost, a trial court properly admitted in evidence advertisements showing that competitors of the grocery chain were charging the same or lower prices on identical merchandise. The court did not err in determining that the grocery chain acted in good faith in believing that it was meeting legal prices. The very fact that a competitor advertises a certain price on a given article over a long period of time without being challenged, and apparently without adverse economic effects, may warrant a merchant in assuming that such price is a legal one.

See Sales Below Cost, Vol. 2, ¶ 7161.25.

For the appellants: Miles Lord, Attorney General, and Howard H. Gelb, Special Attorney, St. Paul, Minn., for the State of Minnesota; and Loftsgaarden & Loftsgaarden, St. Paul, Minn., for Minnesota Council of Retail Trade Associations, Intervenor.

For the respondents: Lipschultz, Altman, Geraghty & Mulally, St. Paul, Minn.

Syllabus

1. Under Minnesota law, offers or sales at less than cost are illegal only where *both* injury to competitors and the destroying of competition are established as either the purpose or the effect of the defendant's action.

2. M. S. A. 325.06(4), which requires, among other things, that the provisions of § 325.04 shall not apply to any sale made in good faith to meet the legal prices of a competitor, does not require that the defendant establish the absolute legality of his competitor's prices in order to rely on such price and come within such exemption. If a merchant in good faith sets the price of an article on the basis of a competitor's price, which he in good faith believes to be a legal price, there is no violation.

3. Section 325.06(4) does not prevent the introduction of competitor's prices in all instances or for all purposes without the foundation required by this section. Where the defendants claim that sales below cost were necessary to actual business survival as well as a type of business promotion and advertising, and that such sales did not have the effect of destroying competition, competitors' prices, for a reasonable time before and after the defendants' prices, may be shown to substantiate such claims.

4. In an action by the state to enjoin the operators of a small retail grocery chain from offering and selling merchandise at less than cost as prohibited by law, the evidence examined and *held* to support the trial court's finding that, although certain items were advertised and sold at less than cost, such advertisements and sales were not made for the purpose or with the effect of injuring competitors and destroying competition.

5. A trial court sitting without a jury need only find the ultimate issuable facts. Where the decisive facts found by the trial court are sustained by the evidence, it is not necessary to specifically discuss proposed findings of fact which would not change the result.

6. Where full latitude is afforded a plaintiff on cross-examination of a defendant, including the use of parts of the defendant's deposition, there is no prejudicial error in the trial court's excluding the introduction of the entire deposition of the defendant, particularly where the plaintiff does not set forth the allegedly damaging evidence contained in the deposition and no offer of proof appears in the record.

Affirmed.

Opinion

[*Trial Court Ruling*]

DELL, Chief Justice [*In full text*]: In this action the state seeks to enjoin the defendants from offering and selling merchandise at less than cost as prohibited by law. Following a trial without a jury, the court found that while there were advertisements and sales at less than cost, there was not the necessary purpose or effect required by statute to constitute a violation of law and that, therefore, the defendants were entitled to judgment of dismissal on the merit. Plaintiff appeals from the order denying its alternative motion for amended findings and conclusions, or a new trial.[1]

[*Defendants' Business*]

When this action was instituted, defendants owned four retail grocery stores in different areas of St. Paul operating under the trade name of Cut Price Super Markets. Subsequently the defendants acquired a fifth store. In the latter part of 1955 defendants advertised and sold certain brands of ketchup, coffee, and sugar at less than their cost. Certain of their competitors testified that they were injured by such action. The evidence indicates that defendants operated in a highly competitive market—their competitors ranging from large national chains, operating as many as 50 stores in defendants' trade area, to one-store independents. One of defendants' stores has four large chain competitors within eight blocks; another has three within one mile; and another has five within a mile and a half. The evidence indicates that within a rather broad limitation set by actual cost the most important factor in setting the price of an item is what competitors are charging for such items. Such features as trading stamps, large color advertisements, and giveaway policies of competitors, as well as other obvious economic factors, also influenced the determination of what price to give a particular item. Defendants' position appears to be that these advertisements and sales were made in good faith as necessary to actual business survival and were not made with the purpose or effect required by the statute. They introduced numerous advertisements of their competitors showing that they were charging the same or lower prices for these identical items. There is also undisputed evidence that defendants' relative position in their market had declined in the two years prior to these advertisements and sales while some of their competitors showed substantial increases during this same period.

[1] Intervenor's position is substantially the same as plaintiff's and therefore will not be considered separately.

[*Requisite Purpose or Effect*]

1. Some preliminary consideration of the applicable law is necessary. Not every sale below cost is condemned under Minnesota law. Such an offer or sale must be accompanied by a certain purpose or have a certain effect. Twenty-nine other states have statutory prohibitions against sales below cost applicable to most industries and products.[2] All but one of these states[3] require that the offer or sale be made with some specific culpable purpose or have such an effect.[4] The absence of such a qualification would seem to render such a law unconstitutional.[5]

Under M. S. A. 325.04, only those offers or sales of goods at less than cost are declared illegal which are made:

> "* * * for the purpose *or* with the effect of injuring competitors *and* destroying competition, * * *." (Italics supplied.)

It is to be noted that *both* injury to competitors *and* the destroying of competition must be established as *either* the purpose *or* effect of the defendants' actions in order to find or sustain a violation. Apparently realizing the difficulty of enforcement of this type of law, the legislature provided some aid to the establishment of the dual purpose or effect necessary.[6] It provided that any sale by a retailer below an 8-percent markup, for the purpose or with the effect of injuring competitors *or* destroying competition, shall be prima facie evidence of a violation.[7] Thus, by showing such a sale with the purpose or effect of *either* injuring competitors *or* destroying competition, a plaintiff makes a prima facie showing of *both* elements. However, the establishment of a prima facie case is by no means conclusive.[8] If a court finds from competent and sufficient evidence that the challenged offer or sale was not, in fact, made with the requisite dual purpose nor had such effect, then it must find that there is no violation.[9]

[*Advertisements of Competitors*]

2. We will first consider plaintiff's contention that the trial court erred in admitting the advertisements of the defendants' competitors, since this evidence constituted a major part of the defendants' case.[10] These advertisements were published during a period from approximately six months prior to defendants' alleged violations until about one month after the advertisements and sales challenged in this action. Certain of these advertisements were introduced to show the high degree of competition in the St. Paul grocery market. They were used to demonstrate the competitive influence of large advertisements, gift stamps, and other

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[2] 2 CCH, TRADE REGULATION REPORTS par. 7101. Nine other states have similar prohibitions applicable to certain specific industries or products. *Id.* See, also, *Louisiana Wholesale Distributors Assn. v. Rosenzweig* [1948-1949 TRADE CASES ¶ 62,262], 214 La. 1, 6, 36 So. (2d) 403, 404.

[3] New Jersey has no requirement of purpose or effect. This statute has been declared unconstitutional because of this defect. *State v. Packard-Bamberger & Co. Inc.* [1932-1939 TRADE CASES ¶ 55,240], 123 N. J. L. 180, 8 A. (2d) 291.

[4] 2 CCH, TRADE REGULATION REPORTS par. 7151.

[5] See, *State v. Packard-Bamberger & Co., Inc.* [1932-1939 TRADE CASES ¶ 55,240], 123 N. J. L. 180, 8 A. (2d) 291; see, also, *Fairmont Creamery Co. v. Minnesota,* 274 U. S. 1, 47 S. Ct. 506, 71 L. Ed. 893; *McElhone v. Geror* [1940-1943 TRADE CASES ¶ 56,042], 207 Minn. 580, 292 N. W. 414; *Commonwealth v. Zasloff,* 137 Pa. Super. 96, 8 A. (2d) 801; *Perkins v. King Soopers* [1950-1951 TRADE CASES ¶ 62,677], 122 Colo. 263, 221 P. (2d) 343. But, see, *May's Drug Stores v. State Tax Comm.* [1950-1951 TRADE CASES ¶ 62,741], 242 Iowa 319, 45 N. W. (2d) 245.

[6] Such aid to the establishment of a violation is not uncommon. See, *e. g.,* Rev. Code of Wash. § 19.88.140 (intent); Calif. Bus. & Prof. Code, §§ 17041, 17026 (cost).

[7] M. S. A. 325.52.

[8] See, *Blumberg v. Palm,* 238 Minn. 249, 253, 56 N. W. (2d) 412, 415; *Topinka v. Minnesota Mutual Life Ins. Co.* 189 Minn. 75, 248 N. W. 660; *State v. Twentieth Century Market* [1940-1943 TRADE CASES ¶ 56,073], 236 Wis. 215, 221, 294 N. W. 873, 876.

[9] See, *Opinion Attorney General,* No. 681-A, November 8, 1946 [1946-1947 TRADE CASES ¶ 57,516]; *Opinions Attorney General,* No. 417-E, November 24, 1947 [1948-1949 TRADE CASES ¶ 62,208], February 4, 1949 [1948-1949 TRADE CASES ¶ 62,372], March 23, 1949 [1948-1949 TRADE CASES ¶ 62,406], and July 5, 1949 [1948-1949 TRADE CASES ¶ 62,459].

[10] Plaintiff actually assigns as error certain determinations allegedly made in the trial court's memorandum. While a memorandum may be used to explain ambiguous or vague findings, it is extremely doubtful if any error in a memorandum would warrant a new trial or reversal. Since a correct decision will not be reversed because it was based on the wrong reasoning (1 Dunnell, Dig. [3 ed.] § 421), the opinion of the trial judge, as expressed in a memorandum opinion, may be disregarded. However, since plaintiff's argument under this assignment appears to be directed to the alleged erroneous admission of certain advertisements, we will consider the assignment of error as so specified.

giveaway features employed by defendants' competitors. The competitive activity of the defendants' trade area is a legitimate area of inquiry in actions of this kind and insofar as they were introduced for this purpose, we cannot say that the trial court erred in admitting such evidence.

[*Meeting Competition*]

Plaintiff contends more specifically, however, that insofar as these advertisements showed that the defendants' competitors were charging the same or lower prices on identical items, they were inadmissible since there was no preliminary showing as required by § 325.06(4). This section states that the provisions of § 325.04 shall not apply to sales made:

> "In an endeavor made in good faith to meet the legal prices of a competitor selling the same commodity, articles, goods, wares, or merchandise in the same locality or trade area."

We are of the opinion that the record furnishes a sufficient evidentiary basis to warrant the trial court in concluding that these preliminary requirements were satisfied.

There is obviously sufficient evidence to justify a finding that these competitors were in the same locality or trade area. The principal area of dispute relates rather to the issue of the "legality" of these competitors' prices. Plaintiff takes the position that § 325.06(4) requires that the defendant must establish the absolute legality of these competitors' prices at his peril. We do not agree. Such an interpretation would ignore the qualification of "an endeavor made in good faith," an all-important phrase in this exemption. We are of the opinion that an examination of the history of this type of provision and a consideration of the practicalities involved necessitates a less strict interpretation.

An exemption such as this is common in unfair trade acts. Eighteen states have provisions similar to Minnesota, i. e., exempting sales below cost made in good faith to meet the *legal* prices of a competitor.[11] Eight states require only good-faith meeting of competition without reference to the legality of his price.[12] Certain acts originally were absolute in requiring that the competitor's price was a "legal" price, without regard to the good faith of the defendant. Such an absolute requirement has been termed invalid.

As stated in *Commonwealth v. Zasloff* [1940-1943 TRADE CASES ¶ 56,034], 338 Pa. 457, 465, 13 A. (2d) 67, 71:

> "* * * And how could a merchant know whether a selling price which he proposed to fix was legal because it met 'the legal price of a competitor for merchandise of the same grade, quantity and quality'? How could such 'legal price of a competitor' be ascertained without examining the competitor's books in order to determine whether *his* price was legal? The standard set by the act to differentiate criminal from legitimate sales is so vague, indefinite and incapable of practical application that this in itself would make its enforcement a violation of the due process clause: * * *."

In *State v. Packard-Bamberger & Co. Inc.* [1932-1939 TRADE CASES ¶ 55,240], 123 N. J. L. 180, 185, 188, 8 A. (2d) 291, 294, 295, the New Jersey Supreme Court made this comment on such an absolute provision:

> "* * * How a person is to determine the legality of the price of a competitor is not declared, and the impracticability, if not the impossibility of determining the 'legality' of a competitor's price is obvious.
>
> * * *
>
> "* * * A person might believe he was complying with the provisions of this act in all respects, and find himself guilty of its violation because * * * he met the price of a competitor, believing such price to be a lawful one, when it was not * * *."

Thus, in response to arguments similar to plaintiffs' here, the qualification of "good

[11] Ark. Stat. 1947 Ann. § 70-306(d); Calif. Bus. & Prof. Code, § 17050(d); Colo. Rev. Stat. 1953. § 55-2-6(4); Ky. Rev. Stat. § 365.040(4); La. Rev. Stat. 1950, 51:426(7); Rev. Stat. of Maine 1954, c. 184, § 3(VIII); Rev. Codes of Mont. 1947, § 51-107(d); N. H. Rev. Stat. Ann. 1955. 358:3(h); N. J. Stat. Ann. (Perm. ed.) § 56:4-14 (e); N. Dak. Rev. Code of 1943, § 51-1007(7); Okla. Stat. Ann. (Perm. ed.) Title 15, § 598.7; Ore. Rev. Stat. § 646.120(4); Tenn. Code Ann. § 69-304(h); Utah Code Ann. 1953, § 13-5-12(d); Code of Va. 1950, § 59-19(7); Rev. Code of Wash. § 19.88.100(4); W. Va. Code of 1955, § 4678(8h) (d); Wyo. Comp. Stat. 1945, § 39-410(D).

[12] Ariz. Rev. Stat. § 44-1463(7); Idaho Code, § 48-407(d); Gen. Stat. of Kan. 1949, § 50-405(*e*); Ann. Code of Md. art. 83, § 114(h); Ann. Laws of Mass. c. 93, § 14G(*h*); Rev. Stat. Neb. 1943, § 59-1206(7); Purdon's Pa. Stat. Ann. (Perm. ed.) Title 73, § 216(g); Wis. Stat. 1955, § 100.30 (6)(g).

faith" has been held to obviate any absolute requirement that the defendant must establish the legality of the competitor's prices. In *People v. Pay Less Drug Store* [1944-1945 TRADE CASES ¶ 57,296], 25 Cal. (2d) 108, 117, 153 P. (2d) 9, 14, the California Supreme Court pointed out:

"* * * The requirement is not absolute. It is merely that the defendants shall have endeavored 'in good faith' to meet the legal prices of a competitor. A similar provision was upheld in *State v. Sears,* 4 Wn. 2d 200 [103 P. 2d 337, 345], the court saying 'that if a merchant in good faith reduces his prices to meet those of a competitor, who he in good faith believes has a legal price, he will not be violating either the intent or the wording of the act.' The provision therefore is not like that involved in *Commonwealth v. Zasloff,* * * * also, *State v. Packard-Bamberger & Co.,* * * * holding invalid a provision which exempted the merchant if the price was made 'to meet the legal price of a competitor' as an absolute requirement without according him the opportunity of showing his good faith."

In *McIntire v. Borofsky* [1948-1949 TRADE CASES ¶ 62,266], 95 N. H. 174, 177, 59 A. (2d) 471, 474, the New Hampshire Supreme Court stated concisely:

"One of the exceptions to the act is 'where the price of merchandise is made in good faith to meet legal competition.' * * * If this required the retailer to examine his competitor's books to ascertain whether the competition was legal, it would be of doubtful validity. * * * All that is required of the retailer, however, is an endeavor 'in good faith' to meet the legal prices of his competitor."

We are of the opinion that such an interpretation is the practical and correct one. If a merchant in good faith sets the price of an article on the basis of a competitor's price, which price he in good faith believes to be a legal one, there is no violation.

In the case now before us we cannot say that the court erred in determining that the defendants acted in good faith in believing they were meeting legal prices. The inferences are conflicting. Although we may have reached a different determination on a *de novo* consideration, there is sufficient evidence in the record to permit the trial court to infer the good faith of the defendants, including direct testimony of such "good faith." The very fact that a competitor advertises a certain price on a given article over a long period of time without being challenged, and apparently without adverse economic effects, may warrant a merchant in assuming that such price is a legal one.

[*Evidence of Purpose or Effect*]

3. Furthermore, plaintiff's entire argument appears to be based on the assumption that this section prevents the introduction of competitor's prices *in all instances, for all purposes,* unless there is the required foundation set forth in this section. Again we cannot agree. Even if such evidence were inadmissible as a defense under § 325.06 (4) insofar as it relates to defendant's meeting of competitor's prices, this does not render its admission fatal where it may be properly admitted for another purpose.

From a review of the record, it appears that the defendants' theory in introducing this evidence was much broader than merely supporting a claim that they were meeting competitor's prices. As previously mentioned, part of this evidence was directed to showing the high competitive features of defendants' trade area. The defense also contended that it was customary to set prices on the basis of what competitors were charging for the same items, and that their "purpose" in setting these prices was not injury to competitors or destruction of competition but rather actual business survival as well as a type of promotion and advertising to counteract the giveaway and trading-stamp schemes of certain competitors. These contentions, if believed, would fairly negate any claim that the prices were established to injure competitors or destroy competition. This evidence is reasonably corroborative of such contentions. It is doubtful if such a "purpose" is merely "meeting the prices" of a competitor within the meaning of § 325.06(4) so as to prevent the introduction of such evidence without the preliminary foundation required by that section.

Furthermore, it is apparent that the defendants also introduced this evidence to show that their prices did not have the *effect* of injuring competitors or destroying competition. Plaintiff alleged in the complaint that the defendants' sales under cost were made for the purpose *or* had the effect of injuring competitors and destroying competition. Proof of either "purpose"

or "effect" would warrant a finding of violation. Thus, defendants were entitled to introduce evidence tending to show that their acts did not have the effect claimed. The fact that competitors were charging the same or lower prices for a reasonable time before and after the alleged violations was valid evidence that the defendants' prices did not, and even could not, have the effect of injuring such competitors or destroying competition in the market involved.

Plaintiff's objection to the admission of this evidence was general and was not accompanied by any request for a qualification or restriction of the use of such evidence. Evidence lawfully admissible for one purpose cannot be excluded merely because it may be used for another purpose. Upon proper request the court should limit its application, but where the objection is to the whole and not accompanied by a request for restriction of its use, the trial court commits no prejudicial error in admitting the evidence.[13]

Plaintiff also contends that these advertisements were too remote in time from the date of the alleged violations charged in this action. We are of the opinion that they are not so remote as to warrant this court's interference.

The admission and exclusion of evidence rests, to a large degree, in the discretion of the trial court.[14] We cannot say that in the matter now before us the trial court abused such discretion.

[*Sufficiency of Evidence*]

4. Plaintiff next contends that the trial court erred in finding that the defendants' advertisements and sales were not in violation of law. The trial court found generally in accordance with the statutory language that the advertisements and sales were not made for the purpose or with the effect of injuring competitors and destroying competition. In its memorandum, however, the court indicated that while it felt that the plaintiff did make a prima facie case because of the evidence of "slight" injury to some independent competitors, in its opinion it was clear that the acts of the defendants were not done with the purpose or effect required under the law. Since, as previously discussed, both injury to competitors and destroying competition are necessary to establish a violation, the absence of either a purpose or effect of destroying competition will warrant a judgment for the defendants without regard to any injury to competitors. We are of the opinion that the record before us amply supports the trial court's position.

[*Purpose of Defendants*]

As far as the *purpose* of the defendants is concerned, we have the testimony of one of the defendants, a managing partner whose duty it was to compute and determine the selling price for the various grocery items sold by Cut Price. His testimony is replete with legitimate reasons why the challenged prices were established—reasons other than an intention to injure competitors or destroy competition. This witness testified that in setting the selling price on any item, the major consideration was the prices advertised by competitors on these same items and that was one reason for such prices. He further indicated that these prices were established to counteract the promotional and advertising effect of giveaway and trading-stamp schemes of competitors and to regain business which the defendants had recently lost. He testified that there was as much as a 20-percent decline in the number of families that shopped in their markets in the three years preceding this action and offered the results of an independent survey to support such contentions. He attributed defendants' declining position to the low prices set by competitors plus the development by their competitors of the use of trading stamps and other "giveaways" as stimulated by extensive advertising campaigns. He testified that the only form of competition open to the defendants and the independents were low prices. This witness identified the numerous advertisements, both before and after the date of the alleged violation charged in this action, showing the defendants' competitors were advertising the same or lower prices for these identical items.

Purpose or intent are seldom, if ever, easy elements to prove. They necessarily involve subjective determination. They may, of course, be inferred from the objective

[13] *State v. DeZeler*, 230 Minn. 39, 41 N. W. (2d) 313; see, *Van Brunt v. Greaves*, 32 Minn. 68, 19 N. W. 345.

[14] *Klingman v. Loew's Inc.*, 209 Minn. 449, 296 N. W. 528; see, 19 Dunnell, Dig. (3 ed.) § 9714.

conduct of the person concerned. In this case there is direct testimony of the defendants' "good faith" from the person responsible for setting prices for the defendants' stores. There is also abundant corroborative evidence that his sole motive was defensive in the face of competitors' actions. The evidence is sufficient to support a finding that the advertisements and sales were not made for the purpose of either injuring competitors or destroying competition.[15]

[*Effect of Defendants' Actions*]

We must then consider the *effect* of the defendants' advertisements and sales. While the trial court indicated that it did feel that the defendants' actions had the effect of injuring some competitors "to a slight degree," it emphasized that "It is also clear that these sales did not destroy or even diminish competition," and "had no effect whatever in the direction of destroying competition."

The phrase "destroying competition" or its equivalent is a part of the unfair-trade statutes of 15 states in addition to Minnesota.[16] Other states use the phraseology "substantially lessening competition" or its equivalent,[17] an obviously more workable test.

Although "destroying competition" is a common test in unfair-trade laws, it appears to have had no specific judicial interpretation.[18] Perhaps this is due to the unstrategic position of this phrase in the laws of most states. Nine of the fifteen states using this phrase provide a less absolute, alternative basis of establishing a violation.[19] The other six speak solely of a *purpose or intent* to destroy competition with no reference to effect.[20] Proving such an intention is obviously something quite different—something less—than proving that the defendants' acts had the *effect* of destroying competition. Thus, among the states which do require or permit the establishment of a violation by proof of some "effect," only Minnesota requires the plaintiff to prove the effect of "destroying competition."

Webster defines "effect" and "destroy" as follows:

> Effect: "That which is produced by an agent or cause; * * * result; outcome; * * * consequence * * *."
>
> Destroy: "To undo or unbuild; to ruin the structure, organic existence, or condition of; * * * to demolish; * * *. To ruin completely or to injure or mutilate beyond possibility of use, * * *. To bring to naught by putting out of existence; * * *. To annihilate; to cause to vanish; to abolish; * * * to nullify; * * *."[21]

In short, the obvious literal requirement to satisfy this test might be held to require the complete elimination of all effective competition.[22] A strong argument could be made for such an interpretation based on the availability of obvious alternative words such as "damage" to indicate a lesser condition. However, in considering the practicalities of the evil sought to be remedied

[15] See, *Ellis v. Dallas* [1952 TRADE CASES ¶ 67,345], 113 Cal. App. (2d) 234, 248 P. (2d) 63.

[16] Ark. Stat. 1947 Ann. § 70-303; Calif. Bus. & Prof. Code, § 17043; Colo. Rev. Stat. 1953, § 55-2-3; Gen. Stat. of Conn. § 6716; Ky. Rev. Stat. § 365.030; Rev. Stat. of Maine 1954, c. 184, § 2; Ann. Code of Md. art. 83, § 113; Ann. Laws of Mass. c. 93, § 14F; Rev. Codes of Mont. 1947, § 51-103; N. H. Rev. Stat. Ann. 1955, 358:2; Ore. Rev. Stat. § 646.100(1)(a); R. I. Acts and Resolves of 1939, c. 671, § 2; Rev. Code of Wash. § 19.88.040; W. Va. Code of 1955, § 4678 (8b); Wyo. Comp. Stat. 1945, § 39-407.

[17] Ariz. Rev. Stat. § 44-1464; Idaho Code, § 48-404; Gen. Stat. of Kan. 1949, § 50-402; La. Rev. Stat. 1950, 51:422; Rev. Stat. Neb. 1943, § 59-1203; N. Dak. Rev. Code of 1943, § 51-1003; Okla. Stat. Ann. (Perm. ed.) Title 15, § 598.3; Purdon's Pa. Stat. Ann. (Perm. ed.) Title 73, § 213; Tenn. Code Ann. § 69-303; Utah Code Ann. 1953, § 13-5-7; Code of Va. 1950, § 59-13. Code of Laws of S. C. 1952, § 66-65, speaks of "driving out competition * * *." Wis. Stat. 1955, § 100.30(4), speaks only of injuring a competitor. N. J. Stat. Ann. (Perm. ed.) § 56:4-8, requires no purpose or effect; see footnote 3, *supra*.

[18] Compare, under milk licensing law, where "destructive competition" was defined as that which would "tend not only to damage but to destroy competition." *Matter of Eisenstein v. Du Mond*, 268 App. Div. 320, 323, 51 N. Y. S. (2d) 811, 814.

[19] The following states offer injury to competitors as an alternative basis. Calif. Bus. & Prof. Code, § 17043; Gen. Stat. of Conn. § 6716; Rev. Stat. of Maine 1954, c. 184, § 2; Ann. Code of Md. art. 83, § 113; Ann. Laws of Mass. c. 93, § 14F; N. H. Rev. Stat. Ann. 1955, 358:2; R. I. Acts and Resolves of 1939, c. 671, § 2. Ore. Rev. Stat. § 646.100(1)(a), condemns actions which may lessen, injure, destroy, prevent, hinder, *or* suppress the competition of competitors. Rev. Code of Wash. § 19.88.040, speaks of offenses which destroy *or* tend to destroy competition.

[20] Ark. Stat. 1947 Ann. § 70-303; Colo. Rev. Stat. 1953, § 55-2-3; Ky. Rev. Stat. § 365.030; Rev. Codes of Mont. 1947, § 51-103; W. Va. Code of 1955, § 4678(8b); Wyo. Comp. Stat. 1945, § 39-407.

[21] Webster's New International Dictionary (2 ed.) (1947).

[22] *Cf. Matter of Eisenstein v. Du Mond*, 268 App. Div. 320, 323, 51 N. Y. S. (2d) 811, 814.

and the apparent legislative intent, such a requirement would approach absurdity,[23] for seldom, if ever, is *all* competition eliminated by the most severe price cutting. Nor should the administrative body responsible for enforcement of such laws be required to wait until such a condition exists before attempting some legal restraint.

It is our duty to construe and interpret a statute so as to give it practical meaning and effect within the legislative intent.[24] However, until a proper factual case is presented which requires a clear determination and offers a practical situation in which all the conflicting problems and considerations in the area involved are apparent, a court should restrain from theorizing. This should be particularly true in the field of economic regulation. The eventual goal of any interpretation must be viewed in the practical situation existing in the field to be regulated.[25]

In the matter now before us, it does not appear necessary or proper to establish a rigid standard or definition of the phrase "effect of * * * destroying competition." Certainly the phrase requires, at the very least, some substantial damage to the competitive atmosphere of the defendants' trade area or to a competitor. Here there is no showing of substantial damage to even one competitor, much less any effect whatsoever on the competitive atmosphere of the St. Paul retail-grocery market. A careful review of the evidence leaves serious doubt that plaintiff's evidence could support a finding of the destroying of competition in the broadest possible meaning of that phrase, if the trial court had made such a determination. The evidence certainly affords ample support for the finding that the defendants' actions did not have the effect of destroying competition. Whether the actions of the defendants were with the requisite dual purpose or had such effect was a question of fact to be resolved by the trier of fact.[26] We emphasize what we have repeatedly said, that we may only interfere with the findings of the lower court where the evidence taken as a whole furnishes no substantial support for such findings. If the evidence fairly tends to support the findings—if reasonable persons might draw different conclusions from the evidence—then the findings should not be disturbed.[27]

[*Evidence*]

Plaintiff's witnesses, independent competitors of the defendants, testified to extremely vague injuries, resorting to obvious speculation not only as to defendants' actions being the cause of any loss, but the very fact of any loss at all. The only definite economic estimate of loss was by one witness and amounted to $4. The defense successfully brought out many other factors which could have been responsible for the supposed losses. On the other hand, there was ample evidence introduced by the defendants to show that the same competitive atmosphere apparently prevailed some time before as well as after the alleged violations. As previously pointed out, there was evidence that the defendants' competitors were advertising the same or lower prices on these same products as much as 5 months before the defendants' advertisements and for some time thereafter. It also appears that during the 2 years preceding these alleged violations the defendants' relative position in the market had decreased almost 21 percent while certain of their competitors had increased their position as much as 41 percent and 46 percent. While this evidence would not necessarily prevent the defendants' actions from being illegal by, in fact, destroying competition and injuring competitors at the time of such practices, it does offer persuasive support for the trial court's conclusions. A consideration of the evidence in its entirety indicates ample support for the disputed finding.

[*Defendants' Position in Market*]

5. The trial court found that the defendants operated a chain of grocery stores in St. Paul "in competition with many other chain grocery companies, many of whose operations were larger than those of the defendant." The plaintiff contends that the court erred in this finding by failing to state that defendants were also in competition with grocers smaller than the defendants. Plaintiff only makes token reference to this alleged error, citing no authority in sup-

[23] See, 17 Dunnell, Dig. (3 ed.) § 8947.
[24] See, 82 C. J. S., Statutes, § 312; 17 Dunnell, Dig. (3 ed.) § 8937, *et seq.*
[25] See, 17 Dunnell, Dig. (3 ed.) § 8940.
[26] See, *Mering v. Yolo Grocery & Meat Market* (Cal.), 127 P. (2d) 985; *State v. Twentieth Century Market* [1940-1943 TRADE CASES ¶ 56,073], 236 Wis. 215, 221, 294 N. W. 873, 876.
[27] See, 1 Dunnell, Dig. (3 ed.) § 411.

port of its position that such an omission constitutes reversible error. The truth of the finding is undisputed. We know of no rule requiring the trial court to state every fact. Obviously the court was attempting to merely indicate that the defendants were not the "giant" of its trade area, a fact amply supported by the evidence. We fail to see how the fact that it was also not the smallest would change the decision. Only the ultimate issuable facts must be found.[28] Where the decisive facts, as found by the trial court, are sustained by the evidence, it is not necessary to specifically discuss proposed findings of fact which would not change the result.[29]

[*Exclusion of Deposition*]

6. Finally plaintiff alleges error in the trial court's refusal to admit in evidence the deposition of one of the defendants, a managing partner of the stores and the principal witness for the defense. It is apparent from the record that extensive latitude was permitted in the cross-examination of this witness, including the use of part of the deposition for attempted impeachment. The record is not clear as to the exact purpose for which the plaintiff sought to introduce the deposition. It came after thorough and extensive cross-examination of this witness and was offered so that "perhaps the matter can be simplified * * *." Considerable cross-examination followed and finally counsel for plaintiff stated "That is all I have of this witness." No further particular parts of the deposition were offered for impeachment or otherwise. Plaintiff does not set forth the allegedly damaging evidence it now claims is contained in the deposition and no offer of proof appears in the record. A court cannot assume the materiality of evidence not included in the record nor in any way disclosed, and in the absence of any showing of the nature and substance of such evidence, this court cannot determine whether it was erroneously excluded or if plaintiff was prejudiced by such exclusion.[30]

As we understand it, plaintiff's position is that Rule 26.04(2) of Rules of Civil Procedure gives him the absolute right to introduce a party's or managing agent's deposition. This rule states:

> "The deposition of a party or * * * managing agent * * * may be used by an adverse party for any purpose." Plaintiff omits reference to the preceding qualifying language of the main body of Rule 26.04, that a deposition may be used "so far as admissible under the rules of evidence, * * *."

We do not read into this rule a mandatory requirement that a court must admit the deposition of an adverse party regardless of trial circumstances.[31] As stated in *Arnstein v. Porter,* (2 Cir.) 154 F. (2d) 464, 470:

> "* * * As we have said, 'a deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand' * * *"

and at footnote 11:

> "* * * Of course, under the Rules, the deposition of an adverse party may be used 'for any purpose,' but it is not a compulsory substitute for his examination in open court."

In view of the full latitude afforded plaintiff in cross-examination of the witness, and the unrestricted use of the deposition, short of its blanket admission, and since the plaintiff has not set forth the allegedly damaging evidence contained in the deposition nor protected itself by a proper offer of proof at the trial, we find no error in the court's exclusion of the deposition.

Affirmed.

[¶ 68,827] Noerr Motor Freight, Inc.; Kramer Bros. Freight Lines, Inc.; McLean Trucking Company; Lansdale Transportation Co., Inc.; T. M. Zimmerman Company; W. I. Womeldorf & Sons Company; Rodgers Motor Lines, Inc.; Akers Motor Lines, Inc.; Keystone Lawrence Transfer & Storage Company; W. J. McCormick Truck Transportation; Martin Brothers; Pennsylvania Transfer Company; F. W. Lusk Transfer Company; Davidson Transfer & Storage Company; Suwak Trucking Company; C. W. Dillie; A. W. Bauman, Jr. Trucking Company; Martsolf Bros.; Spector Motor Service, Inc.; G. C. Braden Trucking Company; Edward G. Horn Trucking Co.; Seaboard Tank

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[28] 19 Dunnell, Dig. (3 ed.) § 9851.

[29] *Johnson v. Grady,* 187 Minn. 104, 244 N. W. 409.

[30] See, *Gutmann v. Klimek,* 116 Minn. 110, 133 N. W. 475.

[31] See, *United States v. United Shoe Machinery Corp.* (D. Mass.) [1950-1951 TRADE CASES ¶ 62,631], 93 F. Supp. 190.

Lines, Inc.; Friedman's Express, Inc.; Karn's Transfer, Inc.; Lombard Bros. Incorporated; Lester C. Newton Trucking Company; and Pennsylvania Motor Truck Association, Plaintiffs; and D. F. Bast; Ed. Chadderton Trucking; Cooper-Jarrett, Inc.; Eastern Freight-Ways, Inc.; Fowler & Williams, Inc.; William F. Grossett, Inc.; Fischbach Trucking Co.; Hall's Motor Transit Co.; Mushroom Transportation Co., Inc.; Miller Motor Express, Inc.; Yale Transport Corporation; Daily Motor Express; McCullough Transfer Co.; and York Transportation Co., Intervening Plaintiffs v. Eastern Railroad Presidents Conference; Walter S. Franklin, Individually and as President of the Pennsylvania Railroad Company; M. W. Clement, individually and as former President of the Pennsylvania Railroad Company; R. W. Brown, individually and as former President of the Reading Company; Joseph A. Fisher, individually and as President of the Reading Company; Lewis D. Freeman, individually and as Trustee of New York, Ontario & Western Railway; Fred W. Okie, individually and as President of Union Railroad Co. (Pittsburgh); Pennsylvania Railroad Company; New York Central Railroad Company; Chesapeake & Ohio Railway Company; Norfolk & Western Railway Company; Charles J. Graham, individually and as President of Pittsburgh & West Virginia Railway; Baltimore & Ohio Railroad Company; Reading Company; New York, New Haven & Hartford Railroad Company; Lehigh Valley Railroad Company; Lehigh & New England Railroad Company; Delaware, Lackawanna & Western Railroad Company; Delaware & Hudson Railroad; Erie Railroad Company; Western Maryland Railway; Pittsburgh & West Virginia Railway; New York, Chicago & St. Louis Railroad Company; Boston & Maine Railroad; Central Railroad Company of New Jersey; Central Railroad Company of Pennsylvania; Maine Central Railroad Company; New York, Ontario & Western Railway; Lehigh & Hudson River Railroad; Union Railroad Company (Pittsburgh); Canadian Pacific Railway Company; Canadian National Railways; and Carl Byoir & Associates, Inc., Defendants.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 14715. Dated October 10, 1957.

Sherman Antitrust Act

Combinations and Conspiracies—Conspiracy To Lessen Competition in Long-Haul Carriage of Freight—Campaign To Destroy Good Will of Industry—Fomentation of Governmental Restrictions.—Railroads, their local association, and a public relations firm were found to have engaged in an unlawful conspiracy to injure interstate long-haul truckers and their local association (the plaintiffs) in the northeastern section of the United States. The defendants conspired with the intent and object of substantially lessening competition in the industry and achieved such object by conducting a campaign designed to destroy the good will of the long-haul trucking industry and by fomenting governmental restrictions. The defendants formed a conspiracy for an illegal objective (injury to the truckers' business and good will and, if possible, the elimination of the truckers as competitors), and, in concert, they attempted to use both legal and illegal means to accomplish their illegal objective. The defendants' activities did not constitute a mere appeal to the legislature. Evidence established the formation of so-called "independent citizen groups" which were mere pawns in circulating information derogatory to the truckers, the dissemination of false information to customers of the truckers, the organization of groups to protest the use of the highways by the plaintiffs' "Big Trucks," and the duping and using of public officials and officials of independent organizations to accomplish the purpose of driving the truckers out of competition with the defendants. The defendants' activities constituted an unreasonable restraint of trade. However, the activities were not illegal per se.

The defendants' counterclaims charging that the truckers engaged in similar activities were dismissed on the ground that the activities engaged in by the truckers did not constitute an unlawful conspiracy to injure the railroads. The truckers had as their purpose the defense and promotion of their interests. While both the railroads and the truckers used, or wanted to use, fronts and/or the propaganda technique, the truckers always used the technique for the affirmative purpose of seeking legislation which would be beneficial to themselves rather than to burden the railroads.

See Combinations and Conspiracies, Vol. 1, ¶ 2005, 2005.280.

Combinations and Conspiracies—Elements and Proof of Unlawful Conspiracy—Participation in Conspiracy—Membership in Association—Knowledge of Illegal Acts.—Where railroads, their local association, and a public relations firm were found to have engaged in an unlawful conspiracy to injure interstate long-haul truckers by conducting a campaign to destroy the good will of the long-haul trucking industry, certain defendants which were members of the railroad association contended that the evidence was insufficient to link them as co-conspirators. In rejecting the contention, the court ruled that mere membership in an unincorporated association, in and of itself, was not sufficient to establish liability for conspiracy, and that, if the purposes of an association are lawful on their face, its members should not be held for the acts of the association outside its purposes, unless knowledge of the illegal acts is brought home to the members. On the basis of the evidence, the defendants, although not involved in the carrying out of the details of the campaign, had full knowledge of its illegal object and general means for achieving that objective. Furthermore, there was ample evidence to support the finding of agency on the part of the presidents of these corporate defendants to impute their conduct to the respective corporate defendants. In order for one to be found guilty as a conspirator, it need only be shown that, with knowledge of the conspiracy, he knowingly performed acts designed to promote or aid in the attainment of the object of the known conspiracy.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.410, 2017.121.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Defenses—Legislative or Executive Acts—Monopoly Created by State Legislation—Appeals to Legislature and Constitutional Rights—Motive of Plaintiff.—Where railroads, their local association, and a public relations firm were found to have engaged in an unlawful conspiracy to injure interstate long-haul truckers by conducting a campaign to destroy the good will of the long-haul trucking industry, the court rejected the defenses based on the defendants' contentions that a judicial tribunal may not invalidate a duly promulgated legislative or executive act; the doctrine of separation of powers precludes a search for executive or legislative motives in carrying out their respective functions; a monopoly created by virtue of duly enacted state legislation is without the ambit of the antitrust laws; their activities merely constituted an appeal to the legislature; and that to deprive them of the right to act would be to deprive them of the constitutional rights of freedom of speech, freedom to assemble, and freedom to petition the legislature; and the plaintiffs, in instituting the action, were motivated by a desire to bring the defendants into disrepute in furtherance of their own objective to acquire a monopoly of the long-haul freight business.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Injury to Public—Causal Relation Between Injury and Antitrust Violation.—The activities of railroads, their local association, and a public relations firm in conspiring to injure interstate long-haul truckers by engaging in a campaign to destroy the good will of the truckers were held to be a substantial factor and the proximate cause of injury to the public. Public injury must be established in a private antitrust action. The truckers established a resultant increase in the cost to shippers and consumers of all commodities necessary to life. If the effect of the conspiracy is to increase the cost of operation of the truckers, thereby increasing consumer's costs, an injury to the public is effected. The loss of business suffered by the truckers and the expense entailed by the trucking industry in counteracting the defendants' activities was tremendous and quite obviously resulted in higher costs to the consumer. Also, because of the legislative activities of the defendants, the public was deprived of the flexible service and convenience supplied by this mode of transportation in certain states.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.350, 9009.475.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Injury to Plaintiff—Causal Relation Between Injury and Antitrust Violation.—The activities of railroads, their local association, and a public relations firm in conspiring to injure interstate long-haul truckers by engaging in a campaign to destroy the good will of the

truckers were held to constitute a substantial factor in injurying the truckers in their business and property. Regardless of the success or failure of legislation proposed by the railroads and unfavorable to the truckers, an injury to the truckers was accomplished. There was a loss of good will to the trucking industry and individual truckers, and the damages flowing from the expenses entailed by the truckers in counterbalancing the defendants' campaign showed private injury.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.275, 9009.350.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Injunctive Relief—Threatened Injury.—Where railroads, their local association, and a public relations firm were found to have engaged in an unlawful conspiracy to injure interstate long-haul truckers and their local association by conducting a campaign to destroy the good will of the long-haul trucking industry, the court found that the truckers and their association had been irreparably harmed and that there was a strong possibility that the defendants were ready, willing, and able to continue with their campaign. The truckers and their association were entitled to an injunction against the defendants. However, individual defendants were to be excluded from the injunction because they were either officers or employees of the corporate defendants, and, as such, would be bound by the terms of the injunction to be issued.

See Private Enforcement and Procedure, Vol. 2, ¶ 9022.50, 9024.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Damages—Attorneys' Fees and Costs.—Where railroads, their local association, and a public relations firm were found to have engaged in an unlawful conspiracy to injure interstate long-haul truckers and their local association by conducting a campaign to destroy the good will of the long-haul trucking industry, the court ruled that, in view of a stipulation stating that costs including attorneys' fees were borne by the truckers' association only, costs and fees would not be awarded in favor of the individual truckers. An award of costs and reasonable attorneys' fee would be made in favor of the truckers' association and against all of the corporate defendants, including the public relations firm. The expense to each railroad defendant (excluding the railroads' association and individual defendants) would be apportioned according to their percentage contribution to the association for a specified year. The public relations firm would contribute 20 per cent of the costs and fees.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.725, 9011.800.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Damages—Expenditures to Defend Good Will—Damages Resulting from Veto of Bill.—Where railroads, their local association, and a public relations firm were found to have engaged in an unlawful conspiracy to injure interstate long-haul truckers and their local association by conducting a campaign to destroy the good will of the long-haul trucking industry, the court ruled that the truckers' association was entitled to damages for the loss occasioned by the expenditures required because of the defendants' campaign of destruction of good will, and that the truckers were entitled to nominal damages in the amount of six cents each (to be trebled). Eighty per cent of the damages would be assessed against the corporate defendants other than the public relations firm; twenty per cent of the damages would be assessed against the public relations firm; and no damages would be assessed against the individual defendants and the railroad association. Damages against the corporate defendants would be assessed on the basis of their percentage contribution to the association for a specified year. While the truckers established the fact of damage resulting from the defendants' activities, they had, by stipulation, specifically limited themselves to those damages proximately flowing from a veto of a Pennsylvania bill. Money damages cannot be awarded for injuries proximately resulting from a duly promulgated executive act. A governor acting pursuant to his authority in vetoing a bill cannot be a proximate cause of monetary injury to a party who would have been benefited by the legislation in question. Also, the court noted that it must apply the same standard to the ascertainment of the fact of damage as it does to the ascertainment of the amount of actual damage. However, superimposed upon

this rule is the rule that legal injury cannot flow as a proximate result of a legislative or executive act.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.400, 9011.520.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Evidence Admissible To Prove Violations—Proof of Regional Conspiracy—Damages Limited to Single State.—Where long-haul truckers and their local association alleged a conspiracy by railroads and others in the whole of the northeastern part of the United States, the defendants' contention that, because the plaintiffs limited themselves to proof of damages only within a single state, they should be likewise limited in proof of the conspiracy was rejected.

See Private Enforcement and Procedure, Vol. 2, ¶ 9012.130.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Evidence Admissible To Prove Violations—Proof of Conspiracy—Acts Occurring After Monetary Damage Caused.—Testimony of activities of conspirators occurring after the act which allegedly caused actual monetary damage to the plaintiffs was admissible in evidence. The testimony was relevant to show the need for injunctive relief against alleged continuing activities against the plaintiffs. Furthermore, it was relevant to show a true picture of the alleged conspiracy.

See Private Enforcement and Procedure, Vol. 2, ¶ 9012.130, 9025.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Jurisdiction Over Parties—Unincorporated Association—Waiver of Objections to Venue and Jurisdiction—Filing of Counterclaim.—The activities of an unincorporated association within Pennsylvania were sufficient to establish that the association was doing business within the state and therefore to establish venue in the Eastern District of Pennsylvania. Service upon the president of the association constituted service upon the association. Furthermore, the association waived any objection to venue or jurisdiction by joining in the filing of a counterclaim in the action.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.

For the plaintiffs: Dilworth, Paxson, Kalish & Green.

For the defendants: Montgomery, McCracken, Walker & Rhoads for Eastern Railroad Presidents Conference. Ballard, Spahr, Andrews & Ingersoll, and Hughes, Hubbard, Blair & Reed for Carl Byoir & Associates, Inc. Barnes, Dechert, Price, Myers & Rhoads for The Pennsylvania Railroad Co., M. W. Clement, and Walter S. Franklin. Harold B. Bornemann for Lehigh & New England Railroad Co. Dennis P. Donovan for Canadian National Railways. Drinker, Biddle & Reath for Central Railroad Co. of New Jersey, Central Railroad Co. of Pennsylvania, Norfolk & Western Railway Co., and Western Maryland Railway. Carl E. Glock and James B. Anderson for Fred W. Okie and Union Railroad Co. Guckes, Shrader & Burtt for Baltimore & Ohio Railroad Co. Morgan, Lewis & Bockius for Chesapeake & Ohio Railway Co., Delaware, Lackawanna & Western Railroad Co., Erie Railroad Co., Lehigh & Hudson River Railway Co., New York, Chicago & St. Louis Railroad Co., The Reading Co., R. W. Brown, and Joseph A. Fisher. Daniel Mungall, Jr., and Stradley, Ronon, Stevens & Young for Boston & Maine Railroad, Canadian Pacific Railway Co., The Delaware & Hudson Railroad Corp., Maine Central Railroad Co., and New York, New Haven & Hartford Railroad Co. Myers, McVeigh, Mansfield & O'Brien for New York Central Railroad Co. T. W. Pomeroy, Jr., and Paul Maloney for Pittsburgh & West Virginia Railway Co. and Charles J. Graham. Saul, Ewing, Remick & Saul for Lehigh Valley Railroad Co. White, Williams & Scott for New York, Ontario & Western Railway and Lewis D. Freeman.

For prior opinions of the U. S. District Court, Eastern District of Pennsylvania, see 1956 Trade Cases ¶ 68,338 and 1953 Trade Cases ¶ 67,544, 67,538.

Opinion

[*Nature of Action*]

CLARY, District Judge [*In full text except for omissions indicated by asterisks*]: The present action involves a suit for an injunction and treble damages under the Sherman and Clayton Antitrust Acts, Sections 1 and 2 of the Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. A. § 1, *et seq.*, and Section 15 of the Act of October 15, 1914, 38 Stat. 731, 15 U. S. C. A. § 15, by 41 interstate long-haul truckers and the Pennsylvania Motor Truck Association, hereinafter called "PMTA," against some 35 railroads operating in the northeastern part of the United States; the Eastern Railroad Presidents Conference, hereinafter referred to as the "Conference" or "ERPC," and Carl Byoir & Associates, Inc., a New York public relations firm, hereinafter called "Byoir." Opinions dealing with preliminary motions to dismiss, discovery matters, and a motion to file an amended answer and counterclaim are reported at [1953 TRADE CASES ¶ 67,544] 113 F. Supp. 737 (E. D. Pa. 1953); [1953 TRADE CASES ¶ 67,538] 14 F. R. D. 189 (E. D. Pa. 1953), and [1956 TRADE CASES ¶ 68,338] 19 F. R. D. 146 (E. D. Pa. 1956).

The basic allegation in both the claim and the counterclaim is that the defendants on the one hand conspired to obtain a monopoly of and to drive the plaintiffs out of the business of long-haul freight transportation in the northeastern section of the United States by various and sundry means, which will be more fully discussed later in this opinion, and on the other hand the defendants claim that the plaintiffs themselves were engaged in an illegal conspiracy for the identical purpose to obtain a monopoly of the long-haul freight industry in the same part of the United States and to force the railroads out of that segment of the transportation business in the area.

* * *

THE COUNTERCLAIMS

[*Nature of Claims*]

A review of the evidence presented in this case by which the defendants attempted to establish a conspiracy on the part of the truckers to monopolize the long-haul transportation industry in the northeastern part of the United States reveals consistent and persistent activities on the part of the truckers which in many respects parallel the activities of the railroads in the field. It is the contention of the railroads on the basis of that testimony that if, in the opinion of the Court, an illegal conspiracy on the part of the truckers has not been established, the evidence of the truckers' activities as presented in the defendants' testimony shows a course of conduct which justified every activity of the railroads as reasonable competition in a free enterprise competitive system.

* * *

[*Legislative Activities*]

With the above factors in mind, it will be seen that through the decade of 1940 to 1950 there was a distinct clash between the railroads and the truckers in the State of Pennsylvania over any legislation which would be favorable to the truckers. That the truckers and PMTA attempted to do everything possible to attain their legislative objectives and aims is amply established by this record. While the defendants in this case attempted to label the legislative efforts as an attempt to divert business from the counterclaimants, it was actually an attempt by the truckers to obtain legislative approval to enter into competition with the defendants and counterclaimants in a field in which up to that time by legislative action they had a complete monopoly. The record establishes that the truckers wrote to and made personal contacts with legislators in support of bills increasing the weight of trucks; that they had representatives of other industries write and make personal contacts with legislators in Harrisburg without disclosing trucker connections; and that they had such persons intentionally refrain from advising the legislators and the said officials that the letters and contacts had been solicited; that they solicited from legislators statements in support of their position and had news releases issued thereon. There is no doubt also that in every way possible the truckers tried to eliminate the opposition to its legislative program of the Pennsylvania State Grange and the Pennsylvania State Association of Township Supervisors, and even the railroads. The latter was a suggestion that shippers route through other lines rather than the Pennsylvania Railroad. It is clear, however, that the suggestion from the truckers was made in order to weaken P. R. R. objections to the Big Truck Bill and was not designed to drive the P. R. R. from the transportation field.

[*Tax Manual*]

About the middle of the decade PMTA had a tax manual prepared charging that the railroads of Pennsylvania themselves did not pay their fair share of taxes as compared with other states and made a wide distribution of it to legislators, banks, security investment houses, etc. That this action was directed against the railroads running through Pennsylvania is entirely clear. However, the truckers had been the target of a strong campaign directed to the public with the purpose of convincing the public that trucks did not pay their fair share of taxes. In such a competitive situation it is well within reasonable limits of competitive practice that the truckers, if they could do so, be permitted to likewise show the public that their competitors, the railroads, were actually guilty of the fault charged against the truckers. Further, this material was sent out with attribution to the PMTA, something the defendants never did in this campaign.

* * *

[*Study*]

A firm of consultants, Wilder & Associates, was also employed to make a study of the activities in the public relations field of PMTA, express an opinion thereon, and make recommendations for a change of policy. This completely objective study, completed and published in December of 1949, showed clearly the attitude of the public toward the truckers as to the areas in which they were deficient and made recommendations looking to the elimination of such deficiencies. It is most impressive to the Court, sitting as a jury in this case, that no part of this 81 page report is critical of the railroads or any suggestion made that the truckers might obtain further business at the expense of the railroads; and certainly there was no suggestion of any conspiracy to attain such ends. * * *

* * *

[*Truck Bill*]

As stated above, under Pennsylvania activities, the Big Truck Bill was passed with a resounding majority in both Houses. Eventually the Bill was vetoed by the Governor as above outlined. Defendants contend strongly that PMTA in arranging for support of the Bill was guilty of such unfair concerted action against them as to amount to substantial evidence of conspiracy on the part of the trucking industry to drive the railroads out of business. The fallacy of that reasoning lies in the fact that the truckers were striving to accomplish and end in support of their own industry in order to allow that industry to compete with the railroads, and everything done in this connection was well within the limits of fair competition in private enterprise. There is not nearly sufficient evidence to convince the Court sitting as a jury in this case that the truckers intended by this action anything other than self-help, and any action taken was not calculated to destroy the railroads but merely to obtain an opportunity to compete for the business with the railroads in a field theretofore denied them by statute.

* * *

* * * The defendants have asked the Court to find that all of these allegations on the part of the truckers were false and were made for the purpose of destroying the railroads' position in the transportation industry. Nothing could be farther from the real fact. The actions were taken to protect themselves from serious and unwarranted in fact attacks. They charged that the edited film inaccurately put the trucking industry in an odious light, which it did. They charged that the United States Government, through the Bureau's sponsorship of the edited film, was devastatingly and inaccurately critical of the trucking industry, which it was. They charged also that on April 13, 1953 it was the purpose of the railroad industry to distribute a pamphlet in connection with accomplishing the same sinister purpose, which at that time it was. While the charge that the tentative findings of the Highway Research Board were fraud from beginning to end, originated by paid railroad agents using railroad money, is not supported by the evidence, the interpretation as distorted by Byoir and released to the public as the official findings did constitute a fraud upon the public and even constituted a fraud on the Chief Executive of the Commonwealth of Pennsylvania, through the Secretary of the Highway Department. The Court also finds as a fact that a deliberate distortion of a fine scientific achievement, Maryland Road Test—One, was used as one of the instruments in the campaign of the railroads to either severely limit or destroy the heavy trucking industry.

[*Truckers' Organization*]

Charnay's investigation of the Byoir activities (one public relations firm investigating another) convinced the truckers of something they had suspected from the outset—that the railroads and railroad money were behind the continuous attacks upon the trucking industry. Charnay also attempted in a limited degree to use the Byoir technique of phony organizations. He set about to form a completely fictitious organization to be known as the Pennsylvania Motor Safety League. While its purpose was ostensibly to help the trucking industry, its ultimate purpose was to attack the railroads. Fortunately in this case wiser heads within the organization of the PMTA and wiser counsel prevented the formation of such an organization and its utilization by the truckers in a campaign against the railroads.

[*Use of Information*]

It is also worthy of note at this point that although the truckers sought out and made a collection of all railroad accidents and were in a position to magnify them in a campaign against the railroads, they were never used, but were merely held in reserve for defensive use should the railroad again start their publicity barrage about truck accidents. Also in 1952 the truckers implemented the tax manual of the mid-forties and had printed an entirely new brochure indicating to municipalities that the railroads were not paying their fair share of taxes in the State of Pennsylvania, contrary to a decision of the Supreme Court of Pennsylvania, and pointing up the fact that notwithstanding such decision, no action had been taken by the public officials concerned to revoke charters. This was a frontal attack upon the railroads and over 10,000 copies of this manual were distributed urging the taxation of railroads. However, there was no attempt to conceal its origin and its purpose was to counteract the propaganda of the railroads that the truckers were receiving enormous subsidies at the expense of the taxpayers. The Court, sitting as a jury, finds as a fact that there was no purpose or intention in putting out this tax manual to destroy the railroads in the long-haul industry, but the action taken was purely defensive of the three year old campaign of the railroads against the truckers and comes within the rule of reason in free competitive enterprise. * * *

[*Truckers' Objective*]

It is also clear, as stated in a previous memorandum opinion, that these papers enabled the truckers to establish what they had long suspected—concert of action on the part of the railroads in a deliberate attempt to keep the truckers from a large segment of the long-haul industry or, if possible, to destroy their effectiveness in this particular field and eliminate them as competitors. It follows therefore, from what has been said above, that the truckers with the one exception above noted, in every instance acted only in support of their own industry, and without any intent to restrain commerce.

[*Use of Consultant*]

Among the complaints made by the defendants against the plaintiffs is that they engaged an emeritus professor of engineering of the University of Michigan, one Dr. John S. Worley, who, although a consultant engaged and paid for by PMTA, was held out to the public as an independent highway engineering expert. The purpose of his employment was to testify at the expense of PMTA and without attribution *in favor of* the Big Truck Bill. It will be noted that here again is emphasized the difference in approach to their respective problems by the two competing industries. Dr. Worley was not engaged to injure the railroads but to help the truckers. It is certainly within the rule of reason in competing industries that either one may engage outside help and seek allies to further their own respective aims, provided however, that such friends and allies are not used in a conspiracy to destroy the competitor. A concert of action which has for its purpose the crippling of competition in a particular field and if possible of effectively destroying that competition is prohibited by the Sherman and Clayton Antitrust statutes. The Court sees no violation of the statutes in the Worley episode.

[*Publicity*]

Another charge of the railroads against the truckers which should be disposed of at this point is that the present action, its pleadings, depositions, and even the testimony taken at the trial have been used by Charnay as a vehicle of publicity for the sole purpose of bringing the truckers' story to the public. As a corollary thereof, the

railroads charged that this action constitutes virtually malicious abuse of legal process. The railroads also point out that this suit was financed wholly from a public relations program fund as indicative of the fact that the suit was purely for publicity purposes. This contention does not impress the Court. The result of the action clearly indicates that the plaintiffs herein had a valid cause of action which was brought in good faith and on sound factual and legal grounds. Naturally, in a case of great magnitude, it could be expected that the expenses of litigation would be rather large. How the plaintiffs individually and in concert raised the money to support the litigation is of no concern to the Court. That they chose to finance it out of the public relations fund is also unimportant. As to the charge that the pleadings and depositions, and even the testimony taken at the trial, were commented upon and in the public press by the plaintiffs or their agents is likewise of no concern to the Court. This Court has no intention of restraining the use of public documents or interfering with the right of the press or individuals to comment upon events which happen publicly in a court of law, provided such use is not part of an illegal conspiracy in restraint of trade or commerce.

* * *

[*Counterclaims Dismissed*]

Defendants as part of their counterclaim attempted to introduce certain evidence with respect to the highway systems in the northeastern part of the United States; the effect of the use of heavy trucks thereon; the increasing cost of construction, including changes of geometric designs to meet the requirements of heavy traffic; and other evidence with respect to the economic phases of the trucking industry, all of which will be referred to briefly hereinafter. All of this testimony was excluded by the Trial Judge as being either cumulative or not relevant to the issues in the case. From what has been said before and after a review of the evidence, it is clear that the counterclaims filed are without merit and, therefore, will be dismissed.

SUMMARY

[*Review of Findings*]

* * *

Without in any wise limiting the findings of fact contained in the above narrative description of the facts adduced in this case and the Court's comment thereon, a useful purpose may be served at this point in reviewing in summary form the findings of the Court in this case as a preliminary to a discussion of the law of the case and the application of the law to the facts as found.

[*Conspiracy*]

The Court has found as a fact that the railroads and Byoir entered into a conspiracy in unreasonable restraint of trade, the nature and purpose of which was to injure the truckers in their competitive position in the long-haul freight industry in the northeastern section of the United States. This, of course, involves interstate commerce. The immediate purpose was to create public resentment to the truckers, not only in the minds of the general public but in the minds of those who utilized the services of the trucks and in such a manner as to interfere with business relations between shippers and truckers. There is no doubt that the railroads prior to the development of the long-haul truck industry had an actual monopoly of that field. A new industry in competition had appeared. That industry by reason of more flexibility and faster service had made great inroads in that particular competitive field and its business had increased a thousand fold. Both were regulated industries. The truckers could not operate without a certificate from the Interstate Commerce Commission showing the need for the service in a particular locality. While it is true that "contract carriers" as distinguished from "common carriers" might be utilized by an individual shipper (and these carriers form a large part of railroad competition), most of these carriers are likewise regulated by the Interstate Commerce Commission and only in the case of carriers of agricultural products is there any exemption from regulation. Common carriers, of course, are in the same status as railroads. Goods offered has to be transported at published rates. There is further no doubt that at this time there was "erosion" in great measure of previous railroad business to the truckers. That such erosion would "injure" the railroads in their revenues is likewise clear. That injury, however, is not a legal injury. It is merely a diminution of revenue because of a better competitive method of transportation evolved by the trucking industry. That the rail-

roads recognized the problem and knew the underlying factors causing their loss of revenue is abundantly clear from this record. The railroads knew, despite the higher charges of the truckers, 6¢ per mile as against 1.4¢ per mile, that the truckers were rapidly gaining business because of extreme flexibility. They knew also that even without a show of necessity on their part before the Interstate Commerce Commission they (railroads) could be licensed to establish equally flexible truck routes. (See the opinion of Mr. Justice Reed in *I. C. C. v. Parker,* 326 U. S. 60 (1945), and dissenting opinion of Douglas, J. re the effect of majority decision.) Instead of meeting the competition in the field and giving the shippers what the shippers wanted, they determined upon another course of action —to injure and/or destroy the truckers and thereby force the shippers to their detriment to continue to use the railroads. This, of course, would be to the shippers' disadvantage in this great area of flexibility which was clearly so vital to the shipper but would eliminate the fundamental cause of the railroads' loss of revenue. It was with this very thought in mind that the combination of Byoir and the railroads occurred in August of 1949 and a definite program for accomplishing this desired result was instituted with the full knowledge and consent both of Byoir and every defendant railroad. Briefly restated, the plan was first to create hostility to the truckers. With that as a base the rest of the plan evolved. This plan generally had 10 fundamental objectives:

[*Objectives*]

(1) To seek out or create "independent" organizations favorable to the railroads' point of view and opposed to the truckers.

(2) Through Byoir and the ostensible independent organizations create a hostile public using the method detailed under the heading, "Campaign of Vilification."

(3) Through the organizations and at the instigation of Byoir create a demand for more tax revenues by government at all levels, particular the local level.

(4) Through Byoir and railroad contacts have one of these organizations hire a recognized and ostensibly impartial statistical group to make a study of revenue-producing methods most palatable to the public; the statistical group would be supplied by Byoir with the questions to be asked the public and the answers to these questions would form the basis for the conclusions in the study. These questions by Byoir would be so framed that only the desired answers would be forthcoming—that the truckers must be more heavily taxed. Another use of these so-called independent survey organizations was to focus attention upon the trucks as destroyers of the highways and emphasize by "statistics," based on the false premise that truckers are the prime users of roads, that the truckers were the recipients of enormous public subsidies.

(5) With these statistics on hand have the "independent" organizations through Byoir publicize them from one end of the United States to another, through speeches, magazines and news releases.

(6) Interest writers of important magazines in articles attacking the truckers and present the writers with all the statistics compiled by the "independent sources."

(7) With an outstanding magazine article have the organizations, through Byoir, intensify their campaign and then seek further articles with the evergrowing research material as a basis.

(8) While all of the above was being carried out to aid financially and in every other way legislators disposed to the railroads' point of view.

(9) Present the research packages and a hostile and aroused public to the Legislature and then propose the type of legislation determined by the associated railroads of that particular state as the type of legislation desired, and which to the associated railroads appeared feasible under the circumstances.

(10) Make absolutely certain that the general public attributed the entire campaign to public-spirited organizations only, keep the railroads in the background, and conceal particularly from objective-minded public officials interested in the problem the fact that the entire campaign was a creature of the railroads, the whole cost of the campaign being borne by the railroads, and for the purpose of hindering and destroying the trucking industry as a competitor to the railroads in the long-haul transportation industry.

[*Injury to Truckers*]

It is clear from the above, regardless of the success or failure of legislation proposed by the railroads unfavorable to the truckers, that a real private injury to the truckers was accomplished. There was definitely a loss of good will to the trucking industry and in some instances that loss of good will was extreme. In the use of the term "good will" in this opinion I refer not only to the definition of Lord Eldon, who defined good will as "the probability that the old customers will resort to the old place," but also to the more comprehensive definition of Judge Story, "that good will is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or common celebrity, or reputation for skill, or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." 24 Am. Jur. § 3, p. 803, and cases there cited. Therefore, the use of the term "good will" in the instant case relates not only to the direct damage done to the truckers, i. e., the refusal of truck users, because of the campaign, to avail themselves of that form of transportation (loss of business), but refers also to the more subtle type of injury done the entire trucking industry by discrediting it in the eyes of the general public, the 99% users of the highways, and eliminating the likelihood of public appreciation of the trucking industry as such or sympathy with the truckers' position which would be fundamental in gaining general public support to avoid the imposition of crippling burdens and restrictions.

The defendants' actions destroyed to a large extent the public confidence which the truckers had earned by their own efforts and which they might have won additionally, especially in the light of the innumerable beneficial accomplishments of the truckers in the field of long-haul transportation. We must assume that most people are honest law-abiding citizens, and that includes those engaged in the trucking field. It certainly has not been proved in this case that all or even a substantial number of truckers are law breakers. To the contrary, the evidence in this case clearly shows that, except for a small segment, the truckers are decent law-abiding citizens who obey the law, but as a result of this campaign they were categorized as lawbreakers, road-hoggers, completely indifferent to the safety of others on the highway and moochers on the public through failure to pay their way.

[*Conspiracy Summarized*]

As a final note it can be remarked at this point that, although not outlined above, overt acts to accomplish the objectives of this conspiracy were committed among others in the states of Connecticut, Indiana and Illinois. This feature is mentioned at this point to show that this was not a series of individual conspiracies but was one large ever-growing conspiracy with the single objective of "improving the competitive position of the railroad in the field of transportation," but by the illegal means of limitation of or destruction of the trucking industry. Restated in extremely simple form I have found the following:

1. That the defendants combined in and about May 19, 1949 with the intent and object of substantially lessening competition in the long-haul carriage of freight in unreasonable restraint of trade.

2. That they were joined in this combination by the Byoir organization on or about August 15, 1949 for the same purpose and with the same intent and for a handsome remuneration.

3. The instrumentality or means by which this object was to be achieved was primarily by a campaign designed to destroy the good will of the truckers and, secondly, by fomenting governmental restrictions obtained by virtue of the methods outlined in the factual phase of this decision.

4. Hundreds of overt acts in furtherance of this plan were carried out throughout the country, and all in furtherance of the same object and design.

THE LAW OF THE CASE

[*Questions Presented*]

A discussion of the law of the case must involve a consideration of the following legal questions:

(1) Was there a conspiracy in violation of the antitrust statutes? This question, of course, involved legality of means; legality

of object; illegality of means and illegality of object.

(2) The rule of reason in free competitive enterprise:

(3) Whether, if a conspiracy is shown to exist, the defendants' activities complained of caused injury both to the plaintiffs and to the public:

(4) Whether the defenses interposed by the defendants justify the activities complained of; this includes a determination of the question as to whether, as contended by the defendants, plaintiffs in instituting this action were motivated by a desire to bring the defendants into disrepute in furtherance of an objective on the part of the plaintiffs to acquire a monopoly of the long-haul freight business:

(5) Whether, if an illegal conspiracy existed, the evidence presented is insufficient to link certain of the defendants with the activities as co-conspiratory:

(6) Damages and relief.

[*Legal Conclusions*]

After full consideration of the above problems the Court has determined its legal conclusions as follows:

(1) The defendants in this case formed a conspiracy in violation of the Sherman and Clayton Antitrust Acts for an illegal objective (injury to the truckers' business and good will and, if possible, the elimination of the truckers as competitors); that in concert and as co-conspirators the defendants attempted to use both legal and illegal means to accomplish their illegal objective.

(2) As to the rule of reason, the activities of the railroads and Byoir constituted unreasonable competition in a free competitive economic system.

(3) The activities of the railroads and Byoir caused injury to the trucker-plaintiffs and injury to the public.

(4) The defenses interposed by the defendants in this case are not available to the defendants under the facts of the case nor were the plaintiffs in instituting this action motivated by a desire to bring the defendants into disrepute in furtherance of an objective to acquire a monopoly of the long-haul freight business.

(5) The Court, sitting as a jury, has found the evidence to be sufficient to link all of the defendants as co-conspirators in this case.

(6) As to damages and relief, the Court holds that all of the plaintiffs are entitled to injunctive relief against continuing illegal activities of the defendants. In addition, PMTA is entitled to compensatory damages, to be trebled as provided by statute, together with reasonable costs and attorney's fees; the remaining individual defendants are entitled only to nominal damages by virtue of a stipulation filed in this action and which will be later discussed. But before proceeding to a discussion of the several legal questions involved a few general observations are in order.

[*Statutes*]

The pertinent sections of the Sherman and Clayton Acts in this case are as follows:

Sherman Act § 1.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *."

Sherman Act § 2.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *."

Clayton Act § 15.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides * * * and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[*Construction of Sherman Act*]

Fortunately antitrust law is living law. Being far from static, it, like the Constitution, is dynamic law to be adjusted to the times and to new situations. As Chief Justice Hughes aptly remarked in *Appalachian Coals Inc. v. U. S.* [1932-1939 TRADE CASES ¶ 55,025], 288 U. S. 344, 359-60 (1933):

"As a charter of freedom the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. . . . The restrictions the Act imposes are not mechanical or

artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness."

The court further pointed out that the Act should be construed in a broad and practical conception of the common law of restraint of trade and monopoly. As such the Act constitutes a flexible public policy directed against all undue limitations on competition, both in the form of realized monopolization as well as partial but significant restraints of trade tending to the same end, or attempts to reach the prohibited end.

In a very comprehensive opinion in the case of *American Tobacco Co. v. United States* [1946-1947 TRADE CASES ¶ 57,468], 328 U. S. 781 (1946), at pages 809-810, 66 S. Ct. at page 1139, Mr. Justice Burton speaking for the court set forth the nature of the prohibitions of the Sherman Act in the following language:

"It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose."

[*Nature of Conspiracy*]

As has been said, a conspiracy is not made out in so many words but must be gathered from the four corners of the evidence and the inferences to be drawn therefrom. Intelligent businessmen, aided by expert legal counsel, simply do not say, or put in writing, that they are going to drive a competitor out of business. And, of course, they did not in this case. However, courts today are aware of the subtle and tacit agreements now used to effectuate business conspiracies. That foregoing statement is made with the full realization that certain phases of the Byoir campaign were something less than subtle. The picture of conspiracy as a meeting by twilight of a trio of sinister persons, with parted hats and close together, belongs to a darker age. *McConnell, The Treble Damage Action,* U. of Ill. Law Forum 659, 661 (1950). The distinct impression of the Court, sitting as a jury, in drawing the inferences from the evidence presented, is that this was a carefully calculated plan under the guidance of competent legal counsel which sought to choose a means of injuring and, if possible, destroying interstate truck competition that would afford the greatest amount of constitutional protection and thereby seek to render it immune from the coverage of the antitrust laws. A further inference to be drawn is that the plan was to be cast in the guise of a gigantic legislative campaign in order to attempt to surround it with the protections of the right to assemble, the right to petition the legislature and freedom of speech. With that thought in mind a calculated risk was taken that the plan adopted was the safest means of carrying out the predetermined object of seeking to maintain a monopoly in restraint of trade. Unfortunately, the gamble proved unsuccessful. The campaign of vilification upon the long-haul trucking industry, which was the real instrumentality for carrying out this conspiracy, far exceeds the factual patterns presented in the *Slick Airways* case which will be discussed *infra* in detail. This was a deliberate attempt to injure a competitor for an illegal purpose by destroying public confidence in it. And that places this case into an area long denounced by the antitrust laws.

[*Technique Used*]

The factors bringing about the present action are new in the field of antitrust litigation and must be examined in the light of the climate of competition as it then existed. It is a battle between two great leaders of a highly competitive industry, both staffed with capable and expert legal counsel. Public relation techniques are closely interwoven with every facet of this case. The chief device used by the railroads, and to a lesser extent by the plaintiffs, which latter did not involve violation of the Sherman and Clayton Antitrust Acts, is one long known to political experts under the term, "The Big Lie." This technique, as it appears from the evidence in this case, has been virtually adopted in toto by certain public relations firms under the less insidious and more palatable name of "The third-party technique." Its sole means and its effectiveness is to take a

dramatic fragment of truth and by emphasis and repetition distort it into falsehood. That was the technique employed almost without exception by Byoir and the railroads throughout the campaign.

We will now proceed to discuss the legal questions in the order set forth at the opening of this section of the opinion.

The Conspiracy—Means and Objectives

An unlawful conspiracy has been defined as a combination between two or more persons to do an unlawful or criminal act, or to do a lawful act by criminal or unlawful means: *Duplex Printing Press Co. v. Deering*, 254 U. S. 443 (1921). A lawful act may, when done by many in concert, become a conspiracy and public wrong and may be prohibited; *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n of North America*, 274 U. S. 37 (1937). An unlawful conspiracy may be formed without simultaneous action or agreement on the part of the conspirators; *Interstate Circuit, Inc. v. United States* [1932-1939 TRADE CASES ¶ 55,205], 306 U. S. 208 (1939). The civil liability for acts of conspiracy flows from the damages caused by the acts committed pursuant to the formed conspiracy; accurately speaking, there is no such thing as civil liability for conspiracy as such; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies; 11 Am. Jur. § 45, p. 577, and cases there cited.

Let us look at the record in this case. The acts committed by the defendants in pursuance of their plan reveal that the defendants formed an illegal conspiracy for an illegal object—injury to the truckers' business and good will and, if possible, the elimination of the truckers as competitors. By illegal means (the destruction of the truckers' good will) they sought to obtain their illegal objective. By what they claimed were legal means—appeals to the legislature—they also sought to accomplish their illegal objective.

The defendants have strenuously contended that all of their activities were geared to a legislative program and that none of their activities come within the orbit of activities proscribed by the Sherman and Clayton Antitrust Acts. It has been noted and the Court here restates that the entire campaign and its objectives did not constitute a mere appeal to the legislature; nor was it a large-scale lobbying campaign. True, one phase of the activities was of a legislative nature—but a rather new approach to legislation, to say the least. The other phase, and the more important one of the campaign, was one of vilification designed to destroy the good will of the long-haul trucking industry. Hence, the Court has rejected the contention of the defendants that their combination was entirely legislative. I have further determined that the railroads were not acting as the guardian of the public welfare, as they have so earnestly asserted. Even counsel for the defendants at R. 2853 had to admit that the defendants were not motivated by "altruism."

It is a situation such as this that the power and force of group action comes into play and the remarks of Mr. Justice Burton, *supra*, become very pertinent. When such group action is reinforced, as it was in this case, by unlimited financial resources to accomplish its objectives, it may very well and does in this case present a picture of activities proscribed by the Antitrust statutes. On the facts as found, a common law conspiracy has been made out.

The defendants in their arguments in this case have confused means and objectives. This problem was presented to Chief Judge Forman in the case of *Slick Airways v. American Airlines* [1950-1951 TRADE CASES ¶ 62,889], 107 F. Supp. 199 (D. N. J. 1952), appeal dismissed [1953 TRADE CASES ¶ 67,466], 204 F. 2d 230 (3rd Cir. 1953), cert. denied, 346 U. S. 806 (1953). At page 207 Chief Judge Forman made this pertinent comment:

> "The defendants misconceive the nature of the complaint by confusing the means allegedly used with the result to be achieved . . . It is in this that they fall into error for these alleged acts rather constituted the means and methods by which the defendants conspired to drive the plaintiff out of business in violation of the anti-trust law."

A similar argument to the defendants' contention that their activities with regard to legislation were the only activities for which they combined (which is untrue) was made before Judge Forman. The defendants there claimed that their appearance in that case before the Civil Aeronautics Board to block and delay the issuance of a certificate of convenience and necessity to the plaintiff to act as a common carrier

was proper and legal. Judge Forman disposed of that contention in the following language at page 214:

"While it may be questioned whether any of this alleged activity by defendants of itself constituted illegal conduct, it is fundamental, as previously noted, that legal means may be utilized to accomplish the unlawful objective of conspiracy, *American Tobacco Co. v. U. S., supra,* 328 U. S. at page 809, 66 S. Ct. 1125, 90 L. Ed. 1575, and this court cannot deprive the plaintiff of its right to attempt to prove that these alleged acts were part of the total acts undertaken to effectuate the alleged conspiracy."

The most recent decision dealing with the problem of confusion of object and means is *Parmelee Transportation Co. v. Keeshin, et al.* [1956 TRADE CASES ¶ 68,484], 144 F. Supp. 480 (D. Ill. 1956). The plaintiff in that case was a transportation company which for over a quarter of a century was in the business of transporting (for the defendant railroads) from one to another of the eight railroad stations in Chicago, passengers and baggage in the process of interstate journeys. The plaintiff alleged that one Keeshin promised a member of the Interstate Commerce Commission a valuable consideration if he would persuade the individual railroad presidents to use their influence to cause their lines to eliminate plaintiff from the transfer business in Chicago and grant the contract instead to a corporation to be formed by Keeshin. This was to be accomplished by the ICC member representing to the railroad presidents that he would exercise influence on the ICC in their favor. The complaint avers that the new company was formed, that the plaintiffs were not allowed to compete for the contract and that a less favorable contract than the one under which they formerly operated was entered into by the railroads with the new corporation in pursuance to the agreement. The defendants argued that the fact that the contract with the new corporation was an exclusive one did not make it illegal as a monopoly—which is true. They further argued that the contract made by the railroads acting together did not indicate the existence of a monopoly because they were not competitors and were therefore in a position to deal with whom they pleased. In reply to these contentions Judge Sullivan noted, at page 484:

"The flaws in the proposition lie in the minor premise; the assumption that the railroads could lawfully act together to grant a transfer contract ignores completely the complaint's allegation that the purpose and effect of that joint action was and is to prevent competition in biddings for contracts for terminal service. Acts otherwise lawful are 'within the proscription of the anti-trust statutes, *if done for the purposes prohibited by the anti-trust laws, i. e., to eliminate competition.*'"

This Court is not condemning the field of public relations. It is only condemning it as it was used in this case, as an instrumentality of destruction rather than one of promotion. Neither does the Court determine it illegal for an industry to seek any and every proper legislative goal; nor to enlist the support of other persons in obtaining legislation. But it is illegal to use the practices and methods shown by the record of this case to destroy a competitor's good will and to use third parties as fronts to carry out a consipracy to destroy a competitor.

The proofs in this case have definitely established joint action on the part of all of the defendants to destroy the good will and injure the business of the plaintiffs. They have proved the formation of so-called "independent citizen groups" which were mere pawns in circulating information derogatory to the plaintiffs; dissemination of false information to customers of the plaintiffs for the same purpose; the organization of groups to protest the use of the highways by plaitniffs' "Big Trucks," and the duping and using of public officials and officials of independent organizations to accomplish the same purpose of driving the plaintiffs out of competition with the defendants. The actions of the defendants do not fall within legal bounds of either proper means or proper objectives and consequently such activities must be condemned.

Rule of Reason

With the distinction between objectives and means disposed of, we now apply the facts as found to the climate of competition as it existed at the time the defendants embarked upon their illegal plan. A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls

within the class of restraints that are illegal per se. The plaintiffs have strenuously argued that per se violations have been made out in this case. I do not so find. The activities of the defendants were not such as to bring them within the purview of price fixing, refusing to deal with nonmembers of an association, thereby excluding a competitor from a substantial market, and the other classes of cases covered by that rule of law. See *United States v. Insurance Board of Cleveland* [1956 TRADE CASES ¶ 68,460], 144 F. Supp. 684, 697 (D. Ohio 1956).

The record discloses that both sides used, or wanted to use, fronts and/or the propaganda technique. However, there is one very important distinction in the use of the technique by the parties; *the plaintiffs always used the technique for the affirmative purpose of seeking legislation which would be beneficial to themselves rather than to burden the railroads.* As they so often stated, and as the Court has found, they were seeking to remove what they called "The Chinese Wall" of low weight limitations which isolated it from the surrounding states. The plaintiffs engaged in the negative approach (which seeks to injure your competitor) only as a *defensive* measure after they were severely hurt in the public mind and the legislative halls by Byoir and the railroads. On the other hand, the defendants did not go out and seek to meet the new mode of competition by adjusting their facilities to the public demand, but rather *sought to destroy the good will built up by this new competitor through the campaign as outlined. This public relations battle of bogus organizations and distortion of facts and vilification was not a climate of competition into which the defendants were injected. They created it.* They were faced with the budding seeds of competition growing in an area that was once a railroad monopoly in the long-haul freight business. Once the seeds started to flourish because of the flexible service given to shippers, the railroads resorted to the negative approach of injuring the competitor rather than adjusting their facilities to meet the growing seeds of competition. And they certainly could have met this competition on the field of *service* with their extensive facilities and ability to enter the trucking business in places where flexibility was desired and required by the shippers even at an increased cost. See *I. C. C. v. Parker,* 326 U. S. 60 (1945). Neither the railroads nor Byoir were new at this "propaganda" approach. As noted, the railroads had been harshly criticized for its use by the Wheeler Report, *supra.* Byoir received even harsher treatment for his use of the technique. He was found guilty of violating the antitrust laws in a suit growing out of its activities on behalf of the A & P, which was one of its major selling points in seeking and getting the ERPC account. Byoir's prior activities in the field are well pointed out by Judge Lindley in the case of *United States v. New York Great A & P Tea Co.* [1946-1947 TRADE CASES ¶ 57,491], 67 F. Supp. 626 (D. Ill. 1946), at pages 673 and 674, where he alludes to the false front activities. On appeal Judge Minton, later Mr. Justice Minton, also spoke harshly of Byoir's illegal activities in furtherance of a scheme to violate the antitrust laws at [1948-1949 TRADE CASES ¶ 62,375] 173 F. 2d 79, 89, 90 (7th Cir. 1949).

It was Carl Byoir's view of antitrust law that there was no stigma attached to a violation thereof, and that "if you got caught you just ran into the wrong judge." In commenting upon the *A & P* decision Carl Byoir stated to Mr. Dilworth, then attorney for plaintiffs, in his deposition:

> "Now, you know and I know, Mr. Dilworth, that antitrust is not a law like going through a stop light, that it is a law on which you can go into twenty federal courts and get twenty different opinions on different matters, and this was pursued. The antitrust people didn't like Carl Byoir and they pursued me through five courts until they found a judge who had their view of antitrust. And I am not critical of it; it was his view; but as far as I am concerned I thing every one of these organizations was a perfectly proper organization, *and if there is criticism that it wasn't publicized, sometimes you can't always get printed what you want to get printed."* R. 2451; also see R. 228, 229. (Emphasis supplied)

The above quotation, in the light of Byoir's previous conflicts with the statutes, shows a studied, consistent and contempetuous attitude toward the Antitrust Laws of the United States and his willingness to flout them at will, if the price was right.

In arriving at the conclusion that the defendants' conduct was unreasonable I have considered and alluded to: (1) The economic conditions peculiar to the industry, including the fact that both industries

are heavily regulated; (2) The practices which have obtained; (3) The nature of the defendants' plan; (4) The reasons which led to its adoption; (5) The probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce and transportation. It follows logically that the ultimate effect of this plan would have been to deprive the shipping public of the great advantages of the flexible services provided by the trucking industry and would have relegated shippers to the use of railroad transportation only which was rapidly being proved out-dated (unless it adjusted itself, which it was in a position to do) to the modern demands of that same shipping public. See *Appalachian Coals, Inc. v. U. S.* [1932-1939 TRADE CASES ¶ 55,025], 288 U. S. 344, 361 (1933); *Board of Trade v. U. S.*, 246 U. S. 231 (1918), and *Standard Oil Co. v. U. S.*, 221 U. S. 1, 57 (1911) for the factors to be considered in an application of the rule of reason. Applying these criteria the Court, sitting as a jury, finds that the defendants acted unreasonably in their campaign against the long-haul truckers.

Proximate Cause

Prior to any discussion of the public and private injury which is necessary to support the plaintiffs' cause of action it is necessary to examine a stipulation of counsel. This stipulation was entered into on 17 May 1956 and, after approval by the Court, was filed of record as docket paper 460.

The stipulation in its pertinent sections reads as follows:

"2. No plaintiff (except plaintiff Pennsylvania Motor Trust Association) has paid any counsel fees or expenses in connection with this suit, except as stated in paragraph 4." (Note: the importance of this section and section 4 will become apparent in the "Relief" phase of this decision.)

"3. The only damages claimed by the plaintiffs (except plaintiff Pennsylvania Motor Truck Association) are those that each of them may have suffered because of its inability to carry more than the weight limits fixed by the laws of Pennsylvania prior to the change in the law in 1955."

"4. Since 1949 plaintiffs (except plaintiff Pennsylvania Motor Truck Association) have supported the activities of the Pennsylvania Motor Truck Association by making contributions to the cost of such activities and none has objected to any such activities."

A reading of section 3 of this stipulation might at first give the impression that the plaintiffs have limited the proof of private and public injury to such that might flow from the veto of S. B. 615. This is far from the case. Proof of *monetary* (as contrasted with injury-type) damages and injunctive relief were the subjects of several pre-trial meetings of counsel with the Court. In the interest of limiting proof of *monetary* damage (as constrasted to injury to public and plaintiffs) and to shorten the trial of the case, counsel for the parties entered into the aforesaid stipulation. It is in that context and only that context that it is to be read. In that light it becomes apparent that its importance does not become a matter for legal discussion until we arrive at the "Relief" and monetary (actual amount) damage phase of the decision.

In an action of this nature the plaintiff must allege and prove a violation of the act and damage to his business or property proximately resulting from the acts and conduct of the defendants which constitute a violation of the act. Injury to the plaintiffs in and of itself is not sufficient to warrant a civil action for injunctive relief and or damages. There must be harm to the general public in the form of undue restriction of trade and commerce as a result of the wrongful contract, combination or concert of activity. However, the injury to the public need not be nationwide in geographical scope. If it involved monopolistic effect upon interstate commerce it may be narrow in geographic scope. It must, however, injuriously and appreciably affect the public interest. *Shotkin v. General Electric Co.* [1948-1949 TRADE CASES ¶ 62,341], 171 F. 2d 236, 238, 239 (10th Cir. 1948).

However, the Supreme Court has permitted plaintiffs in treble damage suits to rely on inferential and comparative evidence on the ground that the wrongdoer should bear the risk of the uncertainty which his wrong has created. See *Bigelow v. RKO Radio Pictures, Inc.* [1946-1947 TRADE CASES ¶ 57,445], 327 U. S. 251 (1946); *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555 (1931). The Court made it clear that there is a great public interest involved in civil antitrust litigation since it forms one of the

greatest deterrents to the violation of the antitrust laws by virtue of the prospect of a large money recovery by a plaintiff. Accordingly, and as noted by the Court in the *Bigelow* case, difficulties of proof are no longer confused with the right of recovery.

A.

Public Injury

The Court finds that defendants' activities were a substantial factor, and the proximate cause of injury to the public. The plaintiffs have shown a resultant increase in the cost to shippers and consumers of all commodities necessary to life, including clothing and food, a high percentage of which reaches consumers only by carriage in motor trucks. If the effect of the conspiracy is to increase the cost of operation of the truckers, thereby increasing consumer's costs, an injury to the public is effected. The loss of business suffered by and expense entailed to each and every plaintiff and the industry as a whole in counteracting the undermining of public confidence was tremendous and quite obviously resulted in higher costs to the consumer. This in and of itself is a sufficient injury to support the cause of action. There is further public injury which flowed from the so-called legislative phase of the combination. Because of the legislative activities of the defendants, as set forth in the facts, the public was deprived of the flexible service and convenience supplied by this mode of transportation in certain of the states involved. Although a sufficient show of public injury has been made out on the basis of the prior discussion, this is an added proof that should be mentioned.

B.

Private Injury

The plaintiffs have satisfied the Court by a preponderance of the evidence that the defendants' activities as set forth constituted a substantial factor in injuring the plaintiffs in their business and property. The private injury was twofold, either part fully satisfying the requirement that defendants' actions constituted a proximate cause of private injury sufficient to support the plaintiffs' cause of action. The former has already been mentioned in the "Summary" section of the opinion. It was the tremendous loss of good will flowing from the defendants' efforts to undermine public confidence through its campaign of vilification. The damages flowing from the expenses entatiled by PMTA in counterbalancing the defendants' campaign fully satisfy the Court of ample private injury. The damage to the individual plaintiffs through the loss of good will is also certainly present and fully meets the requirements of showing private injury. *Darden v. Besser* [1957 TRADE CASES ¶ 68,646] 147 F. Supp. 376, 382 (E. D. Mich. 1956).

The second phase of the injury pertains to the legislative end of the conspiracy. Defendants' counsel in his opening argument admitted that the passage of S. B. 615 would have enormously increased the gross revenues of trucks using the roads at a trifling increase in cost, (R. 42). A Byoir study distributed in the name of the Pennsylvania State Grange reported that fifteen typical motor carriers would have increased their gross annual earnings by more than 3½ million dollars for added license fee payments of only $26,352.00. (R. 704-710; P. 112). This information was buttressed by a study of I. C. C. records which showed that five of the present plaintiffs would have grossed approximately one million dollars more in one year had S. B. 615 been passed, (R. 1316; P-169). The Byoir study further indicated that the veto meant that some five million dollars of freight was retained by the Pennsylvania Railroad because the truck limit was not raised, (R. 411; P-53.) Mr. Mackie testified that in a typical area, defeat of the bill would result in a loss of revenue of $9,270.00 per truck per year (R. 1452), and one of the plaintiffs, Mr. Noerr, gave concrete illustrations of the injury to his own company's business, (R. 5473-5476). All of these losses stem from the legislation in question but they are not necessary to a decision in this case. The injury to the individual plaintiffs and the PMTA flowing from the campaign of vilification fully satisfies the requisites of a valid cause of action made out by a preponderance of the evidence. The Court realizes that some of the money and expense which was expended in self-defense in counteracting the defendants' campaign would have been spent for publicity purposes without the railroad-created climate of competition. That point will be discussed in detail later in the opinion. Another important question which

will be discussed at that time is whether the individual plaintiffs, except for the PMTA, have precluded themselves from recovering anything but nominal damages because of the stipulation limiting their claim to compensatory (as contrasted with injury and proximate cause) damages to those flowing from an executive act—the veto of S. B. 615.

Defenses

[*Summary of Defenses*]

The defendants seek to sustain their theory of the case on the basis of certain legal contentions which fall into six general categories. While the present discussion will not comment upon all of defendants' case law, every contention and every case has been thoroughly examined, and it is the Court's opinion that a review in this opinion of the said contentions will be adequate for a proper disposition of the case. Each will be outlined and discussed individually in the order in which they appear, which is as follows:

1. A judicial tribunal may not invalidate a duly promulgated legislative or executive act.

2. The doctrine of separation of powers precludes a search for executive or legislative motives in carrying out their respective functions.

3. A monopoly created by virtue of duly enacted state legislation is without the ambit of the antitrust laws.

4. The defendants' activities merely constituted an appeal to the legislature; that to deprive them of the right to act in the manner set forth in the facts would be to deprive them of the constitutional rights of freedom of speech, freedom to assemble and freedom to petition the legislature.

5. The plaintiffs in instituting this action were motivated by a desire to bring the defendants into disrepute in furtherance of their own objective to acquire a monopoly of the long-haul freight business.

6. A certain group of the defendants assert that even if an illegal conspiracy is found to exist (which they deny) they cannot be included as co-conspirators in spite of their membership, contribution to and general acceptance of the ERPC plan of attack, since they had no part in planning the details of the campaign, attended only a few of the ERPC meetings, and hence the evidence is insufficient to link them as co-conspirators.

[*Separation of Powers*]

1. & 2. These defenses relating directly to separation of powers of government are best understood by a joint discussion of the problems presented. The defendants place great reliance on the cases of *Arizona v. California,* 283 U. S. 423, 455 n.7 (1931) and *Fletcher v. Peck,* 6 Cranch 87 (1810) to sustain their theory of the case. They argue that no inquiry may be made concerning the motives or wisdom of a state legislature or state executive acting within its proper scope of powers. By analogy they seek to carry these principles over to the case under consideration. In the opinion of the Court the analogy is not a valid one. This Court is in complete accord with the principles set forth in those cases. The plaintiffs do not seek to invalidate any legislation nor do they seek to inquire into Governor Fine's motives in vetoing S. B. 615, at least at this state of the discussion. To the contrary, they seek to inquire into defendants' motives in seeking to have Governor Fine veto the measure. Further, the conduct in question preceded and was independent of the executive and legislative acts and was exerted against the entire public; it is for that reason that they are faced with the above suit. They attempted to effect a restraint forbidden by the Sherman Act and hence are not protected by legislation which helps to effectuate the conspiracy.

There may be some force and validity to defendants' argument concerning injury flowing from a legislative or executive act when we reach a discussion of the compensatory damage and relief stage of this opinion. But such argument has no valid place at this point of the discussion. The defendants' contention with respect to the two defenses under consideration is well answered by the Supreme Court in the case of *Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.,* 151 U. S. 1, 18, 19, 20 (1894). In that case there was legislative grant to the Portage Company to construct a railroad. The defendants bribed the officials of the grantee Portage Company to break their contract with the plaintiffs to construct the railroad for the Portage Company. Then by false representations the defendants induced the legislature to revoke

the grant. *Fletcher v. Peck* was argued by the defendants as precluding any recovery by the plaintiffs. The Court first quoted from the *Fletcher* case in order to properly focus upon the law in question. It then applied those legal principles to the facts as found in the *Angle* case and stated:

"The rule upon which this decision (Fletcher) rests has been followed in many cases and has become a settled rule of our jurisprudence. The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act. This principle rests upon the independence of the legislature as one of the coordinate departments of the government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently, or corruptly."

It was the defendants' position in the above case that any wrong done by the Omaha Company to Portage was done by the Wisconsin legislature acting in pursuance to its undoubted power in taking away the land from the Portage Company and giving it to Omaha. Thus, no court could inquire into the influence, motives or information under which those acts were passed. In answering this contention the Court said:

"But it must be remembered that the wrongs of the Omaha Company were done before the legislature passed either the acts of 1882 or that of 1883, and it is to redress those wrongs that this suit was brought. Can it be that the legislature, by passing those acts, condoned the wrongs, and relieved the Omaha from any liability to the Portage Company? * * * An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged. The wrong was not one done by the state or in the act of the legislature in taking away the land grant, *but in such proceedings on the part of the Omaha Company as put the Portage Company in a position which apparently called for the action of the legislature.* There is no more challenge of the validity of this legislation by suing the Omaha Company for the wrongs it did leading up to this legislation than there is in challenging the validity of a criminal proceeding by an action against the prosecutor for malicious prosecution. . . ." (Emphasis Supplied.)

A reading of this language makes it evident that it is applicable to the case at bar and the defendants' contentions in this respect must fall. Obviously, the doctrine of the *Fletcher* case has been extended to the personal protection of members of a legislative committee from a cause of action under the Civil Rights statutes when acting within the sphere of legitimate legislative activity. The Court is in complete agreement with that legal principle as set down in the case of *Tenney v. Brandhove,* 341 U. S. 367, 377, 378 (1951), and the principles applied in *Daniel v. Family Security Life Ins. Co.,* 336 U. S. 220, 224 (1949). However, they simply are not applicable to the case under discussion.

A situation somewhat analogous in principle to the case at bar is found in *Hazel Atlas Glass Co. v. Hartford Empire Co.,* 322 U. S. 238, 247 (1944). In that case Hartford was seeking a patent and realized it had no chance before the Patent Commissioner unless it could prove it had produced a novelty. In order to do so the defendant in support of its application filed an article ostensibly written by the president of the American Flint Glass Workers Union, which in fact was prepared by the Hartford Empire Co. and its agents and attorneys. The Supreme Court ordered the patent set aside despite the fact that the Court of Appeals, in upholding the patent, expressly stated that it had not been influenced by the questionable article. In setting aside the patent the Supreme Court stated:

". . . Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think the circumstances call for such an attempted appraisal. Hartford's officials and lawyers thought the article material. They conceived it in an effort to persuade a hostile Patent Office to grant their patent application, and went to considerable trouble and expense to get it published. Having lost their infringement suit based on the patent in the District Court wherein they did not specifically emphasize the article, they urged the article upon the Circuit Court and prevailed. They are in no position now to dispute its effectiveness. Neither should they now be permitted to escape the consequences of Hartford's deceptive attribu-

tion of authorship to Clarke on the ground that what the article stated was true. Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators."

It is worthy of note that in the *Hazel Atlas* case, as in the case under consideration, the activities of the defendants were done without attribution in order to practice a fraud. It is also worthy of note that the Court was not impressed with the fact that the statements contained in the Clarke article might very well have been true. Here we have a situation where the statements sent out by Byoir were distortions of truth rather than truths and always without attribution. It was not only a fraud upon the legislatures and executives for an illegal purpose (to gain a monopoly), but it was also a fraud upon the public to gain that same purpose through the instrumentality of destroying the truckers' good will. Also, it should be kept in mind that the activities under attack also preceded the executive and legislative acts which the defendants claim are the only activities under scrutiny in the case. To the contrary, it is the entire railroad campaign, the destruction of good will, the fomenting of legislation and the vilification that are under attack.

It should always be kept in mind that this Court has no desire to examine Governor Fine's motives in vetoing S. B. 615. This Court is, however, interested in defendants' efforts to create motives. A cursory reading of the facts as found would quickly indicate that the destruction of the defendants' good will was the primary goal of the defendants in their plan to monopolize the long-haul freight business; but even if their activities were found to be limited to attempts to obtain legislation or to seek the veto of S. B. 615, their conduct under the facts as found constituted illegal activity prohibited by the antitrust laws. See also Chief Judge Kirkpatrick's opinion in *Singer Sewing Machine Co. v. American Safety Table Co.*, 88 F. Supp. 260 (E. D. Pa. 1949).

[*Legislatively-Created Monopoly*]

3. We find another group of cases which advance the proposition that a legislatively-created monopoly is without the ambit of the antitrust laws. *United States v. Association of American Railroads* [1944-1945 TRADE CASES ¶ 57,417], 4 F. R. D. 510 (D. Neb. 1945); *Okefenokee Rural Electric Membership Corp. v. Florida Power & Light Co.* [1954 TRADE CASES ¶ 67,809], 214 F. 2d 413 (5th Cir. 1954); *Georgia v. Pennsylvania Railroad* [1944-1945 TRADE CASES ¶ 57,344], 324 U. S. 439 (1945); *Parker v. Brown* [1940-1943 TRADE CASES ¶ 56,250], 317 U. S. 341 (1943); *United States v. Rock Royal Co-operative,* 307 U. S. 533 (1939); *Mackay Radio & Telegraph Co. v. F. C. C.*, 97 F. 2d 641 (D. C. Cir. 1938); *Keogh v. Chicago & N. W. Ry.*, 260 U. S. 156 (1922); *Olsen v. Smith,* 195 U. S. 332 (1904); and the *Slaughter-House Cases,* 16 Wall. 36 (1873).

The defendants argue that since they were merely seeking to impose legislation upon the truckers any monopoly that they may have obtained by virtue of such legislation would be a legally protected one. In this argument they ignore the fact that their campaign was far more than a mere legislative scheme. They further ignore the principle that legal means may not be used to accomplish an illegal objective. This Court agrees that a legislature has the right and power to legally create a monopoly for the general welfare of the people, and that the recipient of such a monopoly is legally protected, if his conduct is otherwise legal, as are the responsible government officials carrying out the will of the legislature. Further, the beneficiaries of such a monopoly, within permissible limits, may enforce these rights in the courts. But it is not a mere legislatively-created monopoly that is under attack in this case. It is a conspiracy to destroy a competitor; a conspiracy to destroy his good will; the distortion of facts to further that end; the presentation of distorted and false information to the public and to public officials that are under attack, as well as the fomentation of government restrictions.

All of the cases cited by the defendants to advance the contentions set forth in this category explicitly recognize that the recipients of such a monopoly are not PER SE without the ambit of the antitrust laws, and certainly not when a legislative campaign forms a part of a conspiracy to gain an unlawful end. The language of the cited cases alluding to this problem is worthy of note:

In *U. S. v. Association of American Railroads* [1944-1945 TRADE CASES ¶ 57,417], 4

F. R. D. 510 (D. Neb. 1945), the Court at page 524 said:

> "It need hardly be observed, and is not questioned by the defendants, that, notwithstanding the important statutory function in the determination of interstate railroad charges, rates, fares, services, and practices of the Interstate Commerce Commission, the Sherman Act applies to interstate common carriers by rail as well as by other means. . . ."

And in *Georgia v. Pennsylvania Railroad* [1944-1945 TRADE CASES ¶ 57,344], 324 U. S. 439 (1945) at page 456:

> "These carriers are subject to the antitrust laws." . . . Regulated industries are not per se exempt from the Sherman Act. . . ."

Finally, in *Parker v. Brown* [1940-1943 TRADE CASES ¶ 56,250], 317 U. S. 341 (1943) at page 351:

> "There is no suggestion of a purpose to restrain state action in the Act's legislative history. . . ."
>
> "True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or declaring that their action is lawful."

The plaintiffs in this case are not seeking to invalidate the legislation itself on the ground that it violates the Sherman Act as in *Parker v. Brown, supra,* nor are they seeking to undo the action of a state in creating a monopoly. See *Slick Airways, Inc. v. American Air Lines, supra;* c. f. *Forgett v. Scharf* [1950-1951 TRADE CASES ¶ 62,610], 181 F. 2d 754, 756, 757 (3d Cir. 1950); *U. S. v. I. B. C.* [1957 TRADE CASES ¶ 68,649], 150 F. Supp. 397, 404 (S. D. N. Y. 1957).

The defendants place great reliance on the case of *Okefenokee Rural Electric Membership Corp. v. Florida Power & Light Co., supra.* That case involved an action against a competing power company, Florida Power and Light Company, the City of Jacksonville, which was also in the power business, and the Commissioner for Utilities for the City of Jacksonville. The plaintiffs alleged that in pursuance of a conspiracy between the defendants they induced the Florida Highway Department to refuse permission to the plaintiffs to construct proposed lines along a state highway (which because of the marshy condition of the land was the only feasible route) by virtue of false arguments and a smear campaign that there were already pre-existing lines over the same route. The District Court found that the transaction was not one of interstate commerce because the sale and delivery to the ultimate consumer was in Florida, in spite of the fact that the plaintiff's power source was in Georgia and the transmission lines carried it from that source continuously into Florida. In the alternative it found that even if interstate commerce were involved, the restraint was insubstantial and indirect. There is no doubt that interstate commerce is involved in the case at bar and further that the effects of the conspiracy upon that interstate commerce are both substantial and direct. The District Court in *Okefenokee* further found, and the Circuit Court agreed, that the orders complained of were the sole responsibility of the administrative boards, and the subject matter was exclusively within their jurisdiction; hence, the validity of those orders could be attacked only in an action of mandamus or other such remedy in the state court and could not be collaterally attacked in an antitrust proceeding.

The plaintiffs have not here limited themselves in their proofs to those injuries proximately resulting from the veto of S. B. 615 in seeking to sustain their cause of action. Their allegations and proofs go far beyond anything so narrow as that executive act. The effect of the campaign to destroy the truckers' good will had a very substantial and direct effect upon interstate commerce and hence this case is beyond the law of the *Okefenokee* case insofar as plaintiffs' ability to sustain their cause of action is concerned. Defendants have earnestly striven to convince the Court, sitting as a jury, that the plaintiffs' entire case (not simply their right to compensatory damages) is limited to complaints of the defendants' attempts to seek legislation and the loss flowing from such. Hence, they seek to bring themselves within the purview of the *Okefenokee* case. In that respect they have failed to convince the Court.

Further, the truckers do not contend that they have an unrestricted legal right to use the highways; nor are they attempting to alter any decision of any responsible public official. But they did have a legal right to be in the transportation business. Unlike *Okefenokee,* and like *Angle,* the defendants conspired to destroy the good will of their chief competitor in furtherance of their illegal objective, independent of any legisla-

tive or executive act. The limitation of the case to an executive act appears only when the stipulation of counsel comes into the fore upon a discussion of the compensatory or actual damages to be allowed the plaintiffs.

Any discussion of immunity from the antitrust laws because of the alleged presence of a legislative act as the instrumentality for furthering the object of monopolizing a segment of an industry requires an examination of Mr. Justice Holmes' opinion in the case of *American Banana Co. v. United Fruit Co.,* 213 U. S. 347, 358 (1909). This is the last of three cases upon which the defendants place great reliance, the other two being *Fletcher v. Peck* and the *Okefenokee* cases. The *Banana* case has been reviewed on many occasions since it was decided in 1909, and a proper examination of the law as set down in that case requires a reading of that decision in the light of subsequent Supreme Court decisions. The two most enlightening expositions are found in *United States v. Sisal Sales Corp.,* 274 U. S. 268, 275, 276 (1927) and *Steele v. Bulova Watch Co.,* 344 U. S. 280, 288 (1952).

An examination of these cases makes it apparent that the rule of the *Banana* case is not controlling under the facts as found. The court in the *Banana* case simply held that it was not the Congressional intent in passing the Sherman Act to extend its coverage and prohibitions to an alleged monopoly grounded on a seizure of property in pursuance of a sovereign act of a foreign nation. They then found that the acts in question did not constitute a tort in the place where the activity occurred. In the case under consideration the railroads' activities were in no way limited to securing legislation or influencing executive acts. The principle that no legal damages can flow from the acts as such is important in this case only as to any limitation upon the monetary damages claimed by the plaintiffs. Finally, as opposed to the facts in the *Banana* case, all of the facts—the destruction of good will, the vilification, the distortion, as well as the attempts to foment legislation, occurred within the United States.

In the *Sisal* case the court granted an injunction against several individuals and corporations who by virtue of a conspiracy had obtained control of the importation and sale of sisal from Mexico and a complete monopoly of the internal and external trade and commerce in that product. Although sisal was a product of Mexico, a foreign country, and monopoly was effectuated by securing the passage of discriminating legislation in that country, the court held that the activities in question were in violation of the Sherman Antitrust Act and the Wilson Tariff Act and that the case was not controlled by the *Banana* decision, pointing to the above-referred-to narrow application of the *Banana* doctrine.

In the *Bulova Watch Co.* case, Bulova sought an injunction and monetary damages against an American citizen and resident for acts of trade-mark infringement and unfair competition consummated in Mexico. Learning that the plaintiff, which produced a nationally advertised watch, had not registered its trade-mark under the laws of Mexico, the defendant produced a Mexican registration for himself for the trade-mark "Bulova." He then proceeded to conduct a watch business in Mexico City, where without Bulova's authorization and with the purpose of deceiving the buying public, he stamped the name "Bulova" on watches there assembled and sold same, many of them eventually turning up for repair, in the United States. The defendant argued that the *Banana* case was controlling and that the plaintiff's cause of action should be dismissed. In refuting this claim the court said at page 288:

> "*American Banana Co. v. United Fruit Co.,* 213 U. S. 347 (1909), compels nothing to the contrary . . . . This Court agreed that a violation of American laws could not be grounded on a foreign nation's sovereign acts. Viewed in its context, the holding in that case was not meant to confer blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States. Unlawful effects in this country, absent in the posture of the *Banana* case before us, are often decisive; this Court held as much in *Thomsen v. Cayser,* 243 U. S. 66 (1917), and *United States v. Sisal Sales Corp.,* 274 U. S. 268 (1927). As in *Sisal,* the crux of the complaint here is 'not merely of something done by another government at the instigation of private parties;' petitioner by his 'own deliberate acts, here and elsewhere . . . . brought about forbidden results within the United States.' 274 U. S., at 276 . . ."

In the light of the above cases and discussion it is evident that the *Banana* case is not controlling of the outcome of this case, certainly insofar as the plaintiffs sustaining their cause of action.

[*Constitutional Rights*]

4. We now come to a contention by the defendants which has been previously mentioned with respect to the Court's finding concerning the birth of this conspiracy and the calculated risk pursued by the railroads in their campaign against the trucking industry. This Court is most sensitive to the fact that constitutional rights are not to be treated lightly. The desire to insure against any tyranny of law was the moving force behind the creation of our great constitutional safeguards. It is with that thought in mind that the Court approaches this contention, namely, that the defendants' activities or concert of action are protected by virtue of the constitutional rights of freedom of speech, freedom of assembly, and freedom to petition the legislature. The defendants point to the cases of *U. S. v. CIO,* 335 U. S. 106 (1948); *Near v. Minn.,* 283 U. S. 697 (1931); *U. S. v. Cruikshank,* 92 U. S. 542 (1875), among others, in support of their argument. The Court has thoroughly examined the legal principles set forth in those cases, as well as the more recent expositions on those subjects and allied subjects, and finds that they do not extend to the conduct in question. There is no question of a prior restraint involved in this case. The defendants are not being precluded from publishing anything within legal limitations; nor are they being, nor will they be, restrained from petitioning the legislature. Further, the Court is not precluding the defendants or anyone else from seeking out allies. As has already been stated, this is no attack upon public relations or the achievement of a legislative goal through publications, speeches, press releases, or the alignment of friends to seek to accomplish a valid legislative purpose. But when these resources are utilized for the purpose of applying the great power and wealth of group action against a competitor in order to accomplish an illegal objective—the monopolization of the long-haul freight business, they become something more than mere freedom of speech, freedom to assemble, or freedom to petition the legislature—they become an illegal conspiracy. When facts are distorted, allies are "created", public and private officials are "duped" and "used", attempts are made to secure decisions of public officials by virtue of "facts" and "research" which are distortions of truth, and which in the defendants' own language constituted the "planting" of their "poison", we go far beyond the scope of constitutional privilege. *Kansas City Star Co. v. U. S.* [1957 Trade Cases ¶ 68,601], 240 F. 2d 643, 665, 666 (1957). It is not now, and it never has been the law, that a common law conspiracy is within the confines of constitutional protections. The clear and present danger test has never been applied to a conspiracy which reaches the stage of hundreds of overt acts in pursuance of a plan to destroy. This situation has been presented to the Supreme Court before in the case of *Giboney v. Empire Storage and Ice Company* [1948-1949 Trade Cases ¶ 62,391], 336 U. S. 490 (1949). The legal principles stated there are certainly applicable here. This is a new type of conspiracy carefully planned to circumvent prior decisions. The *Giboney* case is one of a series of cases involving the application of freedom of speech to peaceful picketing, but is not in any way limited to that state of facts. The case concerned the constitutional power of Missouri to apply its anti-trade-restraint law to the activities of labor unions, and to enjoin union members from peaceful picketing carried on as a course of conduct which was in violation of the Missouri law noted. The State law in question reads as follows:

> "Combinations in Restraint of Trade Declared a Conspiracy. Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, *transportation,* manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article. Mo. Rev. Stat. Anno. ¶ 8301 (1939)." (Emphasis supplied).

The similarity to the antitrust laws is certainly of more than passing interest. In that case an ice peddlers' union was seeking to break down the resistance of nonmember peddlers who refused to join the union by inducing wholesale distributors to agree

not to sell ice to nonunion peddlers. The union's objective was to secure higher wages and better working conditions for its members. When the plaintiff/distributor refused to go along with the union plan, the union resorted to peaceful picketing, the effect of which was to reduce the distributor's business 85%.

In upholding the grant of the state court injunction against a continuation of the defendant's activities in that case, Mr. Justice Black stated at pages 501 and 502:

> ". . . No opinions relied on by petitioners assert a constitutional right in picketers to take advantage of speech or press to violate valid laws designed to protect important interests of society."
>
> ". . . Nor can we say that the publication here should not have been restrained because of the possibility of separating the picketing conduct into illegal and legal parts. . . . For the placards were to effectuate the purposes of an unlawful combination, and their sole, unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers. It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.
>
> . . . *Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.*" (Emphasis supplied)

There is no question but that the language above is applicable to federal as well as state laws which deem a course of conduct to be detrimental to the public good and illegal. The antitrust laws are valid laws. They indicate the public policy of the Congress of the United States in the field of competitive business. The defendants have engaged in a course of conduct which satisfies the requirements of a common law conspiracy as well as a violation of these laws. *Caraway v. Ford Motor Company* [1957 TRADE CASES ¶ 68,705], 148 F. Supp. 776, 777 (D. Mo. 1957). In that posture it becomes apparent that the defendants' conduct is not within that broad expanse of conduct which is protected by the First and Fourteenth Amendments. What the defendants have combined to do is something more than free speech; something more than freedom to assemble; something more than a petition to the legislature. They have engaged in a course of conduct designed to destroy the good will of a competitor in order to secure a monopoly—all of this in violation of a valid public policy set down many years ago by the Congress of the United States. The Supreme Court has said explicitly that a course of conduct in violation of a strong public policy established either by law or ad hoc decisions may constitute a course of activity without the ambit of constitutional protections. *Hughes v. Superior Court,* 339 U. S. 460 (1950); *International Brotherhood v. Hanke,* 339 U. S. 470 (1950); *International Brotherhood v. Vogt, Inc.,* 25 L. W. 4505.

Much stronger is the fact situation as found by the Court in this case than of those above cited. Further, the Court finds that the defendants also violated another Federal law in the course of their campaign of vilification. In pursuing this plan the railroads, through Byoir, staged a television program broadcast in the name of the Association of Pennsylvania Township Supervisors over Station WGAL in Lancaster, Pennsylvania, which failed to disclose the railroad sponsorship, in violation of the Federal Communications Act, 47 U. S. C. § 317,[1] which reads as follows:

[1] 47 U. S. C. A. § 153 "Definitions (b) 'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, *pictures,* and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." (Emphasis Supplied.)

(k) " 'Radio station' or 'station' means a station equipped to engage in radio communication or radio transmission of energy."

Subsection (b) of this section defining radio communication includes television as one form of radio transmission and this chapter applies to every phase of television. See *Allen B. Dumont Laboratories v. Carroll,* 184 F. 2d 153, 155 (3d Cir. 1950), cert. den., 340 U. S. 929 (1951).

At page 155 Chief Judge Biggs said:

"Section 3(b), 47 U. S. C. A. § 153(b), defines 'Radio communication' as 'The transmission by radio of writing, signs, signals, pictures, and sounds of all kinds . . .'. The television and radio industries have construed this definition to include television as 'one form of radio transmission'. There can be no doubt of the correctness of this construction."

"All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished as the case may be, by such person."

Hardy, the Byoir agent in Pennsylvania, prepared the telecast, and the ERPC ultimately paid for it in full. In accordance with the standard procedure throughout their campaign there was no mention of the ERPC or Byoir. Further, there is ample evidence to warrant the finding that there was no intent to discontinue the above-noted practice. To the contrary, had it not been for this lawsuit there no doubt would have been an increased use of TV and radio by Byoir under the sponsorship of a "front" and, of course, without attribution to the defendants.

Circuit Judge Prettyman in commenting upon this provision of the Communications Act stated that Congress has frequently placed limitations upon the use of the mails and broadcasting. In referring to broadcasts he pointed out that such activity was permeated with a public interest and hence the public was entitled to know who was addressing it over the air. He pointed out that all political parties identify themselves over the air in order to make their appeal useful and that the only reason for anonymity of politcal broadcasting must be a purpose of deception. *Communist Party of U. S. v. Subversive Activities Control Board,* 223 F. 2d 531, 556 (D. C. Cir. 1954), *reversed on other grounds* in 351 U. S. 115 (1956); c. f. *United States v. Harriss,* 347 U. S. 612 (1954) and *Securities & Exchange Commission v. Morgan, Lewis & Bockius,* 113 F. Supp. 85 (E. D. Pa. 1953), aff'd. 209 F. 2d 44 (3d Cir. 1953).

It has been the position of both the railroads and Byoir that the success of their campaign was entirely dependent upon non-attribution to the railroads. In the light of the frequent distortion of facts by Byoir in its news releases, Judge Prettyman's comment concerning deception becomes extremely pertinent. In any event, this is a further example of how the defendants' conduct, although attempted to be shrouded with a legislative cloak, ultimately narrows down to an illegal conspiracy to utilize the group power of the ERPC and Byoir to destroy the good will of the trucking industry in order to secure a monopoly in restraint of trade and in violation of the antitrust laws.

Another case dealing with this subject is the *Associated Press v. United States* [1944-1945 Trade Cases ¶ 57,384], 326 U. S. 1, 7 (1945). The court there stated that it would degrade the clear and present danger doctrine "to fashion from it a shield for business publishers who engage in business practices condemned by the Sherman Act."

And in the case of *Kobe v. Dempsey Pump Co.* [1952 Trade Cases ¶ 67,312], 198 F. 2d 416, 424, 425 (10th Cir. 1952), cert. denied, 344 U. S. 837 (1952), we find a situation where the defendants had instituted admittedly valid patent infringement suits as part of a broader design to violate the antitrust laws. The court held that in the light of that improper objective the privilege of bringing a valid suit was no longer present and the conduct was found to be illegal. Also see *Cape Cod Food Products, Inc. v. National Cranberry Association* [1954 Trade Cases ¶ 67,769], 119 F. Supp. 900, 907 (D. Mass. 1954), and *Forgett v. Scharf* [1950-1951 Trade Cases ¶ 62,610], 181 F. 2d 754, 756, 757 (3rd Cir. 1950).

In the light of the facts as found and the applicable cases, the defendants' argument that their conduct is constitutionally protected must fall of its own weight.

[*Plaintiffs' Motives*]

5. The Court will not go into great detail in examining the question of plaintiffs' motives in instituting this action because that question has been covered extensively under the heading of "The Counterclaims." It will simply be mentioned that neither a finding of improper motives on the plaintiffs' part in bringing suit nor a determination that the plaintiffs were also monopolists would constitute a defense, under the circumstances, to plaintiffs' cause of action. See *Kiefer-Stewart Co. v. Seagram & Sons* [1950-1951 Trade Cases ¶ 62,737], 340 U. S. 211, 214 (1951); *Moore v. Mead Service Co.,* 340 U. S. 944 (1951); *Foremost Promotions v. Pabst Brewing Co.* [1953 Trade Cases ¶ 67,617], 15 F. R. D. 128 (N. D. Ill. 1953); *U. S. v. Cotton Valley Operators Committee* [1948-1949 Trade Cases ¶ 62,216], 75 F. Supp. 1 (D. La. 1948); *Higgins v. Shenango Pottery,* 99 F. Supp. 522, 525 (W. D. Pa. 1951); and 29 *N. Y. L. Rev.* 1463, 1470 (1954).

[*Participation in Conspiracy*]

6. We come now to the defendants' final contention. This defense is presented on behalf of the following defendants: Boston and Maine Railroad, Canadian National Railways, Canadian Pacific Railway Company, Lehigh & New England Railroad Company, Maine Central Railroad Company, Pittsburgh & West Virginia Railway Company and Charles J. Graham, Individually and as President, the Delaware and Hudson Railroad Corporation, The New York, New Haven and Hartford Railroad Company, the Union Railroad Company and Fred W. Okie, Individually and as President of that Company. They argue that even if a conspiracy is found to exist, the mere fact of membership in ERPC does not establish concert of action on their part, and that there is not sufficient other evidence to include them as co-conspirators. The Court agrees with the first part of their argument. Mere membership in an unincorporated association, in and of itself, is not sufficient to establish liability for conspiracy. *Phelps Dodge Refining Corp. v. FTC* [1940-1943 TRADE CASES ¶ 56,297], 139 F. 2d 393, 396 (2d Cir. 1943). If the purposes of an association are lawful on their face its members should not be held for the acts of the association outside its purposes, *unless knowledge of the illegal acts is brought home to the members. Phelps Dodge Refining Corp. v. FTC, supra.*

In the light of the underscored reasoning the Court must differ with the latter part of defendants' argument, *viz.,* that the evidence does not prove knowledge on the part of these defendants of the real ERPC objective and purpose. On the basis of all the evidence the Court finds that these defendants, although not involved in the carrying out of the details of the campaign, had full knowledge of its illegal object and general means for achieving that objective. First of all, the Byoir contract with the ER-TC provided in paragraph 7 that "The party of the second part (Byoir) agrees to consult with and be wholly guided by the party of the first part (ER-TC) on all questions of policy to the end that no material shall be released to the public, or to anyone, giving any impression contrary to the established policies of the party of the first part." (R. 101-102; P-4). The Transportation Committee (ER-TC) was appointed by and created by the ERPC and these defendants were regular contributing members of the ERPC. Further, the Court finds that the provisions of this section of the contract were followed and that the responsible committee heads of ER-TC were always kept abreast of Byoir's activites and that they in turn reported to all the participating members of ERPC.

All of the railroads were assessed under the Conference budget and it was on this basis that the individual contributions to the Conference were allotted. This same budget contained a specific item for the Competitive Transportation Committee (ER-TC), which was by far the largest item in the entire budget, and that budget was sent to all members of the ERPC including the above-mentioned defendants, (P-195).

In order to buttress this evidence we need merely to look at Canadian National Railway Company's answer to plaintiffs' interrogatory No. 3 in which they state that their payments to ERPC "* * * were made from time to time upon the understanding that the same, together with payments of other members of ERPC were to be used for the requirements of ERPC as from time to time described in its budgets and requests for such payments." The Canadian Pacific Railway Company in answering the same further admitted that "* * * such payments were made from time to time upon the understanding that the same, together with payments of other members of ERPC, were to be used for the requirements of ERPC." (P-264).

Further, the minutes of the Conference specifically showing appropriations for the Competitive Transportation Committee, including Byoir's activities and such other activities as the rural roads film, were sent to all members of the ERPC, (P-190). These same minutes specifically indicate the attendance of Messrs. Okie and Graham, two of the above defendants. An examination of the notes of testimony reveals that Mr. Girdler's (Byoir's ERPC account executive), memorandum setting forth the objectives of the program was sent to all of the railroad presidents (R. 267) and that the entire ERPC approved the Byoir plan (R. 845-846). While it is true that the memorandum obviously did not set forth the details of the conspiracy, it did sufficiently lay the groundwork from which any jury might infer, along with all the other evidence, the presence of knowledge.

The evidence further reveals that Byoir reported to the presidents themselves almost every month (R. 847), and that Mr. Deegan, the Public Relations Subcommittee head, approved the Byoir bills to the Conference. Of course, Mr. Deegan was appointed by and represented all of the Presidents as head of that Subcommittee. There is no question but that ERPC was familiar with the goals which Byoir sought to attain and that the President's Conference never disapproved anything which Byoir did in carrying out the terms of its agreement. (R. 224, 225; 1457-1458).

Finally, it must be remembered that competition by nonattribution was not something new to the railroads, as evidenced by the criticism of the Wheeler Report. In the light of that report it becomes more evident that all defendants knew what was meant by the "objectives" and the ERPC "policy."

The Court points to these specific evidences of knowledge not with the intent of having them constitute the sum total of such evidence. They are merely indicative of some of the more obvious considerations that led to the Court's finding that there was ample evidence of knowledge on the part of all defendants, and that as representatives acting in behalf of their respective companies, all defendants were co-conspirators in this illegal plan to ultimately destroy the trucking industry. It is hornbook law that the agreement need not be proved by direct evidence and that conduct pointing to concerted action is sufficient to make out membership in, and the presence of, a conspiracy. In order that one be found guilty as a conspirator it need only be shown that, with knowledge of the conspiracy, he knowingly performed acts designed to promote or aid in the attainment of the object of the known conspiracy. *United States v. National City Lines* [1950-1951 TRADE CASES ¶ 62,757], 186 F. 2d 562 (7th Cir. 1951), cert. denied, 341 U. S. 916 (1951).

There has been presented ample evidence to satisfy the Court as to a finding of knowledge, as well as a finding of agency on the part of the presidents to impute their conduct to the respective corporate defendants. As stated by the court in *U. S. v. Morgan* [1953 TRADE CASES ¶ 67,586], 118 F. Supp. 621 (S. D. N. Y. 1953), in a suit under the antitrust laws, once a conspiracy is shown to have existed, only slight evidence is necessary to connect individual co-conspirators with the illegal undertaking. In the case at bar more than slight evidence has been presented to and believed by the Court.

[*Summary—Observations*]

In concluding this phase of the opinion, the Court will summarize and make a few general observations concerning the presence of the conspiracy. It is clear that the plaintiffs proved an intent to unreasonably restrain trade and hundreds of overt acts in furtherance of that illegal object. Without limiting anything that has already been stated there are three important factors of this case which demonstrate defendants' ultimate objective. First, the railroads realized that if truck rates were increased appreciably above their already higher price shippers would have to again use the railroads despite the flexibility and service of the truck. Every phase of the Byoir-railroad campaign was designed to do that very thing. Secondly, they further realize that any change in the amount the truckers paid in state and local taxes would greatly weaken them as a competitive factor and, of course, their "use" of the independent organizations and distortion of facts was constantly aimed in that direction. Finally, a very interesting situation arose during the Korean conflict which bore directly upon the question of intent to restrain commerce. A discussion arose among members of the ERPC Public Relations Subcommittee concerning the antitruck program being carried out by Byoir and the ERPC in the light of an impending freight car shortage brought on by the Korean War. The participants were fearful of discontinuing the campaign, and yet they wondered how they could justify their efforts to make long-haul trucking more expensive when *with the car shortage they were not in a position to handle any greater volume of business.* The problem was well illustrated in a letter from Mr. Selvage to Mr. Deegan dated August 9, 1950 (D-28). The pertinent section reads as follows:

> "The program to date has been largely negative aimed directly at the trucks and designed to curb their more nefarious activities. Now, with a war situation approaching, with the possibility that there would be a shortage of freight cars (and resultantly a demand for using any kind of a vehicle to move cargo), might it not become unpopular to urge curtail-

ment of any form of transportation. It would be like duPont saying we can't make all of the nylon that is needed but protesting anyone else making it."

James G. Lyne, Editor of Railway Age, commented upon the same problem in a letter of September 26, 1950 to Mr. Littlefield (P-251) and noted that the position of the ERPC concerning trucks would certainly be challenged because they "are playing the dog in the manger in that they are trying to make things tough for the trucks, while they (Railroads) themselves cannot handle the traffic." However, in spite of these queries Mr. Deegan stated flatly that there was no alteration in the campaign, (R. 1850, 1851). It appears rather incongruous that the self-styled guardians of the public interest should have such an utter contempt for the same interest during a time of emergency. Mr. Lyne, in the abovementioned letter, after stating the problem gave his own answer which indicated to this Court a completely self-serving attitude. While cast in language indicative of a railroad concern for public interest, its true import was to the effect that "we know what OUR standard answer to the public is whenever we are approached with such a situation."

RELIEF

The subject of relief will be discussed under three separate headings for the purpose of clarity, namely, Injunctive Relief, Counsel Fees and Costs, and Compensatory (actual) Damages.

A.

Injunctive Relief

On the basis of the facts as found it is apparent to the Court that the plaintiffs, both the individual ones and the PMTA, have been irreparably harmed and that there is a strong possibility that the defendants are ready, willing and able to continue with their campaign to destroy the good will of the long-haul trucking industry unless they are restrained. While it is true that the intensity of the campaign has diminished with the institution of this suit, it is also clear that it will be renewed with equal vigor upon a termination of this litigation unless the Court grants injunctive relief to the plaintiffs. The defendants were ready to extend the campaign to other states and to intensify activities in the states initially chosen as starting points in the campaign to monopolize the industry. In the light of those facts and the defendants' propensity towards the use of the technique set forth in extenso in this opinion, a restraining order will be issued in favor of all plaintiffs and against the ERPC and all the corporate defendants, including Byoir. *Georgia v. Pennsylvania Railroad* [1944-1945 TRADE CASES ¶ 57,344], 324 U. S. 439, 462 (1945). All individual defendants will be excluded since they are either officers or employees of the corporate defendants and as such will be bound by the terms of the injunction to be issued.

In government antitrust cases it is customary to allow the parties to submit a form of proposed restraining order to guide the court in the exercise of this equity power. Since there is no difference in principle between a government suit and a private suit under the antitrust laws, the Court will utilize that same procedure in this case. The plaintiffs are to submit a proposed injunction, not inconsistent with the findings as set forth, within thirty (30) days from the filing date of this opinion. The defendants, on the other hand, may file exceptions thereto within fifteen (15) days, and after hearing thereon the final order will issue.

B.

Attorney's Fees and Costs

In the light of paragraph two of the stipulation of counsel set forth in this opinion, *supra,* stating that the costs including the attorney's fees were borne by the PMTA only, such fees will not be awarded in favor of the individual plaintiffs. At an appropriate future date the Court, in accordance with the pre-trial discussions concerning injunctive relief and proofs of the plaintiffs' actual damages and costs, will take testimony as to the extent of PMTA's costs and a reasonable attorney's fee. Thereafter, an award of costs and a reasonable attorney's fee will be made in favor of the PMTA and against all the corporate defendants including Byoir; the expense to each railroad defendant (ERPC and the individual defendants will be excluded) will be apportioned according to their 1951 percentage contribution to ERPC. Byoir's contribution will be stated under "Summary of Relief."

C.

Compensatory Damages

On the basis of the Court's conclusions of law all the plaintiffs are entitled to three-

fold the damages suffered by them due to injury to their business and property flowing from the defendants' conduct. In accordance with the pre-trial agreement that evidence of actual damage would be heard at a later date in the event that plaintiffs sustained their cause of action, plaintiffs limited their proofs to evidence of general injury flowing from defendants' conduct without attempting to introduce evidence of the actual damage to each individual plaintiff. If it were not for the stipulation of counsel referred to, *supra,* the Court would be prepared to grant damages to each individual plaintiff as well as the PMTA upon a hearing of evidence pointing to the actual damage suffered by them.

The damages to the individual plaintiffs would fall into two main classes—those flowing from the direct loss of good will, prestige and business, as a result of the campaign of vilification and other Byoir activities, and those flowing from the loss of potential revenue and consequent loss of profits as a proximate cause of the defendants' campaign to foment legislation. However, there have been drastic limitations placed on the scope of recoverable damages in this case by virtue of the aforesaid stipulation of counsel which limits recovery insofar as the individual plaintiffs are concerned to *those damages flowing from the loss of potential revenue occasioned by Governor Fine's veto of* S. B. 615. The stipulation specifically excluded the PMTA from any such limitation. Because of these considerations any attempt to ascertain damages will require a distinction between those flowing to the individual plaintiffs and those flowing to the PMTA.

1.

PMTA Damages

As already stated, the defendants' tactics ultimately forced the PMTA, as the representative of the trucking industry in Pennsylvania, to resort to a campaign of self-defense or face increasing difficulties with the ultimate possibility of extinction. The expenditures directly occasioned by that defensive campaign will be returned to PMTA in the form of a money recovery. Evidence of such expenditures proximately resulting from the defendants' *illegal* activities will be heard at a later date along with the evidence of attorney's fees and costs. In determining the extent of recovery to PMTA the Court will take into consideration the fact that PMTA would have expended considerable sums for publicity purposes independent of the railroad activities; it will also consider the fact that the PMTA budgetary trend in the field of publicity was an upward one, again independent of railroad activities. Since the stipulation of counsel, which will be again referred to in detail, does not apply to PMTA they shall recover any damages that they may prove at the appointed time. These damages shall be assessed against all the corporate defendants, including Byoir, but shall not extend to ERPC and the individual defendants. All the damages plus reasonable attorney's fees and costs shall be assessed in the following manner: twenty percent to be borne by Byoir, said amount not to be reimbursed by the ERPC; the remaining eighty percent to be assessed against the remaining railroad-corporate defendants on the basis of their percentage contributions to ERPC for the year 1951.

2.

Plaintiffs Other Than PMTA

These plaintiffs were injured as a proximate result of the defendants' activities in two ways: (1) All of Byoir's and the railroads' activities other than the fomentation of governmental restrictions resulted in a substantial loss of good will (business losses) to these plaintiffs; (2) the fomenting of governmental restriction when done in the manner set forth in the findings and as part of an unlawful object of maintaining a monopoly caused injury to these parties by increasing the cost of operation and/or preventing the carrying of greater loads. Either or both of these injuries are legal injuries insofar as the *fact* (proximate cause), as contrasted with the amount of injury is concerned. However, the second type of injury, in the light of the stipulation of counsel, cannot be regarded by the Court as a legal injury insofar as the calculation of *amount* of damages is concerned.

While it is true that the damage flowing from the loss of good will is difficult of ascertainment, such difficulty has never been associated with impossibility of ascertainment. The Court in view of its conclusions would (absent the stipulation) grant actual damages to each of these plaintiffs upon the presentation of evidence of their individual losses. *Darden v. Besser* [1957 Trade Cases

¶ 68,646], 147 F. Supp. 376, 382 (E. D. Mich. 1956). However, the presence of the stipulation completely alters the case at this point and severely limits the amount of recovery on the part of these plaintiffs.

The standard to be applied in ascertaining the *amount* of damages in treble damage actions was set down in the case of *Story Parchment Co. v. Paterson Co., supra,* at page 563:

> "'The general rule is, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount.'"

Subsequent decisions have clarified the standard and indicated that a liberal interpretation is to be applied to that rule. In effect, these subsequent cases, such as the *Bigelow* case, *supra,* establish the rule that the measure of proof for the fact of damage is identical with the measure of proof of the amount. Either may be sustained upon a showing of any substantial evidence in the record to support such a finding. See *McConnell, The Treble Damage Action* at 667, 668, *supra.* As a practical matter the courts have come close to applying the damage rule applicable to the tortious confusion of goods (let the wrongdoer's liability for damages be measured by the value of the entire mass unless he can introduce evidence of the separate values of the tortiously acquired property and the finished product). This rule was applied in a case where the defendant motion picture operator mixed the receipts from the monopolized shows with the nonmonopolized ones and the plaintiff relied on the *defendant's mixed* gross profits as his measure of damages. The court allowed the mixed amount as the measure, less the leasing rental cost, relying on the equitable doctrine that the defendant's wrong caused this difficulty of proof, and therefore he should not be heard to complain of the liberality of proof. See *Milwaukee Towne Corp. v. Loew's Inc.* [1950-1951 TRADE CASES ¶ 62,891], 190 F. 2d 561 (7th Cir. 1951), cert. denied, 342 U. S. 909 (1952); also *McConnell, The Treble Damage Action, supra,* at page 668.

However, throughout this thread of liberality in the ascertainment of actual damages (with which the Court is in agreement) there is an absence of cases dealing with a fact situation as presented here because of the stipulation limiting recovery in favor of these plaintiffs to damages proximately flowing from the executive act in vetoing in S. B. 615. And it is that factor, and that factor alone, which necessitates a different result in this case. It is undoubtedly true that this Court must apply the same standard to the ascertainment of the *fact* of damage as it does to the ascertainment of the *amount* of actual damage. However, superimposed upon that rule is the rule that legal injury cannot flow as a proximate result of a duly constituted legislative or executive act. A governor acting pursuant to his authority in vetoing a bill cannot be the proximate cause of monetary injury to a party who would have benefited by the legislation in question. And yet that is what this Court would be required to do in order to grant full compensatory damages to these plaintiffs. As has been noted, this stipulation was entered into by all counsel in the interest of a speedy determination of the issues presented at the trial as to liability only without any coercion by either the Court or opposing parties. Hence, it must be read and interpreted in that posture and *in the light of the plain meaning of the words* chosen by respective counsel *with due regard to the knowledge of the same counsel as to their respective theories of the case.*

It is plaintiffs' theory of the case, with which the Court is in agreement, that they may sustain their cause of action on two basic grounds—first on the basis of the defendants' wrongs done before and independent of Governor Fine's veto of S. B. 615, and that it is to redress those wrongs that this suit is brought; within that group counsel includes increased expense of operation, the loss of business and the like; secondly, that they have been injured by the fomentation of restrictive legislation, and the attempts at such, in all of the states referred to in the findings of fact. Plaintiffs, then properly conclude that their case with reference to ground one is without the protection of the *Fletcher v. Peck* type of case because such activities constitute something far and beyond mere legislation enacted in pursuance of a plan to monopolize. They then further conclude that they may also sustain their claim on the basis of the above-referred-to fomentation of legislation in that it is the *attempt to influence such and the overt acts*

carried out in pursuance of that illegal purpose that constitute the wrong; and the fact that some segment of the material used might not have been distorted or that it may not have actually succeeded in influencing either legislative or executive acts is immaterial. Hence, plaintiffs contend there is no need to inquire into either the legislative or executive motives to sustain their claim—first, because the activities other than legislative ones sufficiently make out their case, and secondly, because the attempts to secure such legislation and the overt acts in pursuance of a plan to monopolize are sufficient to again sustain the cause of action independent of the real reasons for the legislative or executive acts. Again, the Court is in agreement and has sustained the cause of action on those grounds and also has found that such activity individually and/or jointly resulted in injury (fact of injury) to the plaintiffs. However, the plaintiffs seek to carry over this theory of the case into an ascertainment of actual damages caused to the individual plaintiffs other than PMTA by the so-called legislative program. This the Court cannot do because the presence of the stipulation in question prevents a continuation of the application of plaintiffs' theory to a finding of actual damages flowing to the plaintiffs other than PMTA. Restated, the stipulation is as follows:

> "3. The *only* damages claimed by the plaintiffs (except plaintiff Pennsylvania Motor Truck Association) are those that each of them may have suffered because of its inability to carry more than the weight limits fixed by the laws of Pennsylvania prior to the change in the law of 1955." (Italics supplied)

There is but one logical interpretation of the words contained therein in the light of the circumstances, and that is that the damages claimed are those resulting as a proximate cause of Governor Fine's veto of S. B. 615. Further, it is clear, and has been already stated, that the stipulation in question is limited in its application to the determination of the *amount* of actual damages and has no application with respect to the *fact* of damages and injunctive relief. For that reason it has no bearing on the plaintiff's ability to sustain their cause of action. However, the only valid interpretation of the language insofar as the *amount* of actual damage is concerned is that plaintiffs have excluded any consideration of damages flowing from the loss of good will to these plaintiffs which resulted directly from the defendants' campaign. Accordingly, they have specifically limited themselves to those damages proximately flowing from the veto of S. B. 615. The Court under the decided cases cannot award money damages for injuries proximately resulting from a duly promulgated executive act. The basis of recovery in antitrust suits is set forth by Judge Maris in the case of *Gordon v. Loew's, et al.* [1957 TRADE CASES ¶ 68,783], — F. 2d —, (3rd Cir. 1957), as follows:

> ". . . the person injured by reason of action forbidden by the antitrust laws recovers the measure of the injury to his business or property and by statutory direction is the recipient of the punitive award. The total recovery is arbitrarily computed; it takes cognizance of the actual loss only as a base. According to the statutory direction the defendant must pay an amount three times that base."

Unfortunately, these plaintiffs are without a base. *Darden v. Besser, supra.* The damages flowing from the loss of good will other than nominal ones have been excluded, and the damages proximately flowing from an executive act are unobtainable. Hence, the Court will grant nominal damages in the sum of six cents (6¢) to each of these plaintiffs and, of course, as stated, include them within the protected group being accorded injunctive relief.

D.

Summary of Relief

1. Injunctive relief is granted to all plaintiffs and is to run against the ERPC and all corporate defendants, including Byoir, but will exclude the individual defendants. Proposed decree will be submitted by plaintiffs as previously stated.

2. Reasonable attorney's fee and costs shall be awarded to the PMTA, and such fee and costs shall run against all corporate defendants, including Byoir, according to the ratio as set out in the succeeding paragraph. ERPC and the individual defendants shall be excluded.

3. Damages shall be awarded to the PMTA for the loss occasioned by the expenditures required because of the defendants' campaign of destruction of good will, and as determined, trebled. Eighty percent (80%) of such damages shall be assessed against the corporate defendants other than Byoir in the manner noted, and

twenty percent (20%) against Byoir, which 20% shall not be reimbursed by ERPC nor by any defendant railroad or railroads. No damages shall be assessed against the individual defendants and ERPC.

4. Nominal damages in the amount of six cents (6¢), to be trebled as provided by statute, shall be granted to each and every plaintiff other than PMTA and shall be assessed in the same manner as the damages flowing to the PMTA.

5. Testimony and evidence with respect to the attorney's fees, costs, and the damages flowing to the PMTA shall be heard at a future date to be determined by the Court.

EVIDENTIARY RULINGS

[*Introduction of Evidence*]

Because of the magnitude and importance of the case the Court permitted great latitude in the introduction of evidence. The trial court in any antitrust case has wide discretion in the admission or exclusion of cumulative and collateral evidence; *U. S. v. General Motors* [1940-1943 TRADE CASES ¶ 56,120], 121 F. 2d 376 (7th Cir. 1941), cert. denied, 314 U. S. 618 (1941); *Kansas City Star Company v. U. S.* [1957 TRADE CASES ¶ 68,601], 240 F. 2d 643 (1957). The evidentiary problems arising at trial may be placed in six distinct categories. The first relates to the admission into evidence, over the strenuous objection of the defendants, of proof of activities in the railroad-Byoir campaign which occurred outside of Pennsylvania. Since the conspiracy was not originated in Pennsylvania, the proof of outside activities was important, not only to show its formation but to show its method of operation, all of which had a great bearing on the fundamental question of intent and injunctive relief, if an illegal conspiracy actually existed. The complaint charged an overall conspiracy in the whole of the northeastern part of the United States. Because the plaintiffs limited themselves to proof of damages only within the State of Pennsylvania, the defendants contend that plaintiffs should be likewise limited in proof of the conspiracy. Such result, of course, does not follow. As stated by Judge Vogel in the case of *Kansas City Star Company v. U. S., supra,* at pages 650 and 651: parties have always been allowed "to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment." * * *

The objection taken to the introduction of this evidence is therefore without merit. * * *

[*Evidence as to Conspiracy*]

The third question arose from the admission of testimony of the acts of the conspirators occurring after the veto by Governor Fine of S. B. 615. Again the defendants attempted to limit the proofs of conspiracy to the time within which plaintiffs alleged the activities of defendants had been the cause of actual monetary damages occasioned by the veto. The evidence received as to post-veto activities was relevant evidence and admissible, if not for any other purpose, at least to establish the need for injunctive relief against the continuing activities of the defendants against the plaintiffs, which activities the Court has now declared to have been illegal. It was also relevant to show the extent of the activities of the defendants in their campaign or, in other words, to round out a true picture of the full scope of the details of the conspiracy. * * *

[*Venue—Service of Process*]

Another question which was present throughout this case was that of venue and service of process upon the Eastern Railroad Presidents Conference as an unincorporated association. From all of the evidence the Court has concluded that the activities of the association within the State of Pennsylvania were such as to justify the finding which the Court now makes that ERPC was doing business within the Commonwealth of Pennsylvania and in the Eastern District thereof sufficient to establish venue in the Court. Service upon Mr. Franklin, the then president of the Pennsylvania Railroad and a ranking member of the Conference, constituted service upon the Conference. Compare these conclusions with *Noerr Motor Freight, Inc. v. ERPC* [1953 TRADE CASES ¶ 67,544], 113 F. Supp. 737, 745, 746 (E. D. Pa. 1953). Over and above that, and with the Conference fully aware that the question of venue and jurisdiction was to be determined at trial, the Conference itself joined in the filing of the counterclaim against the plaintiffs. By such action the Conference thereby waived any objections which it might have to venue or juris-

diction over the person of the association. *Freeman v. Bee Machine Company*, [1940-1943 TRADE CASES ¶ 56,278], 319 U. S. 448, 453, 454 (1943); *Merchants Heat and L. Company v. Clow & Sons*, 204 U. S. 286 (1907).

[*Statistics*]

The final group of offers of evidence related to statistics covering the basic construction of roads in the northeastern section of the United States; the use given such roads by the trucks using the highways in interstate commerce; the amount of destruction caused by such trucks, including certain specific instances in different sections of the country; the increasing cost of maintenance; the increasing cost of construction of roads and with particular reference to the changing geometric designs of the roads, all said to be caused by the increasing size of trucks and the greater weight of trucks. The defendants offered to prove by the use of experts in the highway and traffic fields that in the opinion of the experts the trucks did not pay their fair share of the cost of the foregoing and that thereby the trucking industry was receiving enormous subsidies at the hands of the taxpaying public. In the offer of proof it was averred that these experts would testify that should the trucking industry pay, what in the opinion of the experts were, fair "user charges," the cost of operation of the trucking industry would immediately rise some 4% to 6%. This entire line of testimony was excluded by the Trial Judge for many reasons among which are: (1) There was ample proof in the record that heavy trucks, along with other factors, do constitute *one* of the main causes in the breaking up and deterioration of the already constructed highways; (2) that such proofs would not justify or be a defense to the railroad-Byoir combination to destroy the trucking industry as such. Again, it may be remarked that this is not a suit between either the United States or any State against the trucking industry itself. In such a suit the question of public welfare would undoubtedly play a large part. The railroads throughout this case have attempted to label themselves as the guardians of the public welfare. They attempted to convince the Court that it should so consider the railroads in their activities against the truckers. The answer to that proposition is self-evident. The railroads assisted by Byoir inaugurated and carried out their campaign to effectively limit and if possible destroy the trucking industry as a competitive factor in the long-haul transportation industry to preserve and increase their dollar volume of business; (3) there was ample evidence heard by the Court, sitting as a jury, with respect to these factors in connection with the highly scientific evidence surrounding the Maryland Road Test, in addition to the extensive evidence heard on these and analogous subjects when the defendants presented their proofs concerning the Pennsylvania situation. In that posture, and in the light of the entire record, the probative value of the evidence would not have warranted the time that would have been expended in further burdening an already lengthy record.

The Court, therefore, is of the opinion on a review of the entire case that the rulings made are consistent with the rules of evidence applicable in the Courts of the United States.

* * *

[¶ 68,828] Nationwide Trailer Rental System, Inc., George A. Croft, Sr., and A. E. Simon v. United States.

In the Supreme Court of the United States. October Term, 1957. No. 114. Dated October 14, 1957.

On Appeal from the United States District Court for the District of Kansas. DELMAS C. HILL, District Judge.

Case No. 1174 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Trade Associations—Allocation of Exclusive Territories—Uniform Rates for Overtime Use of Trailers—Boycott.—The United States Supreme Court affirmed a trial court's findings that a by-law of an association of one-way trailer rental operators which established exclusive territories for each of the association's

members violated the Sherman Act, that officers of the association and members of the association engaged in an illegal price fixing scheme by adopting a uniform lease agreement which fixed charges for the overtime use of trailers, and that a by-law of the association which provided for the expulsion of members constituted an illegal boycott.

See Combinations and Conspiracies, Vol. 1, ¶ 2017, 2017.208, 2017.253, 2017.300; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8221.650.

For the appellants: Thurman Arnold and Reed Miller (Arnold, Fortas & Porter), Washington, D. C.; and William T. Stephens, Washington, D. C. (Clyde M. Simon, Wichita, Kan., of counsel).

For the appellee: J. Lee Rankin, Solicitor General; Victor R. Hansen, Assistant Attorney General; and Charles H. Weston, Attorney, Department of Justice, Washington, D. C.

Affirming a decision of the U. S. District Court, District of Kansas, 1955 Trade Cases ¶ 68,101.

[*Affirmance*]

PER CURIAM [*In full text*]: The motions to affirm are granted and the judgments are affirmed.[1]

[¶ 68,829] Samuel Krasnov and Seymour Krasnov v. United States; and Fannie Krasnov, Emanuel O. Munzer, and L. Arthur Greenstein, Executors of the Will of Joseph A. Krasnov, Deceased v. United States. The Comfy Manufacturing Company and Fred E. Katzner v. United States. Arthur Oppenheimer, Jr. v. United States.

In the Supreme Court of the United States. October Term, 1957. Nos. 238, 254, and 255, respectively. Dated October 14, 1957.

On Appeal from the United States District Court for the Eastern District of Pennsylvania. CLARY, District Judge.

Case No. 1038 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Patents—Cross Licensing of Patents—Price Fixing—Restriction on Licensing—Joint Institution of Infringement Suits.—The United States Supreme Court affirmed a trial court's ruling that a corporation and a partnership engaged in the manufacture of ready-made furniture slip covers, and a patentee who assigned his slip cover patent to the corporation, violated Sections 1 and 2 of the Sherman Act when they entered into an agreement under which (1) the corporation licensed the partnership to manufacture and sell slip covers under the patent assigned to it, and the partnership cross licensed the corporation to manufacture and sell slip covers under its patent, (2) the corporation agreed not to grant licenses to others under the patent assigned to it without the partnership's consent, (3) the corporation set the prices to be maintained for slip covers manufactured under the patent assigned to it, and (4) the parties to the agreement jointly determined whether infringement suits should be instituted and shared in the expenses resulting from litigation involving the patent assigned to the corporation.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.225, 2013.430, 2013.600, 2013.750; Monopolies, Vol. 1, ¶ 2610.525, 2610.550, 2610.575; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225.600, 8229.225.

For the appellants: C. Brewster Rhoads (Joseph W. Swain, Jr., of Montgomery, McCracken, Walker & Rhoads, of counsel), Philadelphia, Pa., for Samuel Krasnov,

[1 The Supreme Court's opinion refers to "motions" and "judgments" because it was applicable to the instant case as well as an unrelated case. CCH.]

Seymour Krasnov, and Fannie Krasnov, Emanuel O. Munzer, and L. Arthur Greenstein, Executors of the Will of Joseph A. Krasnov, Deceased. Robert L. Wright and Milton M. Gottesman (Blades and Rosenfeld, Baltimore, Md., of counsel), Washington, D. C., for The Comfy Manufacturing Co. and Fred E Katzner. Joseph F. Padlon, New York, N. Y., for Arthur Oppenheimer, Jr.

For the appellee: J. Lee Rankin, Solicitor General; Robert A. Bicks, Acting Assistant Attorney General; and Daniel M. Friedman, Joseph F. Tubridy, and Ernest L. Folk, III, Attorneys, Department of Justice.

Affirming a decision of the U. S. District Court, Eastern District of Pennsylvania, 1956 Trade Cases ¶ 68,421; for a prior decision of the Court, see 1952 Trade Cases ¶ 67,395.

[*Affirmance*]

PER CURIAM [*In full text*]: The motion to affirm is granted and the judgment is affirmed. Mr. Justice Harlan and Mr. Justice Whittaker are of the opinion that probable jurisdiction should be noted.

[¶ 68,830] Federal Trade Commission v. James F. Crafts.

In the Supreme Court of the United States. October Term, 1957. No. 229. Dated October 14, 1957.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—FTC Subpoena—Production of Documentary Evidence—Enforcement of Subpoena by U. S. District Court—Scope of Subpoena.—A United States Court of Appeals judgment reversing a United States District Court order, enforcing a subpoena *duces tecum* issued by the Federal Trade Commission in a false advertising proceeding against an insurance company, on the ground that the order was too broad in view of the provisions of the McCarran-Ferguson Act was reversed by the United States Supreme Court on the authority of *Endicott Johnson Corp., et al. v. Perkins,* 317 U. S. 501, and *Oklahoma Press Publishing Co. v. Walling, Wage and Hour Administrator,* 327 U. S. 186.

See Unfair Practices, Vol. 2, ¶ 5081.362, 5201, 5301; FTC Enforcement and Procedure, Vol. 2, ¶ 8741.55.

For the petitioner: J. Lee Rankin, Solicitor General; Victor R. Hansen, Assistant Attorney General; Charles H. Weston, Attorney, Department of Justice; Earl W. Kintner, General Counsel, FTC; and Robert B. Dawkins, Assistant General Counsel, FTC.

For the respondent: Christopher M. Jenks, of Orrick, Dahlquist, Herrington & Sutcliffe, San Francisco, Cal.

Reversing a decision of the U. S. Court of Appeals, Ninth Circuit, 1957 Trade Cases ¶ 68,641, reversing an order of the U. S. District Court, Northern District of California, Southern Division, enforcing a Federal Trade Commission subpoena in Dkt. 6310.

[*Reversal*]

PER CURIAM [*In full text*]: The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the Ninth Circuit is reversed. *Endicott Johnson Corp. et al. v. Perkins,* 317 U. S. 501; *Oklahoma Press Publishing Co. v. Walling, Wage and Hour Administrator,* 327 U. S. 186.

[¶ 68,831] **United States v. Toy Guidance Council, Inc.; Masback, Inc.; The Bostwick-Braun Co. (Inc.); Central Indiana Distributing Corporation; Garrison Toy & Novelty Co., Inc.; General Mercantile & Hardware Company (Inc.); The Harold Hahn Company, Incorporated; M. W. Kasch Company (Inc.); Kaufman Bros. Inc.; Pensick & Gordon, Inc.; Edward K. Tryon Co. (Inc.); Williams & Shelton Co. Inc.; Seymour Krause; Melvin S. Lachman; Bennett M. Seigel; Edwin Mazo; and Willard S. Stull.**

In the United States District Court for the Southern District of New York. Civil No. 119-6. Filed October 7, 1957.

Case No. 1329 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Price Fixing—Refusal to Deal—Toys.—Toy wholesalers and a publisher-distributor of toy catalogues were prohibited by a consent decree from entering into any understanding to fix prices of toys, to fix any retail price submitted by any toy manufacturer for use in any toy catalogue, to maintain or require adherence by retail toy dealers to any suggested retail price published in any toy catalogue, to boycott or refuse to deal with any toy retailer who does not maintain any retail price for toys, or not to advertise toys at prices lower than or at a discount from the manufacturer's suggested prices.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.181, 2011.262.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Restricting Use of Competitive Products.—Toy wholesalers and a publisher-distributor of toy catalogues were prohibited by a consent decree from entering into any understanding not to purchase, distribute, or publish any toy catalogue other than that sold, distributed, or published by the defendant publisher-distributor. The publisher-distributor also was prohibited from selling or distributing any toy catalogue upon the condition or understanding that the purchaser not purchase or use any such material from any other source.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.690, 2005.825.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Discrimination—Availability of Prices, Services, or Facilities.—Toy wholesalers and a publisher-distributor of toy catalogues were prohibited by a consent decree from entering into any understanding to (1) grant or receive any price for the purchase of any toy for resale, or any discount or rebate from such price, unless such price, discount, or rebate is made available to all other purchasers of such toy, or (2) grant to or receive from any person services, facilities, or payment of anything of value as compensation or in consideration for advertising or other services or facilities, in connection with the processing, handling, or offering for sale of any toy purchased for resale, upon terms not accorded to all purchasers of such toy on proportionally equal terms. Price differentials could be cost justified in a proceeding charging a violation of the first prohibition.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.630, 2005.768.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Notice of Decree.—A publisher-distributor of toy catalogues was required to send a copy of a consent decree entered against it to each manufacturer, wholesaler, and retailer who had participated in its toy program during a specified period of time.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.60, 8421.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Selection of Customers and Products—Fair Trade.—A consent decree entered against toy wholesalers and a publisher-distributor of toy catalogues provided that (1) any defendant could exercise its individual right to choose and select its customers and select toys submitted to any publisher of any toy catalogue for advertising and promotion therein, and that (2) the decree should not be deemed to prevent any toy wholesaler

from entering into or adhering to any fair trade contract with any manufacturer where so required by such manufacturer.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.39, 8321.48.

For the plaintiff: Victor R. Hansen, Assistant Attorney General, and George D. Reycraft, Charles F. B. McAleer, and Leo A. Roth, Attorneys, Department of Justice.

For the defendants: James W. Cassedy and Leonard E. Nelson, Washington, D. C., for Garrison Toy & Novelty Co., Inc.; The Harold Hahn Co., Inc.; Williams & Shelton Co., Inc.; Willard S. Stull, on behalf of partnership of S. Stull and Howard A. Stull, d.b.a. Stull Brothers; Kaufman Bros. Inc.; General Mercantile & Hardware Co.; Seymour Krause, on behalf of partnership of Seymour Krause and Nathaniel Edelberg, d.b.a. Flint Toy and Athletic Supply Co.; Bennett M. Seigel, on behalf of partnership of Bennett M. Seigel and Louis Singer, d.b.a. Pittsburgh Wholesale Distributors; M. W. Kasch Co. (Inc.); Edwin Mazo, d.b.a. Southern Toy & Hobby; and Toy Guidance Council, Inc. Edmund B. Spaeth, Jr., of MacCoy, Evans & Lewis, Philadelphia, Pa., for Edward K. Tryon Co. (Inc.).

Final Judgment

SYLVESTER J. RYAN, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on March 27, 1957; the consenting defendants, having filed their respective answers in which they deny the offenses charged in such complaint; and the plaintiff and said defendants by their respective attorneys having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without any admission by any of the parties hereto with respect to any such issue;

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein and upon the consent of the parties signatory hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[*Sherman Act*]

This Court has jurisdiction of the subject matter of this action and of the parties signatory hereto. The complaint states claims for relief against the consenting defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce from unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Consenting defendants" shall mean the following defendants and each of them: Garrison Toy & Novelty Co., Inc.; The Harold Hahn Company, Incorporated, Williams & Shelton Co., Inc.; Willard S. Stull, on behalf of partnership of S. Stull and Howard A. Stull, d/b/a Stull Brothers; Kaufman Bros. Inc.; General Mercantile & Hardware Company; Seymour Krause, on behalf of partnership of Seymour Krause and Nathaniel Edelberg, d/b/a Flint Toy and Athletic Supply Co.; Bennett M. Seigel, on behalf of partnership of Bennett M. Seigel and Louis Singer, d/b/a Pittsburgh Wholesale Distributors; M. W. Kasch Company (Inc.); Edwin Mazo, d/b/a Southern Toy & Hobby; and Toy Guidance Council, Inc.

(B) "Council" shall mean the defendant, Toy Guidance Council, Inc., which with its subsidiaries The Toy Yearbook, Inc. and Consumer Toy Catalogues, Inc. shall be considered to be one person;

(C) "Person" shall mean any individual, partnership, firm, corporation, association, or other business or legal entity;

(D) "Toy Program" means any plan, program or activity for the advertisement and promotion of the sale of toys;

(E) "Toy literature" shall mean any literature, catalogue or booklet advertising or promoting the sale of toys.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to any consenting defendant shall apply to such defendant and to each of its subsidiaries, successors, assigns, officers, directors, servants, employees and agents,

and to all persons in active concert or participation with said defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Pricing Practices*]

The consenting defendants are jointly and severally enjoined and restrained from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, understanding, plan, toy program or other program among themselves or with any other person:

(A) To fix, change, maintain or adhere to prices for the sale of toys to any third person;

(B) To fix, change, maintain or adhere to any retail price submitted by any toy manufacturer for use in any toy literature which lists toys available for sale to the public;

(C) To maintain or require or to attempt to maintain or require adherence by retail toy dealers to any suggested retail price published in any toy literature;

(D) To boycott or refuse to deal with any toy retailer who does not maintain or adhere to any retail price for toys;

(E) Not to purchase, distribute or publish any toy literature other than that sold, distributed or published by defendant Council;

(F) Not to advertise toys at prices lower than or at a discount from the manufacturer's published or suggested prices.

V

[*Discrimination*]

The consenting defendants are jointly and severally enjoined and restrained from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, understanding, plan, toy program, or other program, or any other concert of action among themselves, or with any other person, to:

(A) Grant or receive any price for the purchase of any toy for resale, or any discount or rebate from such price, unless such price, discount or rebate is made available to all other purchasers of said toy;

Upon proof being made in any suit or proceeding by the plaintiff under this Section V, that a defendant has granted, or received a price, as aforesaid, nothing herein contained shall prevent such defendant from rebutting the prima facie case thus made by showing that the price differential granted or received made only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which the toy was sold or delivered.

(B) Grant to or receive from any person services, facilities, or payment of anything of value as compensation or in consideration for advertising or other services or facilities, in connection with the processing, handling, or offering for sale of any toy purchased for resale, upon terms not accorded to all purchasers of said toy on proportionally equal terms.

VI

[*Use of Competitive Material*]

Defendant Council is enjoined and restrained from selling or distributing any toy literature upon the condition or understanding that the purchaser not purchase or use any such material from any other source.

VII

[*Notice to Trade*]

Defendant Council is ordered and directed:

(A) Within thirty (30) days from the date of entry of this Final Judgment, to send by mail a true copy of this Final Judgment to each manufacturer, wholesaler and retailer who has participated in its toy program from January 1, 1954 to date;

(B) Within forty-five (45) days from the date of entry of this Final Judgment to file with the Clerk of this Court an affidavit certifying compliance with subsection (A) of this Section VII.

VIII

[*Permissive Provision*]

(A) Subject to each and all of the provisions of Sections IV and V of this Final Judgment, any defendant may:

(1) Exercise its individual right to choose and select its customers; and

(2) Select toys submitted to any publisher of any toy literature for advertising and promotion therein.

(B) Nothing in this Final Judgment shall be deemed to prevent any wholesaler defendant from entering into or adhering to any fair trade contract, otherwise permitted by the acts of Congress commonly known

as the Miller-Tydings and McGuire Acts, with any manufacturer where so required by such manufacturer.

IX

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any consenting defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Access, during the office hours of said defendant, to those books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant which relate to any matter contained in this Final Judgment;

(B) Subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of the defendant, who may have counsel present, regarding any such matters.

Upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, said defendant shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means permitted in this Section IX shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

X

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

XI

[*Effective Date*]

This Final Judgment shall become effective thirty (30) days after entry herein.

Final Judgment

[*Judgment as to Edward K. Tryon Co. (Inc.)*]

SYLVESTER J. RYAN, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on March 27, 1957, defendant Edward K. Tryon Co. (Inc.), having filed its answer in which it denies the offenses charged in such complaint; and the plaintiff and said defendant by their respective attorneys having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without any admission by any of the parties hereto with respect to any such issue;

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein and upon the consent of the parties signatory hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[*Sherman Act*]

This Court has jurisdiction of the subject matter of this action and of the parties signatory hereto. The complaint states claims for relief against Tryon under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce from unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Tryon" shall mean the defendant Edward K. Tryon Co. (Inc.);

(B) "Council" shall mean the defendant, Toy Guidance Council, Inc., which with its subsidiaries The Toy Yearbook, Inc. and Consumer Toy Catalogues, Inc. shall be considered to be one person;

(C) "Person" shall mean any individual, partnership, firm, corporation, association, or other business or legal entity;

(D) "Toy Program" shall mean any plan, program or activity for the advertisement and promotion of the sale of toys;

(E) "Toy literature" shall mean any literature, catalogue or booklet advertising or promoting the sale of toys.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to Tryon shall apply to such defendant and to each of its subsidiaries, successors, assigns, officers, directors, servants, employees and agents, and to all persons in active concert or participation with said defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Pricing Practices*]

Tryon is enjoined and restrained from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, understanding, plan, toy program or other program with any of the other defendants or with any other person:

(A) To fix, change, maintain or adhere to prices for the sale of toys to any third person;

(B) To fix, change, maintain or adhere to any retail price submitted by any toy manuturer for use in any toy literature which lists toys available for sale to the public;

(C) To maintain or require or to attempt to maintain or require adherence by retail toy dealers to any suggested retail price published in any toy literature;

(D) To boycott or refuse to deal with any toy retailer who does not maintain or adhere to any retail price for toys;

(E) Not to purchase, distribute or publish any toy literature other than that sold, distributed or published by defendant Council;

(F) Not to advertise toys at prices lower than or at a discount from the manufacturer's published or suggested prices.

V

[*Permissive Provision*]

(A) Subject to each and all of the provisions of Section IV of this Final Judgment, Tryon may:

(1) Exercise its individual right to choose and select its customers; and

(2) Select toys submitted to any publisher of any toy literature for advertising and promotion therein.

(B) Nothing in this Final Judgment shall be deemed to prevent Tryon from entering into or adhering to any fair trade contract, otherwise permitted by the acts of Congress commonly known as the Miller-Tydings and McGuire Acts, with any manufacturer where so required by such manufacturer.

VI

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Tryon made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Access, during the office hours of said defendant, to those books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant which relate to any matter contained in this Final Judgment;

(B) Subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of the defendant, who may have counsel present, regarding any such matters.

Upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, said defendant shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means permitted in this Section VI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VII

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

VIII

[*Effective Date*]

This Final Judgment shall become effective thirty (30) days after entry herein.

[¶ 68,832] **Federal Trade Commission v. Fred J. Bowman, President, Wilson Athletic Goods Manufacturing Company.**

In the United States Court of Appeals for the Seventh Circuit. September Term, 1957; September Session, 1957. No. 12068. Dated October 14, 1957.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. HOFFMAN, District Judge.

Clayton and Federal Trade Commission Acts

Federal Trade Commission Enforcement and Procedure—Clayton Act Proceeding—Production of Documentary Evidence—Power of Commission To Serve Subpoena on Witness Not Being Investigated or Proceeded Against.—In a Clayton Act antimerger proceeding against a manufacturer of sporting goods, the Federal Trade Commission was held to have the power, under Section 9 of the Federal Trade Commission Act, to issue a subpoena *duces tecum* demanding the president of another sporting goods company to produce certain records of his company, although the company was not a party to the anti-merger proceeding and was not being investigated or proceeded against by the Commission. Section 9 grants to the Commission subpoena power for the production of all documentary evidence relating to any matter under investigation. In view of the provisions of the entire act and its object and policy, the word "such", in the second half of the first sentence of Section 9, has to be construed as referring to the phrase "relating to any matter under investigation." The court assumed that unless the documents produced were relevant to the matter under investigation their use in the hearing would not be permitted.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8701, 8701.55, 8701.74, 8701.92, 8741, 8741.55, 8741.70, 8801.870.

For the petitioner-appellee: James E. Corkey and Carleton A. Harkrader.

For the respondent-appellant: Thomas Freeman, Louis R. Simpson, and Howard C. Parson.

Affirming a decision of the U. S. District Court, Northern District of Illinois, Eastern Division, 1957 TRADE CASES ¶ 68,647, modifying and enforcing a Federal Trade Commission subpoena relating to Dkt. 6478.

Before LINDLEY, HASTINGS and PARKINSON, Circuit Judges.

[*Appeal*]

PARKINSON, Circuit Judge [*In full text*]: This is an appeal from an order of the District Court granting the application of the Federal Trade Commission for enforcement of a subpoena *duces tecum* against the defendant pursuant to Section 9 of the Federal Trade Commission Act, 15 U. S. C. A. § 49.

[*FTC Subpoena*]

The subpoena was issued by the Hearing Examiner in a proceeding entitled *"In the Matter of A. G. Spalding & Bros., Inc., a corporation,"* wherein the complaint charged A. G. Spalding & Bros., Inc. with a violation of Section 7 of the Clayton Act, 15 U. S. C. A. § 18, and required the defendant to produce

before the Commission certain books, records and documents of Wilson Athletic Goods Manufacturing Company and its subsidiaries. As we understand from counsel in argument before this court, there is no question that the documents covered by the subpoena relate in some manner to the matter under investigation.

[*Noncompliance*]

The defendant appeared before the Hearing Examiner but refused, upon advice of counsel, to produce the requested documents on the ground that the Commission was without authority in law to compel production because Wilson Athletic Goods Manufacturing Company was not a party to the proceedings and was not being investigated or proceeded against by the Commission.

[*Court Enforcement*]

The Federal Trade Commission then made application to the District Court for enforcement of the subpoena. The District Court issued a show cause order and, after answer and hearing, entered an order for enforcement, and this appeal followed.

[*Issue*]

The question presented by this appeal, as we see it, requires construction of the first sentence of Section 9 which reads as follows:

> "That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such investigation."

to determine whether the Federal Trade Commission is thereby given the power to require the production of documents of a corporation not being investigated or proceeded against by subpoena *duces tecum.*

[*Tuttle Case*]

This identical question was before the Second Circuit in the case of *Federal Trade Commission v. Tuttle,* 2 Cir. [1957 TRADE CASES ¶ 68,669], 1957, 244 F. 2d 605, certiorari denied 354 U. S. 925, and the majority held that Section 9 grants subpoena power for the production of documentary evidence relating to any matter under investigation.

The court there held that there is sufficient ambiguity in Section 9 to permit consideration of the relevant legislative history, citing *Mastro Plastics Corp. v. National Labor Relations Board,* 350 U. S. 270, 287, and, after a full and complete resumé of the legislative history, concludes that, in applying the common rule of statutory construction that we must not be guided by a single sentence or part thereof, but we must rather look to the provisions of the whole act in light of the object sought to be accomplished, the second half of the first sentence of Section 9 must be construed to mean the production of all documentary evidence relating to any matter under investigation.

[*Case Distinguished*]

The defendant cites and relies upon the case of *Federal Trade Commission v. Baltimore Grain Co.,* D. C. Maryland, 1922, 284 Fed. 886, affirmed 267 U. S. 586. In that case the Commission sought mandamus to compel the respondent corporations to permit the agents of the Commission to examine, inspect and copy their records and documents. That is not the situation here. Section 9 expressly limits such right in case of a corporation being investigated or proceeded against. The *Baltimore Grain* case, therefore, has no application here because the Commission has not asked permission for its agents to examine, inspect and copy the documents of Wilson Athletic Goods Manufacturing Company but rather that they be produced under a subpoena *duces tecum* for use in a hearing relating to the matter under investigation. We must assume that unless the documents produced are relevant to the matter under investigation their use in the hearing will not be permitted.

[*Construction of Section 9*]

The defendant does not contend that he can not be compelled to attend and testify as a witness, for there can be no question that Section 9 empowers the Commission to compel any witness to attend and testify relating to any matter under investigation. To construe the last half of the first sentence of Section 9 so as to give the Commission power to compel the defendant to attend and testify as a witness concerning the records of his corporation but not of requiring him to produce those records is so incongruous that the mere assertion exposes

its fallacy, therefore, when we look to the provisions of the entire Act and its object and policy the word "such" has to be construed as referring to the phrase "relating to any matter under investigation."

[*Affirmed*]

The order of the District Court enforcing the subpoena *duces tecum* is affirmed.

[¶ 68,833] United States v. National Audio-Visual Association, Inc., and Don White.

In the United States District Court for the Eastern District of Virginia, Alexandria Division. Civil Action No. 1589. Filed October 10, 1957.

Case No. 1361 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Price Fixing—Dissemination of Trade-in Value Lists—Audio-Visual Equipment.—An association of audio-visual equipment dealers and one of its officers were prohibited by a consent decree from (1) fixing trade-in allowances, prices, or rentals for audio-visual equipment or (2) preparing or disseminating any book or list containing monetary trade-in values or average trade-in values for such equipment.

See Combinations and Conspiracies, Vol. 1, ¶ 2017, 2017.273.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Allocation of Territories.—An association of audio-visual equipment dealers and one of its officers were prohibited by a consent decree from inducing any manufacturer or dealer to (1) limit the territory within which any dealer may sell or rent audio-visual equipment or (2) allocate or divide, on an exclusive basis, territories for the sale or rental of such equipment.

See Combinations and Conspiracies, Vol. 1, ¶ 2017.188.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Dissemination of Bid Specifications.—An association of audio-visual equipment dealers and one of its officers were prohibited by a consent decree from (1) preparing or disseminating any form or type of bid specification, to be used by any consumer, for the sale, rental, or servicing of audio-visual equipment or (2) inducing any person or organization to use any form or type of bid specification for the sale, rental, or servicing of such equipment. They also were prohibited from inducing any publication to reproduce or publicize any form or type of bid specification.

See Combinations and Conspiracies, Vol. 1, ¶ 2017.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Distribution Control.—An association of audio-visual equipment dealers and one of its officers were prohibited by a consent decree from inducing any manufacturer to refrain from (1) selling any audio-visual equipment to any particular person or group or class of persons or (2) selling any such equipment to any person except on conditions and terms agreeable to the association.

See Combinations and Conspiracies, Vol. 1, ¶ 2017.180.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Participation in Trade Association Activities.—An association of audio-visual equipment dealers and one of its officers were prohibited by a consent decree from permitting any manufacturer of audio-visual equipment to participate in the management, direction, or control of the association by advisory committees or individual manufacturer or other committees of manufacturers.

See Combinations and Conspiracies, Vol. 1, ¶ 2017.121.

Combinations and Conspiracies — Consent Decree — Practices Enjoined — Inducing Manufacturer Not to Grant Discounts.—An association of audio-visual equipment dealers and one of its officers were prohibited by a consent decree from inducing any manufacturer to refrain from giving schools or any group or class of persons discounts or other favorable terms or conditions of sale or rental for audio-visual equipment.

See Combinations and Conspiracies, Vol. 1, ¶ 2017.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Refusal to List Names of Manufacturers in Directory—Inducing Publication Not to Accept Advertising.—An association of audio-visual equipment dealers and one of its officers were prohibited by a consent decree from (1) refusing to list, in any directory of manufacturers, the name of any manufacturer of audio-visual equipment if such manufacturer sells such equipment to dealers with a trade discount or (2) inducing any publication not to accept advertising for audio-visual equipment from any person or group or class of persons.

See Combinations and Conspiracies, Vol. 1, ¶ 2017.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Notice of Decree.—An association of audio-visual equipment dealers was required to publicize the terms of the consent decree entered against it by (1) public announcements of the decree mailed to each magazine and periodical which had disseminated the association's bid specifications, (2) announcements of the decree in a letter sent to each person known to have received the association's bid specification forms, and (3) announcements of the injunctions placed upon it and one of its officers by the decree in two different issues of the association's news publication.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.60, 8421.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; W. D. Kilgore, Jr., Barbara J. Svedberg, George D. Reycraft, Earl A. Jinkinson, Harry H. Faris, and Robert J. Oliver, Attorneys, Department of Justice; and A. Andrew Giangreco, Assistant United States Attorney.

For the defendants: Waller and Waller, by Herman S. Waller, Chicago, Ill., and E. C. Van Dyck, Fairfax, Va.

Final Judgment

ALBERT V. BRYAN, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on October 10, 1957; the defendants having filed their answer to such complaint denying the substantive allegations thereof; and the parties hereto by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without any admission by any party hereto with respect to any such issue;

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein and upon the consent of the parties hereto, it is hereby

Ordered, Adjudged and Decreed, as follows:

I

[*Sherman Act*]

This court has jurisdiction of the subject matter of this section and of the parties hereto. The complaint states a claim for relief against the defendants under Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, entitled "An act to protect trade and commerce from unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "NAVA" means National Audio-Visual Association, Inc., a corporation organized and existing under the laws of Illinois with offices in Fairfax County, Virginia;

(B) "Audio-visual equipment" means new and used 16 millimeter motion picture projectors, filmstrip, slide, and other still projectors, projection screens, tape recorders, and record and transcription players;

(C) "Person" means any individual, partnership, firm, association, or corporation or other business or legal entity.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to the defendants shall apply to such defendants and to their successors, assigns, officers, directors, servants, employees and agents, and to all persons in active concert or participation with a defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Practices Enjoined*]

Defendants Don White and NAVA are jointly and severally enjoined and restrained from:

(A) Fixing, establishing or stabilizing, or attempting to fix, establish or stabilize, trade-in allowances, prices or rentals to be charged for the purchase, sale or rental of any audio-visual equipment; provided, that this subsection shall not be deemed to prohibit defendant Don White from entering into any fair trade agreement valid and enforceable in the State where it is effective;

(B) Inducing any manufacturer or dealer to

(1) limit the territory within which any dealer may sell or rent any audio-visual equipment;

(2) allocate or divide, on an exclusive basis or otherwise, territories for the sale or rental of any audio-visual equipment;

(C) Inducing any manufacturer to refrain from

(1) selling any audio-visual equipment to any particular person or group or class of persons;

(2) selling any audio-visual equipment to any person except on conditions and terms agreeable to NAVA;

(3) giving schools or any group or class of persons discounts or other favorable terms or conditions of sale or rental for audio-visual equipment;

(D) Inducing any publication

(1) not to accept advertising for audio-visual equipment from any person or group or class of persons;

(2) to reproduce or publicize any form or type of bid specification for the sale, rental or servicing of any audio-visual equipment;

(E) Preparing, disseminating or approving any form or type of bid specification, to be used by any consumer, for the sale, rental or servicing of any audio-visual equipment;

(F) Inducing or persuading any person, group or organization to use any form or type of bid specification for the sale, rental or servicing of any audio-visual equipment;

(G) Preparing, disseminating or assisting in the preparation or dissemination of any book, list or literature, containing monetary trade-in values, or average trade-in values for any audio-visual equipment;

(H) Permitting any manufacturer of audio-visual equipment to participate in the management, direction or control of NAVA by advisory committees or individual manufacturer or other committees of manufacturers;

(I) Refusing to list, in any directory of manufacturers, the name of any manufacturer of audio-visual equipment if such manufacturer sells such equipment to dealers with a trade discount.

V

[*Publication of Judgment*]

Defendant NAVA is ordered and directed to publicize, within 90 days from the date of entry hereof, the terms of this Final Judgment in the following manner:

(A) Public announcements thereof mailed to each magazine and periodical heretofore disseminating NAVA bid specifications;

(B) Announcements thereof in a letter sent by first class mail to each person known to have received NAVA bid specification forms from:

(1) NAVA;

(2) an affiliate or member of NAVA; or

(3) any person, group or organization supplied with such forms by NAVA;

(C) Announcements of the injunctions placed upon each of the defendants by the Final Judgment in two different issues of NAVA NEWS distributed to its members and affiliates.

VI

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney

General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Access, during office hours of defendants, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of defendants relating to any matters contained in this Final Judgment;

(B) Subject to the reasonable convenience of defendants and without restraint or interference from defendants, to interview officers or employees of defendants, who may have counsel present, regarding any such matters.

Upon such written request, defendants shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means permitted in this Section VI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VII

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

VIII

[*Costs*]

That the plaintiff recover the costs of this suit.

[¶ 68,834] General Electric Co. v. Better Living Distributors, Inc.

In the New York Supreme Court, Special Term. Part I. 138 N. Y. L. J., No. 78, page 5. Dated October 17, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Violation of Injunction—Contempt—Defense—Solicitation of Violative Sales.—A retailer was fined the sum of $500, plus $150 for costs and expenses, for violating an injunction prohibiting it from selling a fair trader's appliances at less than fair trade prices. The fact that the sales violative of the injunction were solicited by a salesman of a subsidiary of the fair trader did not give the retailer the right to assume that it could sell the appliances in violation of the injunction.

See Fair Trade, Vol. 1, ¶ 3380.34.

[*Contempt*]

BENVENGA, Justice [*In full text*]: This is a motion to punish defendant for contempt of court for violating an injunction of this court restraining defendant from selling plaintiff's appliances at less than fair trade prices. That the sales were made is not seriously disputed. Indeed, one such sale is admitted. The fact that the sales were solicited by a salesman of a subsidiary of the plaintiff did not give the defendant the right to assume that it could sell the articles in violation of the injunction. Nor did the salesman have any right or authority to make any such representations—assuming they were made. The defendant, in making the sales, acted at its peril. Indeed in view of the background of this litigation and defendant's undoubted familiarity with the Fair Trade Law and the fact that the defendant has always been represented by counsel, I doubt whether the defendant's claims are made in good faith. I fail to see any necessity for a reference (see *General Electric Co. v. Golden Rule Co.* [1957 TRADE CASES ¶ 68,698], 3 App. Div., 436). The motion is therefore granted and the defendant is fined the sum of $500, plus $150 costs and expenses. Settle order.

[¶ 68,835] **Minniola O. Miller v. The Town of Suffield, et al.**

In the United States Court of Appeals for the Second Circuit. No. 30—October Term, 1957. Docket No. 24461. Argued October 11, 1957. Decided October 18, 1957.

Appeal from the United States District Court for the District of Connecticut, J. JOSEPH SMITH, Judge.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Dismissal for Failure to File Bond—Necessary Averments To State Cause of Action—Interstate Commerce—Injury to Public Interest.—A treble damage action complaint charging that a town, a bank, and a "pool" of lawyers, brokers, and others conspired to deprive the plaintiff of her patrimony in farms located in the defendant-town was properly dismissed on the grounds that the complaint failed to state a claim for relief, and that the plaintiff did not comply with an order requiring her to file a bond for costs. The order for a moderate bond for costs was justified in view of the background of prior litigation, and the ambiguous allegations of the complaint showed no legal wrong or impairment of interstate commerce or injury to the public interest.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.475, 9009.600, 9013.

For the plaintiff-appellant: Minniola O. Miller, Suffield, Conn., *pro se.*

For the defendants-appellees: Joseph P. Cooney, Hartford, Conn., for Town of Suffield; Howard J. Maxwell, of Steele, Collins & Maxwell, Hartford, Conn., for The Suffield Savings Bank; John S. Murtha, of Shepherd, Murtha & Merritt, Hartford, Conn., for Alcorn, Bakewell & Smith; Francis J. Fahey, Thompsonville, Conn., *pro se;* John D. LaBelle, Manchester, Conn., for Sebastian Gambolati; and Bernard Francis, West Hartford, Conn., for Russell L. Gillette and Rose M. Gillette.

Before: CLARK, Chief Judge, and LUMBARD and MOORE, Circuit Judges.

Minniola O. Miller appeals from the dismissal of her complaint in an antitrust action seeking treble damages of $4,950,000.00 against the Town of Suffield and eleven other defendants. Affirmed.

[*Dismissal of Complaint*]

PER CURIAM [*In full text*]: In the guise of a treble-damage antitrust suit, plaintiff is trying to revive the fantastic claims of fraud and conspiracy discussed and rejected in *In re Miller,* D. C. Conn., 106 F. Supp. 40, affirmed 2 Cir., 198 F. 2d 267, certiorari denied *Miller v. Guthrie,* 345 U. S. 918, rehearing denied 345 U. S. 971. For many years and in a variety of ways she has asserted that the Town of Suffield, The Suffield Savings Bank, and a "pool" of lawyers, brokers, and others have conspired to deprive her of her patrimony in the Miller's Beach farms in Suffield; but her vague charges, however vigorously asserted, have always lacked substance and substantiation. Judge Smith has dismissed her present complaint because she did not comply with his earlier order that she file a bond for costs and because the complaint fails to state a claim for relief. We agree with the dismissal and the grounds on which it was placed. The order for a moderate bond for costs was surely justified in view of the background of the prior litigation. And the ambiguous allegations here show no legal wrong or impairment of interstate commerce or injury to the public interest.

Judgment affirmed.

[¶ 68,836] **United States v. American Smelting and Refining Company and St. Joseph Lead Company.**

In the United States District Court for the Southern District of New York. Civil No. 88-249. Filed October 11, 1957.

Case No. 1177 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Price Fixing—Exchange of Price Information—Lead.—A producer of lead was prohibited by a consent

decree from entering into any understanding with any person engaged in the mining, smelting, refining, or sale of primary lead to fix prices, price differentials, price discounts, or other condition for the sale in the United States of primary lead; and from entering into any understanding, whether in the nature of a cartel or other non-competitive arrangement, with any person (except a foreign government) engaged in the mining, smelting, refining, or sale of primary lead to fix prices for the sale of lead ore, lead concentrates, lead bullion, or primary lead in the domestic or foreign commerce of the United States. Also, the producer was prohibited from exchanging information or consulting with a specified competitor (the co-defendant) with respect to any specific future change in the prices of primary lead to be made by either producer.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.055, 2011.181, 2011.218.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Restrictions on Imports and Exports.—A producer of lead was prohibited by a consent decree from entering into any understanding, whether in the nature of a cartel or other non-competitive arrangement, with any person (except a foreign government) engaged in the mining, smelting, refining, or sale of primary lead to restrict the import into, or export from, the United States of lead ore, lead concentrates, lead bullion, or primary lead.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.718.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Acquisitions.—A producer of lead was prohibited by a consent decree from acquiring any domestic primary lead smelter or any domestic primary lead refinery existing on the date of the entry of the decree. The producer could, however, after a period of ten years, apply for permission to acquire a smelter or refiner.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.460.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Restrictions on Production and Sales.—A producer of lead was prohibited by a consent decree from entering into any understanding with any person engaged in the mining, smelting, refining, or sale of primary lead to reduce, restrict, limit, or prevent the mining, smelting, refining, or sale of primary lead produced in the United States.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.760.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Restrictions on Production.—A producer of lead was prohibited by a consent decree from entering into any understanding with a specified competitor (the co-defendant) which (1) fixes the maximum tonnage of ores or concentrates which the competitor may process, (2) requires the competitor to give the producer any forecast of the rate of production at its mines or requires the competitor to inform the producer of its own production of concentrates, or (3) requires the competitor to have processed, at a specified plant of the producer, lead ores or concentrates in excess of a specified number of tons. The consent decree provided that unless within seven years, the producer either ceases to process at the plant ores or concentrates mined by the competitor or obtains the consent of the Department of Justice to continue such processing, the Government may apply for an order directing that such processing shall cease. Processing contracts between the producer and the competitor at the plant could not bind the competitor for a period in excess of two years.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.760.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Exclusion from Trade—Toll Contracts.—A producer of lead was prohibited by a consent decree from entering into toll contracts for (1) smelting lead ores or concentrates from sources whose lead ores or concentrates were then being smelted at any domestic primary lead smelter not owned by the producer, or (2) refining lead bullion from sources whose lead bullion was then being refined at any domestic primary lead refinery not owned by the producer, which tend substantially to result in the permanent cessation of operations by the domestic primary lead smelter or domestic primary lead refinery.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.660.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Actions Authorized by Government—Contracts with Foreign Government.—A consent decree entered against a producer of lead provided that the decree should not prevent the producer from taking action, or refraining from taking action, officially authorized or directed by the United States Government or prevent the producer from taking action to induce the United States Government to take action or to refrain from taking action. Also, the producer was not prohibited from entering into certain contracts with a foreign government, and a provision prohibiting certain activities did not apply to any act in a foreign country which was officially required by the government of such country.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.33, 8321.48, 8421.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Notice of Proposed Rates.—A specified provision of a consent decree entered against a producer of lead did not prevent a competitor of the producer from giving reasonable notice to the producer of proposed rates of shipment from the competitor to one of the producer's plants.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.48.

Department of Justice Enforcement and Procedure—Consent Decrees—Modification—Future Relief—Government.—A consent decree entered against a producer of lead provided that nothing should prevent the Government from applying for further relief against the producer under Section 2 of the Sherman Antitrust Act, and that the court should rule on any such application in the light of the then prevailing circumstances. Also, the decree provided that the Government could apply for an order directing the producer to cease a specified practice if, within seven years, the producer had not ceased such practice or had obtained the consent of the Department of Justice to continue such practice.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8361.15.

Department of Justice Enforcement and Procedure—Consent Decrees—Modification—Relief from Provision of Decree—Defendant.—A consent decree entered against a producer of lead provided that the producer could apply, after a period of ten years or at any time (depending upon the relief sought), for permission to take action otherwise prohibited by a provision of the decree and that such permission could be granted upon a showing that the effect of such action will not be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the United States.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8361.37.

For the plaintiff: Victor R. Hansen, Assistant Attorney General, and Worth Rowley, W. D. Kilgore, Jr., Harry N. Burgess, Allen A. Dobey, Joseph W. Stanley, and John Fricano.

For the defendant: Cleary, Gottlieb, Friendly & Hamilton, by Fowler Hamilton, for American Smelting and Refining Co.

Final Judgment

SYLVESTER J. RYAN, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on the 9th day of October, 1953, and defendant, American Smelting and Refining Company, by its attorneys, having filed its answer to the complaint denying the material allegations thereof; and plaintiff and said defendant, by their attorneys, having consented to the entry of this Final Judgment, without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting evidence, or an admission by either plaintiff or said defendant, in respect to any such issue;

Now, therefore, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon consent, as aforesaid, of each said party hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I.

[*Sherman Act*]

This Court has jurisdiction of the subject matter hereof and of the parties signatory hereto. The complaint states a claim for relief against defendant American Smelting and Refining Company under Sections 1 and 2 of the Act of Congress of July 2, 1890, 26 Stat. 209, entitled "An act to protect

trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

[*Definitions*]

As used in this Final Judgment:

(A) "ASR" shall mean American Smelting and Refining Company, a corporation organized and existing under the laws of the State of New Jersey;

(B) "St. Joe" shall mean St. Joseph Lead Company, a corporation organized and existing under the laws of the State of New York;

(C) "Person" shall mean any individual, partnership, firm, corporation, association, trust or other legal entity;

(D) "United States" shall mean the continental United States, its territories and possessions;

(E) "Primary lead smelter" shall mean a lead processing plant, the principal lead-bearing raw material for which is lead ores and/or lead concentrates; and "domestic primary lead smelter" shall mean a primary lead smelter located within the United States;

(F) "Lead bullion" shall mean the unrefined metallic lead product of a primary lead smelter produced from ores and concentrates;

(G) "Primary lead refinery" shall mean a lead processing plant, the principal lead-bearing raw material for which is lead bullion and the principal product of which is refined lead; and "domestic primary lead refinery" shall mean a primary lead refinery located within the United States;

(H) "Primary lead" shall mean refined lead produced from lead bullion at primary lead refineries; and "domestic primary lead" shall mean primary lead produced at domestic primary lead refineries excluding lead processed under United States custom bond and exported;

(I) "Acquisition of any domestic primary lead smelter or of any domestic primary lead refinery" shall mean the obtaining of control of any such smelter or refinery, whether such control is obtained directly or indirectly, and whether such control is obtained through purchase of assets, stock or other securities, lease, management contract, statutory consolidation or statutory merger, or through any other similar means;

(J) "Subsidiary" shall mean a corporation (1) more than 50 percent of whose stock entitled to vote upon election of directors (other than stock whose right to vote is dependent solely on the non-payment of dividends or other default) is, directly or indirectly, owned by ASR, or (2) more than half of whose directors are officers, directors, or nominees of ASR.

III.

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to ASR shall apply to ASR, its directors, officers, agents, servants, employees, subsidiaries, successors and assigns, and to those persons in active concert or active participation with it who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to transactions between ASR and its directors, officers, agents, servants, employees, subsidiaries, successors and assigns, or any of them. No provision of this Final Judgment shall prevent ASR from taking action, or refraining from taking action, officially authorized or directed by the United States Government; nor shall any provision of this Final Judgment prevent ASR from taking action to induce the United States Government to take action or to refrain from taking action.

IV.

[*Price Fixing*]

Defendant ASR is enjoined and restrained from, directly or indirectly, entering into, adhering to, maintaining or furthering any contract, agreement, understanding, plan or program with any person engaged in the United States in the mining, smelting, refining or sale of primary lead to fix, determine, maintain or adhere to any price or prices, price differential, price discount or other term or condition for the sale in the United States of primary lead or any grade thereof to third persons. Without limiting in any manner the generality of the foregoing defendant ASR is specifically enjoined and restrained from exchanging information or consulting with St. Joe with respect to any specific future change or changes in the price or prices of primary lead to be made by either company.

V.

[*Production Restrictions*]

Defendant ASR is enjoined and restrained from directly or indirectly, entering into, adhering to, maintaining or furthering any contract, agreement, understanding, plan or program with any other person engaged in the mining, smelting, refining or sale of primary lead, to reduce, restrict, limit or prevent the mining, smelting, refining or sale of primary lead produced in the United States.

VI.

[*Import and Export Restrictions*]

Defendant ASR is enjoined and restrained from directly or indirectly, entering into, adhering to, maintaining or furthering any contract, agreement, understanding, plan or program, whether in the nature of a cartel or other non-competitive arrangement, with any other person (except a foreign government) engaged in the mining, smelting, refining or sale of primary lead (a) to restrict the import into, or export from, the United States of lead ore, lead concentrates, lead bullion, or primary lead or (b) to fix, establish or maintain any price or prices for the sale of lead ore, lead concentrates, lead bullion, or primary lead in the domestic or foreign commerce of the United States; provided, that this Section VI shall not apply to any act in a foreign country which defendant ASR can show was officially required of defendant ASR by the government thereof.

VII.

[*Agreements with Co-Defendant*]

(A) Defendant ASR is ordered and directed to cancel and terminate forthwith the contract between ASR and St. Joe dated November 26, 1951.

(B) Defendant ASR is enjoined and restrained from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement or understanding with St. Joe which (1) fixes the maximum tonnage of ores or concentrates which St. Joe may process at its plant at Herculaneum, Missouri, or at any other plant; or (2) requires St. Joe to give ASR any forecast of the rate of production at its mines or of its receipts of ores, concentrates or other lead-bearing materials from other sources, or requires St. Joe to inform ASR of its own production of concentrates, or the lead content thereof, or its receipts of ores, concentrates or lead-bearing materials from other sources, or the lead content thereof, except that nothing in this clause (2) of Section VII (B) shall prevent St. Joe from giving reasonable notice to ASR of proposed rates of shipment from St. Joe to ASR's plant at Alton, Illinois; or (3) requires St. Joe to have processed at ASR's plant at Alton, Illinois, in excess of 3,750 tons per month, averaged over a six-month period, of lead contained in ores or concentrates. Under any contract between ASR and St. Joe for the processing of lead ores and concentrates at ASR's plant at Alton, Illinois, St. Joe shall not be bound for a period in excess of two years.

(C) Unless within seven years from the date of entry of this Final Judgment defendant ASR either ceases to process at its plant at Alton, Illinois, lead ores or concentrates mined by St. Joe or obtains the consent of the Department of Justice to continue such processing, the plaintiff may apply to this Court for an order directing that such processing shall cease, and upon such application the issue shall be whether, under the circumstances then prevailing, such processing, pursuant to a contract not inconsistent with Subdivision B of this Section VII, may substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the United States; and upon such issue the defendant ASR shall have the burden of proof. Any order directing that such processing shall cease shall provide such time, not to exceed three years, as reasonably may be required by St. Joe to make other arrangements for such processing.

VIII.

[*Acquisitions—Toll Contracts*]

(A) Defendant ASR is enjoined and restrained from the acquisition of any domestic primary lead smelter or any domestic primary lead refinery existing on the date of the entry of this Final Judgment.

(B) Defendant ASR is enjoined and restrained from entering into:

(1) Any toll contract for smelting lead ores or concentrates from sources whose lead ores or concentrates are now being smelted at any domestic primary lead smelter owned by a person other than ASR, which tends substantially to result in the permanent cessation of operations by said domestic primary lead smelter; or

(2) Any toll contract for refining lead bullion from sources whose lead bullion is now being refined at any domestic primary lead refinery owned by a person other than ASR, which tends substantially to result in the permanent cessation of operations by said domestic primary lead refinery.

(C) Nothing in this Section VIII shall prevent ASR from making application to this Court, upon notice to the plaintiff, at any time under Subdivision (B) above, or after the expiration of ten (10) years after the date of this Final Judgment under Subdivision (A) above, for permission of this Court to take action otherwise forbidden by this Section VIII and such permission may be granted by this Court upon a satisfactory showing to this Court by ASR that the effect of such action will not be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the United States.

IX.

[*Relief—Sherman Act, Sec. 2*]

Nothing in this Final Judgment shall prevent plaintiff from applying to this Court for further relief against defendant ASR under Section 2 of the Act of Congress of July 2, 1890, 26 Stat. 209, as amended.

The Court shall rule on any such application in the light of the then prevailing circumstances.

X.

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to ASR given to its principal office, be permitted (1) reasonable access during the office hours of ASR to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of ASR relating to any of the subject matters contained in this Final Judgment; and (2) subject to the reasonable convenience of ASR but without restraint or interference from it, to interview officers or employees of ASR, who may have counsel present, regarding any such matters; and upon such request ASR shall prepare and submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be reasonably necessary to the enforcement of this Final Judgment. No information obtained by the means provided in this Section X shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XI.

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, or for the amendment or modification or termination of any of the provisions thereof, or for the enforcement of compliance therewith or for the punishment of violations thereof.

[¶ 68,837] United States v. Hamilton Glass Company and Glaziers' Local No. 27 of the Brotherhood of Painters, Decorators and Paperhangers of America.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 57C432. Filed September 30, 1957.

Case No. 1326 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Labor Unions—Conspiracy Between Union and Employer—Scope of Union Antitrust Immunity—Jurisdiction of Court—Clayton Act and

Norris-LaGuardia Act.—A Federal District Court had jurisdiction to entertain a Government action charging that a glaziers' union and a glazing contractor conspired to restrain trade in pre-glazed products by compelling users of pre-glazed products to pay union members for the glazing that would have been required had the pre-glazed products not been used or to have pre-glazed products reglazed on the job site. The Clayton Act and the Norris-LaGuardia Act both provide that federal courts shall not issue injunctions in any case growing out of a labor dispute, and they enumerate specific labor union activities which are not to be regarded as violating any law of the United States. However, labor union activities can violate the Sherman Act under certain circumstances, even though the activities are among those enumerated in the acts. In the *Allen Bradley Co.* case, 1944-1945 TRADE CASES ¶ 57,386, 325 U. S. 797, it was held that union activities are not immunized by the acts when they are performed pursuant to a conspiracy of both labor and nonlabor groups to create business monopolies and to control the marketing of goods and services. The *Allen Bradley* doctrine was applicable to the instant case, although the alleged violation of the Sherman Act consisted of a restraint upon business competition rather than market domination or price control. The union cannot claim immunity merely because the restrictions as to pre-glazed products were contained in their collective bargaining agreement with the contractor. Also, the complaint alleged a conspiracy beneficial to the contractor, and it sufficiently alleged that the union aided and abetted the glazing contractor to violate the Sherman Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2101.063, 2101.135, 2101.265.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Sufficiency of Complaint—Allegations of Restraint upon Commercial Competition and Intent.—A motion to dismiss a complaint, charging that a glaziers' union and a glazing contractor conspired to restrain trade in pre-glazed products by compelling users of pre-glazed products to pay union members for the glazing that would have been required had the pre-glazed products not been used, on the ground that it failed to allege any restraint upon commercial competition in the marketing of pre-glazed products and an intent on the part of the defendants to restrain competition was denied. The complaint alleged both a restraint upon commercial competition in the marketing of goods and services and an effect, produced by the restraint, upon market prices and upon other advantages which the consumer derives from free competition. The offenses charged allegedly resulted in a substantial reduction in the use of pre-glazed products and an increase in the business of the contractor. Furthermore, the complaint alleged an effect upon the market prices of pre-glazed products which was not incidental or remote.

It was not necessary for the Government to allege that the claimed restraint was the purpose or aim of the alleged conspiracy because practices which had the effect of restraining competition were alleged. An allegation of intent was not necessary in the instant case.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8221, 8221.870.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Motion to Dismiss Complaint—Lack of Jurisdiction to Grant Relief.—A motion to dismiss a complaint against a union and a contractor on the ground that the court had no jurisdiction to grant the relief prayed for in the complaint in view of the Clayton and Norris-LaGuardia acts was denied as premature. For the purposes of such a motion, the prayer for relief may be disregarded. The question is not whether the relief sought can be granted but whether any relief can be granted.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8229.175.

For the plaintiff: Earl A. Jinkinson, Bertram M. Long, Harry H. Faris, and Dorothy M. Hunt, Chicago, Ill.

For the defendants: Holmes Baldridge, Chicago, Ill., for Hamilton Glass Co.; and Leo Segall, Chicago, Ill., for Glaziers' Local No. 27 of the Brotherhood of Painters, Decorators and Paperhangers of America.

Memorandum on Defendants' Motions to Dismiss the Complaint

[*Complaint*]

JULIUS J. HOFFMAN, District Judge [*In full text*]: This is a proceeding for an injunction under Section 4 of the Sherman Act, 15 U. S. C. § 4. It was brought by the United States of America against two defendants, Hamilton Glass Company and Glaziers' Local No. 27 of the Brotherhood of Painters, Decorators and Paperhangers of America. By its action, the plaintiff seeks to restrain alleged continuing violations of Section 1 of the Sherman Act, 15 U. S. C. § 1. In its complaint the plaintiff alleges that the defendant Local No. 27, along with the defendant Hamilton Glass and all other glazing contractors having union contracts with Local No. 27, have conspired in an unreasonable restraint of interstate trade and commerce in pre-glazed sash and other pre-glazed products. The alleged offense is asserted to consist of various acts by which the defendants have restrained the flow of such products into the Chicago area, thereby denying to potential purchasers the cost-savings which would result from the use of such products.

[*Motion to Dismiss*]

The defendants have moved to dismiss the complaint on the grounds (1) that the complaint fails to state a claim upon which relief can be granted and (2) that this court lacks jurisdiction to entertain the suit.

1.

[*Sufficiency of Complaint*]

In considering the defendants' contention that the complaint fails to state a claim upon which relief may be granted, the court is guided by the test whether the plaintiff would be entitled to recover upon any state of facts which might be proved in support of the allegations. As this court has stated in a previous consideration of the nature of a motion to dismiss which challenges the legal sufficiency of the complaint, "If a liberal reading discloses that, at least by general statement, the plaintiff has charged every element to a recovery, summary dismissal is not justified." *United States v. American Linen Supply Co.* [1956 TRADE CASES ¶ 68,337], 141 F. Supp. 105 (N. D. Ill. 1956).

[*Contentions*]

The defendants' theory with respect to their contention that the complaint fails to state a claim upon which relief can be granted is that the complaint does not state a violation of Section 1 of the Sherman Act, inasmuch as it not only fails to allege any restraint upon commercial competition in the marketing of pre-glazed sash and other pre-glazed products, but also fails to allege intent on the part of the defendants to restrain such competition. The government's theory, on the other hand, is that the complaint does in fact allege that the offenses charged have restrained commercial competition in the marketing of the products in question. It is also the government's position that the complaint contains no allegation of intent to restrain such competition because no such allegation is required.

[*Restraint of Trade*]

The complaint charges that the defendants and co-conspirators have combined in "unreasonable restraint of . . . interstate trade and commerce in pre-glazed sash and pre-glazed products." The conspiracy is alleged to consist of an agreement whereby Local No. 27, aided by the defendant Hamilton Glass Company and co-conspirators, (1) has compelled builders, general contractors, manufacturers of the products in question and others in Chicago area to pay additional sums to the union members whenever pre-glazed products are used by these persons, or to have the products reglazed on the job site, and (2) has induced such persons, by strikes, work stoppages, or threats thereof, not to make use of such products. (However, according to the complaint, whenever pre-glazed products are manufactured or supplied by the defendant Hamilton Glass Company or other co-conspirators, the agreement provides that strikes are not to be called or threatened.) The alleged practices, according to the complaint, have increased the volume of business of the defendant Hamilton Glass Company and the other co-conspirators. The general effects of the conspiracy are alleged to be the following:

(a) The use of pre-glazed sash and other pre-glazed products in the Chicago area has been greatly reduced and the volume of trade in these products in interstate commerce has been substantially decreased;

(b) The public has been denied the cost savings which result from the use of pre-glazed sash or pre-glazed products in the Chicago area.

A complaint charging violation of the Sherman Act is insufficient unless it alleges a restraint upon commercial competition in the marketing of goods and services. In a thorough analysis of the purposes underlying enactment of the Sherman Act, the United States Supreme Court, in *Apex Hosiery Co. v. Leader* [1940-1943 TRADE CASES ¶ 56,039], 310 U. S. 469 (1940), stated that the Act does not condemn every combination in restraint of interstate commerce, but rather that it was directed against "restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury." 310 U. S. at 493. The Court pointed out that it had never applied the Sherman Act in any case "unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services." 310 U. S. at 495. Further, the Court noted that, "Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition." 310 U. S. at 500-501.

The complaint of the government in this case meets the requirements of the Sherman Act as set forth in the *Apex* case. The complaint alleges both a restraint upon commercial competition in the marketing of goods and services and an effect, produced by the restraint, upon market prices and upon other advantages which the consumer derived from free competition.

A restraint upon commercial competition in the marketing of goods and services can be found in the allegations of the complaint which relate to the purported practices of the defendants and co-conspirators which are said to prevent products from being used in the Chicago area that would compete with the services performed by the defendants, thereby reducing the demands in a free market for the defendants' services. The complaint does not expressly allege that the products in question would compete with the defendants' services; however, it is clear that this is the theory of the complaint. In judging its sufficiency we are to look to the four corners of the complaint, reading all its paragraphs together to determine whether the required elements of a Sherman Act offense are stated therein. *United States v. Armour & Co.* [1940-1943 TRADE CASES ¶ 56,288], 137 F. 2d 269 (10th Cir. 1943). In the complaint's definitions of terms* and in the allegations that the offenses charged have resulted in a substantial reduction of the use of pre-glazed products in the Chicago area, and in an increase in the business of the co-conspirators, it is evident that the theory of the complaint is that of a restraint upon the competition of pre-glazed products with the business of the union glazing contractors.

[*Effect upon Market Prices*]

An effect upon market prices is charged first in the allegation that where pre-glazed products are used by builders, general contractors and others in the Chicago area, the defendants have compelled the users thereof either to pay union members for the glazing that would have been required had the products not been employed, or to have the products reglazed on the job site, and second in the allegations that the public has been denied the cost savings which result from the use of such products in the Chicago area. (See *United States v. New York Electrical Contractors Ass'n*, 42 F. Supp. 789 (S. D. N. Y. 1941), where an indictment charging a union local and certain contractors' associations with refusing to install electrical equipment manufactured outside the state, and with causing such equipment to be rewired before installation, was held to satisfy the requirements of the *Apex* decision, where the indictment specifically alleged that the aforesaid practices added to the cost of such equipment.)

* "Glazing" is defined as the installation of "flat glass or mirrors in or on wood, metal sash, frames or walls"; "glazing contractor" is defined as the business of contracting for the furnishing of "flat glass and other materials and the installation thereof in buildings"; and "pre-glazed sash" and "pre-glazed products" are defined as windows, doors and other products which "are glazed at the factories where they are made or at any place other than the job site."

It should be noted that while the defendants recognize that the complaint alleges an effect upon market prices of pre-glazed products resulting from the practices of requiring stand-by pay or reglazing when such products are used by persons in the Chicago area, the defendants maintain that such an effect upon market prices is not the type of effect prohibited by the Sherman Act. The defendants contend that whenever a wage agreement is consummated between a union and an employer, there is some effect on the price of articles involved; such effect, however, is regarded as "incidental" or "remote" with respect to any actionable restraint of trade. However, the price effect alleged in the present complaint is not the type of effect normally regarded as incidental or remote under the Sherman Act. The activities here alleged are performed by a combination of the union and employers and insulate both employer and employee from the competition of products which would replace their services or curtail the demand therefor.

[*Case Distinguished*]

The defendants further contend that *United States v. Carrozzo,* 37 F. Supp. 191 (N. D. Ill. 1941), *aff'd per curiam sub. nom. United States v. International Hod Carriers & Common Laborers' Dist. Council,* 313 U. S. 539 (1941), shows that the conduct here charged does not violate the Sherman Act. That case, however, held that no acts had been alleged on the part of the defendant union which would constitute a restraint of commercial competition in the marketing of the goods in question, since the only acts charged were strikes, or threats thereof, against employers of the defendant union by which the union had compelled the employer-contractors either to discontinue the use of truck cement mixers, or employ the same number of men as would be required on the type of mixer formerly used. Thus, the *Hod Carriers'* case concerned union activity which increased labor costs to the employer. No effect on the market price of truck mixers was alleged; rather, the only effect alleged was an increase in the cost of cement to the ultimate purchaser. Such an effect is, in the terms of the *Apex* case, merely an indirect restraint upon interstate commerce, resulting from higher labor costs created by successful union activity. There was no charge in the *Hod Carriers'* case of combined union-employer activity to restrain the use of products in competition with the employer, with a resultant increase in the cost of the products in question to users other than the employer.

Inasmuch as the present complaint alleges a combination by the defendant union and the employer contractors to coerce third persons not to purchase products which compete with the services of the defendants, and to increase the cost of such products to purchasers when they are used, the complaint alleges a restraint upon commercial competition in the marketing of goods or services, thus satisfying the requirements of the *Apex* case.

[*Intent*]

With respect to the defendants' argument that the complaint is insufficient because it fails to allege that the purpose of the alleged conspiracy was to restrain commercial competition in the marketing of the goods in question, it has been held that where practices are alleged which have the effect of restraining such competition, it is not necessary to allege that such restraint was the purpose or aim of the combination. *United States v. Griffith* [1948-1949 TRADE CASES ¶ 62,246], 334 U. S. 100 (1948); *United States v. Masonite Corp.* [1940-1943 TRADE CASES ¶ 56,209], 316 U. S. 265, 275 (1942); *United States v. Patten,* 226 U. S. 525 (1913). Although an allegation of intent may be necessary in a complaint charging that union activities against an employer are in restraint of interstate commerce, see *Apex* case at 511; *Coronado Coal Co. v. United Mine Workers,* 268 U. S. 295 (1925), it has already been shown that this is not such a case.

2.

[*Jurisdiction of Court*]

The second major contention of the defendants is that this court lacks jurisdiction to entertain the present suit. They argue that under the provisions of the Clayton and Norris-LaGuardia acts, (1) combinations of labor and business groups are only subject to the provisions of the Sherman Act when the alleged combination has conspired to monopolize a market or control prices, (2) a combination of labor and business groups in violation of the Sherman Act is not present where the alleged conspiracy consists only of contracts which the union has succeeded in obtaining with its employers, and

(3) under those Acts this court has no jurisdiction to grant the relief prayed for in the present complaint.

[*Federal Laws*]

The Clayton and Norris-LaGuardia acts both provide that federal courts shall not issue injunctions in any case growing out of a labor dispute, and they enumerate specific labor union activities which are not to be regarded as violating any law of the United States. (Section 20 of the Clayton Act, 29 U. S. C. § 52; Sections 1 and 4 of the Norris-LaGuardia Act, 29 U. S. C. §§ 101, 104.) These Acts have been interpreted to mean that labor union activities enumerated therein can not be considered violations of the Sherman Act. *United States v. Hutcheson* [1940-1943 TRADE CASES ¶ 56,091], 312 U. S. 219 (1941). In this respect it was held in *United States v. International Hod Carriers & Common Laborers' Dist. Council, supra,* and *United States v. American Federation of Musicians,* 47 F. Supp. 304 (N. D. Ill. 1942), *aff'd per curiam,* 318 U. S. 741 (1943), that activities on the part of labor unions directed against the use by employers of labor-saving devices were within the coverage of the Acts and thus could not be held to violate the Sherman Act.

Despite the provisions of the Clayton and Norris-LaGuardia acts, however, labor union activities have been held to violate the Sherman Act under certain circumstances, even though the activities in question were among those enumerated in the Clayton and Norris-LaGuardia acts. Specifically, it has been held that union activities are not immunized by those acts when they are performed pursuant to a conspiracy of both labor and non-labor groups "to create business monopolies and to control the marketing of goods and services." *Allen Bradley Co. v. Local Union No. 3* [1944-1945 TRADE CASES ¶ 57,386], 325 U. S. 797, 808 (1945); followed in *United States v. Employing Plasterers Ass'n* [1954 TRADE CASES ¶ 67,692], 347 U. S. 186 (1954); *United Brotherhood of Carpenters v. United States* [1946-1947 TRADE CASES ¶ 57,545], 330 U. S. 395 (1947); *Local 175 of the Internat'l Brotherhood of Electrical Workers v. United States* [1955 TRADE CASES ¶ 67,978], 219 F. 2d 431 (6th Cir. 1955); *Las Vegas Merchant Plumbers Ass'n v. United States* [1954 TRADE CASES ¶ 67,673], 210 F. 2d 732 (9th Cir. 1954); *Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n* [1946-1947 TRADE CASES ¶ 57,466], 155 F. 2d 799 (3rd Cir. 1946). The theory of these cases, as enunciated in the *Allen Bradley* case, is that the special exceptions granted to labor unions from antitrust legislation should not be construed in such a way that business groups, by combining with labor unions, can frustrate the fundamental aims of that legislation.

[*Allen Bradley Case*]

The defendants contend that the *Allen Bradley* decision and the line of cases based thereon have no application to the present issues, while the plaintiff argues that they are controlling. The defendants maintain that the Supreme Court in the *Allen Bradley* case balanced the policies of the antitrust legislation, on the one hand, and those of the labor legislation, on the other hand, and determined that only where the activities in question are such that the business groups involved are able to secure complete domination of market and prices are the immunities conferred by the labor legislation inapplicable.

Cases following the *Allen Bradley* decision have uniformly involved violations by combinations of business and union groups in which market domination or price control has been achieved. The question is therefore presented whether those cases preclude application of the *Allen Bradley* doctrine to a Sherman Act violation by a like combination where the violation consists not of market domination or price control, but of restraints upon commercial competition in the marketing of goods or services, resulting in higher prices for the goods, and curtailing trade therein.

The *Allen Bradley* case and decisions following it do not preclude application of the *Allen Bradley* doctrine to a Sherman Act violation of the type alleged here. While the Court in that case stated that it could, with assurance, draw the line against the immunity derived from the Clayton and Norris-LaGuardia acts at the point of market and price domination by combined union and business groups, nevertheless, this court does not regard that statement as meaning that only Sherman Act violations resulting in total market domination can be brought within the reach of that act. The Supreme Court in *Allen Bradley* was faced only with the decision whether the immunity conferred by labor legislation reached the type

of Sherman Act violation presented by the conspiracy there in question. The underlying theory of that case, however, appears to be as applicable to the type of violation charged in the present complaint as to that charged in *Allen Bradley*. That theory was stated in the following language of the Court:

> "The primary objective of all the Anti-trust legislation has been to preserve business competition and to proscribe business monopoly. It would be a surprising thing if Congress, in order to prevent a misapplication of that legislation to labor unions, had bestowed upon such unions complete and unreviewable authority to aid business groups to frustrate its primary objective." 325 U. S. at 809-10.

The allegations of the present complaint charge a restraint upon business competition, although not a monopoly. Such a restraint, however, if permitted when caused by a combination of business and labor groups, could cause a frustration of the objectives of anti-trust legislation equally as fundamental as that which would result from allowing combinations of such groups to monopolize the market. Therefore, this court does not consider that only where combined business and labor groups have gone so far as to monopolize the market or fix prices can the Sherman Act be regarded as proscribing the combination.

[*Union Interests and Benefits*]

The defendants next contend that the charges of the present complaint show merely that Local No. 27, pursuing its own self-interest in eliminating the use of products which would reduce the demand for the services of its members, has succeeded in obtaining collective bargaining agreements with its employers, and that contracts so obtained are protected by the Clayton and Norris-LaGuardia acts. In this connection they assert that the complaint charges no more than that the glazing contractors have contracted with the union to provide that all glazing performed by these contractors shall be done on the construction job site, and that the employer group has aided the union to achieve the conditions specified in the contracts. They further assert that the complaint does not allege any benefit to the contractors resulting from the alleged conspiracy, nor does it charge that the defendant local was "used" by the employer group to further the latter's aims.

That a union's contracts with employers possess the immunity claimed by the defendants is clear. See *United States v. Bay Area Painters and Decorators Joint Committee, Inc.*, 49 F. Supp. 733 (N. D. Cal. 1943). The Supreme Court, in *Allen Bradley*, however, discussed the type of situation in which immunity is conferred upon the contracts, pointing out that where such agreements "stand alone" they are not in violation of the Sherman Act. The union there involved had argued that its bargaining agreements with the employers immunized the union from a charge under the Sherman Act. The agreements provided that the employers would not purchase electrical equipment from any manufacturer which did not employ members of the union. The Court stated:

> "We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone. It was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other business men from that area, and to charge the public prices above a competitive level. It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. *Apex Hosiery Co. v. Leader, supra,* 503. But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-La-Guardia acts." 325 U. S. at 809.

The present complaint charges considerably more than the "natural consequences of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act." While the defendants contend that the complaint merely alleges that the union has contracted with the alleged co-conspirators for job site glazing, and that the contractors have aided the union in enforcing the terms of those contracts, the complaint itself reveals more. It alleges

that the contractors have conspired among themselves as well as with the union to engage in the various activities charged. Thus, the complaint states that "the defendant Hamilton and co-conspirators have entered into contracts with the defendant Local 27, and the defendants and co-conspirators have engaged in a combination and conspiracy . . . in violation of Section 1 of the Sherman Act." It further states that "the combination and conspiracy herein charged has consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators" to carry out the terms of the conspiracy. These allegations thus do not show merely that the union has contracts with the contractors, individually, which contracts were obtained by activity of the union "acting alone." They charge that the contractors and union have acted concertedly in restraint of trade, the union participating with a combination of contractors to suppress the competition of pre-glazed products. The *Allen Bradley* case shows that such concert of action, even when beneficial to the union and its members, removes the protection which the union would otherwise possess under the Clayton and Norris-LaGuardia acts. See, to the same effect, *United States v. Milk Drivers and Dairy Employees Union* [1957 TRADE CASES ¶ 68,813], Civil No. 4361, D. Minn., Aug. 30, 1957.

With respect to the defendants' contention that the complaint does not charge a conspiracy to the benefit of the employer group as well as to the union, the complaint specifically alleges that the offenses charged "have increased the volume of business done by the defendant Hamilton and the co-conspirators," and that the conspiracy is "to the benefit of the said union glazing contractors."

[*Use of Union*]

The court cannot agree with the defendants' contention that a union is immune from a Sherman Act charge of a conspiracy between labor and business unless it is alleged that the union has been "used" by the employer group to violate the Act. The *Allen Bradley* case held that where a union aids and abets an employer group to violate the Sherman Act, it has lost its immunity. The present complaint, in charging that Local 27 has engaged in several activities in furtherance of the conspiracy, in charging that the activities have resulted in an increase in the business of the contractors, and in charging that the two groups have conspired together in restraint of trade, does allege that Local 27 has aided and abetted the group of glazing contractors to violate the Sherman Act.

[*Relief*]

The defendants also contend that this court has no jurisdiction to grant the relief prayed for in the complaint. The court, however, agrees with the plaintiff on this point that this contention is premature. As stated in *Dederick v. North American Co.*, 48 F. Supp. 410, 412 (S. D. N. Y. 1943), "For purposes of a motion to dismiss a complaint the prayer for relief may be disregarded. The question is not whether the relief sought can be granted but whether any relief can be granted."

[*Motions Denied*]

The motions of the defendants to dismiss the plaintiff's complaint will be denied.

[*Answers*]

The defendants are ordered to file their respective answers to the complaint on or before October 31, 1957.

[¶ 68,838] United States v. Joseph A. Krasnov, Samuel Krasnov, Seymour Krasnov, The Comfy Manufacturing Company, Fred E. Katzner, and Arthur Oppenheimer, Jr.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 11024. Filed May 3, 1957.

Case No. 1038 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Injunctive Decrees—Death of Defendant Prior to Entry of Final Judgment—Survival of Action.—Under Federal and Pennsylvania law, an action by the Government for injunctive relief under the Sherman Act is a continuing one which does not abate by reason

of the death of a defendant before the entry of a final judgment. Therefore, a motion to delete from a final judgment the name of a defendant who died prior to the entry of the final judgment, but after a decision was rendered against the defendants, on the ground that the action did not survive against him was denied.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8221, 8233.

For the plaintiff: Joseph F. Tubridy, Department of Justice, Washington, D. C.

For the defendants: C. Brewster Rhoads and Joseph W. Swain, Jr., Philadelphia, Pa., for Samuel Krasnov and Seymour Krasnov.

For prior decisions of the U. S. District Court, Eastern District of Pennsylvania, see 1956 Trade Cases ¶ 68,421 and 1952 Trade Cases ¶ 67,395. For a subsequent decision of the U. S. Supreme Court, see 1957 Trade Cases ¶ 68,829.

Order

[*Abatement of Action*]

THOMAS J. CLARY, District Judge [*In full text*]: And now, to wit, this 3rd day of May, 1957 upon consideration of the motion for relief from judgment under Rule 60 filed by defendants, Samuel Krasnov and Seymour Krasnov, to correct the Final Judgment entered in this matter on March 14, 1957, so as to delete therefrom, defendant Joseph A. Krasnov, who died on February 16, 1957, on the ground that the action did not survive against him, the final decree having been entered subsequent to his death; briefs submitted and oral argument had thereon, and it appearing to the Court that while it has the right to enter its Final Judgment *nunc pro tunc* as of a date prior to said death of party defendant, since its decision filed July 30th, 1956 found generally in favor of the plaintiff and against all of the defendants, such action is unnecessary in view of the determination by the Court that under Federal law (Common and Statute) and Pennsylvania law (Common and Statute) the action is a continuing one which did not abate by reason of the death of defendant Joseph A. Krasnov before the entry of Final Judgment, it is Ordered, Adjudged and Decreed that the motion to delete from the Final Judgment entered the name of the defendant Joseph A. Krasnov and it is hereby Denied.

[¶ 68,839] Julius Nagler et al. v. Admiral Corporation et al.

In the United States Court of Appeals for the Second Circuit. No. 364—October Term, 1956. Docket No. 24249. Argued June 11, 1957. Decided October 2, 1957.

Appeal from the United States District Court for the Southern District of New York, EDMUND L. PALMIERI, Judge.

Robinson-Patman Price Discrimination Act and Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Necessary Averments to State Cause of Action—Sufficiency of Complaint—Conspiracy—Price Discrimination.—The dismissal of an antitrust suit brought by thirteen retail appliance dealers against twenty-four suppliers and two retail chain stores on the ground that the complaint failed to adequately state causes of action under the Sherman and Robinson-Patman Acts was reversed. The Federal Rules of Civil Procedure contain no special rule of pleading in antitrust cases. The intent and effect of the rules is to permit a claim to be stated in general terms. Pleading of evidence is not required and is undesirable. It is a matter for the discovery process, not for allegations of detail in a complaint. Looking "beyond the mere mountain of words to the meaning sought to be conveyed," the reviewing court found that the complaint contained a sufficient statement of claims upon which to base a lawsuit. The trial court had held that the defendants were deprived of notice of the precise nature of the claims that each would be required to meet because the claims of all of the plaintiffs against all of the defendants were stated collectively.

It was not necessary that the complaint contain a direct allegation that the defendants conspired together since the trier of facts could draw an inference of agreement or concerted action from the "conscious parallelism" of the defendants' acts. The Robinson-Patman Act makes price discrimination illegal, unless it is within one of the statutory exceptions, but the burden of bringing the case within one of the exceptions is upon the defendants. The plaintiffs set forth a prima facie case which, if proved, would force the defendants to their proof in rebuttal.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.170, 9009.750.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Pretrial Procedures—Misjoinder of Defendants.—The dismissal of an antitrust suit brought by thirteen retail appliance dealers against twenty-four suppliers and two retail chain stores on the ground that there was no common question of law or fact supporting the joinder of the defendants under Rule 20(a) of the Federal Rules of Civil Procedure was reversed. The "suggestion of concerted activity because of the 'conscious parallelism' of the defendants' acts affords a clear ground of joinder without need of more." If joinder is permissible on the facts alleged, it should not be restricted to certain theories of relief only, when the facts alleged support both theories. Therefore, there was no proper basis for distinguishing between Sherman Act and Robinson-Patman Act claims, although the plaintiffs might have indulged in unnecessary and repetitious separate statements of causes of action. Modern procedure favors the trial and disposition of similar cases together as a matter of court efficiency. The reviewing court also noted that the plaintiffs stated their intention to ask for consolidation of their case with another case pending before the trial court.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.275.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Parties Plaintiff—Class Action.—In an antitrust action brought by thirteen retail appliance dealers against twenty-four suppliers and two retail chain stores, the trial court erroneously held that allegations that the plaintiffs represented a class under Rule 23(a)(3) of the Federal Rules of Civil Procedure should be stricken. The instant suit was a "spurious" class action. It was, in actual effect, little more than an invitation to non-parties closely interested to intervene. It was difficult to see what harm the allegations did, since they would serve no function if the invitation was accepted by no one. On the other hand, they might serve a helpful function in leading to the consideration of substantially similar problems all at once.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.20.

For the plaintiffs-appellants: Arnold Malkan (Paul Lewin on the brief), New York, N. Y.

For the defendants-appellees: George A. Raftery, of O'Brien, Driscoll & Raftery, New York, N. Y. (O'Brien, Driscoll & Raftery, New York, N. Y., for Admiral Corp. and Admiral Corp. New York Distributing Division, Inc.; Donovan, Leisure, Newton & Irvine, New York, N. Y., for Philco Corp. and Philco Distributors, Inc.; Weil, Gotshal & Manges, New York, N. Y., for Davega Stores Corp.; Cravath, Swaine & Moore, New York, N. Y., for Times Appliance Co., Inc.; Adelman & Shapiro, New York, N. Y., for Warren-Connelly, Inc.; Moses Block, New York, N. Y., for Maytag-Atlantic Co., Inc.; Samuel Spiegel, New York, N. Y., for Roto Broil Corp. of America and Jay Kay Metal Specialties Corp.; and William D. Friedmann, of O'Brien, Driscoll & Raftery, New York, N. Y., and Melville C. Williams, of Pope & Ballard, Chicago, Ill., on the brief).

Reversing a decision of the U. S. District Court, Southern District of New York, 1956 Trade Cases ¶ 68,449. For a prior decision of the Court, see 1956 Trade Cases ¶ 68,448.

Before: CLARK, Chief Judge, and CHASE and HINCKS, Circuit Judges.

Julius Nagler and Oscar Resnick, doing business as Brooks Radio & Television, and twelve other retailers of radio, television, and electrical appliances in the Greater New York area, appeal from the dismissal, D. C. S. D. N. Y. [1956 TRADE CASES

¶ 68,449], 144 F. Supp. 772, for improper pleading and joinder, of their action for damages and injunction for restraint of trade and price discrimination brought against twenty-four supplier defendants, distributors and wholesalers of such appliances, and two retail appliance dealers operating chain stores in the same area. Reversed and remanded.

[*Causes of Action—Motions*]

CLARK, Chief Judge [*In full text*]: This is an antitrust and price-discrimination action for injunction and damages by thirteen retailers in the Greater New York area of radio, television, and electrical appliances. It is brought against twenty-six defendants, of whom twenty-four are "suppliers," i. e., manufacturers, wholesalers, and distributors, and two are retailers operating chain stores in this area. The case is founded upon the allegation that these two defendant-retailers, Davega Stores Corporation and Vim Television and Appliance Stores, Inc., received special price concessions from the supplier defendants. The complaint is in twenty-nine paragraphs and three counts, or "causes of action" as they are labeled. The first cause is for "Defendants' Discrimination Against Plaintiffs in Violation of the Robinson-Patman Act," 15 U. S. C. § 13; while the other causes, reincorporating the allegations of the first, are for violations of the Sherman Act, 15 U. S. C. §§ 1, 2. Ten of the defendants joined in a motion to dismiss for improper pleading under F. R. C. P., rule 8(a) and (e), and for misjoinder of parties; alternatively they asked for relief under F. R. 10(b), 12(e) and (f), i. e., for separate statements as to each defendant, for a more definite statement, and for striking parts of the complaint. Other defendants have moved for more definite statements; but such motions are not before us, nor have these defendants appeared as appellees. The court, in a substantial opinion, D. C. S. D. N. Y. [1956 TRADE CASES ¶ 68,449], 144 F. Supp. 772, granted dismissal on the grounds urged and dismissed the complaint as to all the defendants. This appeal followed.

[*Dismissal on Pleadings*]

The drastic remedy here granted for pleading errors is unusual, since outright dismissal for reasons not going to the merits is viewed with disfavor in the federal courts. See for recent expressions of the fundamental policy: *Atwood v. Humble Oil & Refining Co.*, 5 Cir., 243 F. 2d 885; *Rennie & Laughlin, Inc. v. Chrysler Corp.*, 9 Cir., 242 F. 2d 208, 213; *Cooper v. R. J. Reynolds Tobacco Co.*, 1 Cir., 234 F. 2d 170, and other cases cited below. And this has been true generally in both English and American law and legal history, for cases are not finally disposed of on mere points of pleading alone.[1] Courts naturally shrink from the injustice of denying legal rights to a litigant for the mistakes in technical form of his attorney. Moreover there are, or would be, serious questions of *res judicata;* and since this doctrine is two-edged, its application may well present problems for defendants as well as plaintiffs. Quite possibly those defendants who have not sought the relief they have given (and who are not here to support the grant) may have been motivated by doubts as to what they have won. For are the plaintiffs merely relegated to initiating a new action or are they permanently barred? Compare *Griffin v. Griffin*, 183 Va. 443, 32 S. E. 2d 700, with *Gould v. Evansville & C. R. Co.*, 91 U. S. 526; and see *Lawlor v. National Screen Service Corp.* [1955 TRADE CASES ¶ 68,061], 349 U. S. 322, and Von Moschzisker, *Res Judicata*, 38 Yale L. J. 299, 318-420. We are clear, therefore, that the case must go back for some less final disposition at least permitting the plaintiffs to amend. But because of their practical importance in routine litigation, we think some elaboration of both the pleading and the joinder issues is desirable.

[1] This history has been often recounted; see, *e.g.*, Clark, Code Pleading 17-21, 56-58, 225-245 (2d Ed. 1947), and the address cited in note 3 *infra*. A vivid and classic critique of special pleading, occasioned by Baron Parke's technical rulings under the ill-fated Hilary Rules of 1834, is found in Serjeant Hayes' "Crogate's Case: A Dialogue in ye Shades on Special Pleading Reform"—a dialogue supposedly between Crogate of the famous case of that name and Baron Surrebutter (Baron Parke)—now reprinted in 9 Holdsworth, History of English Law 417 (2d Ed. 1938). So Justice Frankfurter, dissenting in *Johnson v. New York, N. H. & H. R. Co.*, 344 U. S. 48, 62, thus summarizes:

"It has been said of the great Baron Parke: 'His fault was an almost superstitious reverence for the dark technicalities of special pleading, and the reforms introduced by the Common Law Procedure Acts of 1854 and 1855 occasioned his resignation.' (Sir James Parke, 15 D. N. B. 226.)"

[*Pleading—Federal Rules*]

It is true that antitrust litigation may be of wide scope and without a central point of attack, so that defense must be diffuse, prolonged, and costly. So many defense lawyers have strongly advocated more particularized pleading in this area of litigation;[2] and recently the judges in the court below have treated it as accepted law that some special pleading—the extent is left unclear—is required in antitrust cases.[3] But it is quite clear that the federal rules contain no special exceptions for antitrust cases. When the rules were adopted there was considerable pressure for separate provisions in patent, copyright, and other allegedly special types of litigation. Such arguments did not prevail; instead there was adopted a uniform system for all cases[4]—one which nevertheless allows some discretion to the trial judge to require fuller disclosure in a partcular case by more definite statement, F. R. 12(e), discovery and summary judgment, F. R. 26-35, 56, and pre-trial conference, F. R. 16. Perhaps the leading case making this clear is the oft-cited decision in *Package Closure Corp. v. Sealright Co.*, 2 Cir. [1944-1945 TRADE CASES ¶ 57,227], 141 F. 2d 972, 978, where the late Judge Frank, speaking for the court, said:

> "It is urged by defendants that a stricter requirement as to a plaintiff's pleading in treble damage actions is necessary because of the expense often involved in such litigation. But in that respect such actions are not unique, for huge expense is involved, too, in many a patent infringement suit and in many a suit where jurisdiction rests on diversity of citizenship. To impose peculiarly stiff requirements in treble damage suits will be to frustrate the Congressional intent. * * * We see no reason whatever to believe that the Supreme Court intended its liberal rules governing pleadings to be inapplicable to a suit for treble damages."

And he goes on to point out that if

> "the defendants, before trial, desire more detailed information from plaintiff, they can seek it by interrogatories, deposition or discovery." [1944-1945 TRADE CASES ¶ 57,227] 141 F. 2d 972, 979.

To the same general effect is *United States v. Employing Plasterers Ass'n of Chicago* [1954 TRADE CASES ¶ 67,692], 347 U. S. 186, where the Supreme Court reversed the dismissal of a complaint, *Howard v. Local 74 of the Wood, Wire & Metal Lathers, International Union of Chicago,* D. C. N. D. Ill. [1953 TRADE CASES ¶ 67,548], 118 F. Supp. 387, for failure to state a cause of action for relief under the Sherman Act. As the opinions above and below show, the complaint was most broad and general. Speaking for the Court, Mr. Justice Black said [1954 TRADE CASES ¶ 67,692], 347 U. S. 186, 189:

> "The Government's complaint may be too long and too detailed in view of the modern practice looking to simplicity and reasonable brevity in pleading. It does not

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[2] For a recent able presentation of this point of view, see Armstrong, *The Use of Pretrial and Discovery Rules: Expedition and Economy in Federal Civil Cases,* 43 A. B. A. J. 693, 696 (1957), also criticizing current uses of discovery and pre-trial.

[3] See Clark, Special Pleading in the "Big Case"? a Paper presented at the Seminar on Long Cases in New York, Aug. 26-30, 1957, citing some dozen reported cases from the Southern District of New York. The most significant examples, besides the present case, are *Baim & Blank, Inc. v. Warren-Connelly Co.,* D. C. S. D. N. Y. [1956 TRADE CASES ¶ 68,285], 19 F. R. D. 108, 109, specifically relied on by the judge below, and *United Grocers' Co. v. Sau-Sea Foods, Inc.,* D. C. S. D. N. Y. [1957 TRADE CASES ¶ 68,661], 150 F. Supp. 267, 269. In the *Baim & Blank* case the judge granted a motion to dismiss, but with leave to amend, which led promptly to a new complaint, doubled in size, and some attempt at formal separation of the claims of different plaintiffs, with no appreciable gain in information. Decision on a motion to strike this complaint has been stayed by stipulation pending determination of the present appeal. Hence no real progress has been made in the 2⅓ years the case has pended. In the *United Grocers' Co.* case, the motion to dismiss was granted; but the judgment was soon reopened on plaintiffs' motion to permit them to move for leave to file an amended complaint. Later another judge granted such leave, D. C. S. D. N. Y. [1957 TRADE CASES ¶ 68,731], 151 F. Supp. 760. An amended complaint was filed, again of doubled size, but of doubtful informative value; this was met by a most lengthy motion to strike, which was denied by still another judge. Eventually an answer was filed, after the greater part of a year had been wasted by five motions before four different judges, but without progress toward adjudication. All the cases noted in the article, except the one here on appeal, provided for amendment of the complaint; but no gain in information has yet been seen on any repleading.

[4] See, *e.g.*, F. R. 81(a); Copyright Rule of Practice 1, 307 U. S. 652, 17 U. S. C. fol. § 101; and the Federal Forms, such as Form 17—Complaint for Infringement of Copyright and Unfair Competition. So the recently adopted Rule 71A, for the Condemnation of Property, in subdivision (c) has some special requirements for describing the property, but otherwise follows the general practice, see subdivision (a).

charge too little. It includes every essential to show a violation of the Sherman Act. And where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified. If a party needs more facts, it has a right to call for them under Rule 12(e) of the Federal Rules of Civil Procedure. And any time a claim is frivolous an expensive full dress trial can be avoided by invoking the summary judgment procedure under Rule 56."

A like ruling is made in the companion case of *United States v. Employing Lathers Ass'n of Chicago* [1954 TRADE CASES ¶ 67,693], 347 U. S. 198, 200. And in *Radovich v. National Football League* [1957 TRADE CASES ¶ 68,628], 352 U. S. 445, 453, 454, the Court, in upholding a broad general complaint, stressed that it should not add pleading requirements to burden the private antitrust litigant favored by Congress beyond what is specifically set forth in the antitrust laws. Other cases of like tenor are cited in the footnote.[5]

In asserting a special rule of pleading for antitrust cases, our brothers below have in terms rejected the "modern 'notice' theory of pleading" as here insufficient[6] and said that an antitrust complaint must "state a cause of action instead of merely stating a claim."[7] But while these essentially nebulous concepts often creep into pleading discussions, they are no part of the rules themselves, but were in fact rejected for more precise formulations. It is well to go back to the rules themselves and their intended purpose. To this end we accept as definitive the precise statement formulated by the Advisory Committee in the light of both purpose and experience to answer criticisms based on some dispute in the interpretation of the rules. This appears in the Report of Proposed Amendments, October 1955, pp. 18, 19, and Preliminary Draft, May 1954, pp. 8, 9, as a note explanatory of F. R. 8(a)(2) and the Committee's decision to recommend the retention of that rule in its present form. The following extracts therefrom are directly pertinent to our present discussion:

"The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement. * * * It is accordingly the opinion of the Advisory Committee that, as it stands, the rule adequately sets forth the characteristics of good pleading; does away with the confusion resulting from the use of 'facts' and 'cause of action'; and requires the pleader to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it."

[*Complaint*]

Turning to the complaint before us, we remark that in outward form at least it is an imposing document consisting of twelve or more printed pages. Both sides purport to rely on the pleading admonitions in some of the district court cases we have referred to:[8] the defendants to show, as the district court indeed held, that the plaintiffs have not heeded these warnings, and the plaintiffs to claim that they have and have expanded their allegations accordingly. At any rate, we have one result, which seems to be invariable when detailed pleading is stressed, namely, a vast increase in verbiage. The complaint is filled with the pleading of con-

[5] *Darnell v. Markwood*, D. C. Cir. [1954 TRADE CASES ¶ 67,910], 220 F. 2d 374; *Louisiana Farmers' Protective Union v. Great Atlantic & Pacific Tea Co. of America*, 8 Cir. [1940-1943 TRADE CASES ¶ 56,239], 131 F. 2d 419; *Cooper v. R. J. Reynolds Tobacco Co.*, 1 Cir., 234 F. 2d 170; *Byrd v. Bates*, 5 Cir., 220 F. 2d 480; *Atwood v. Humble Oil & Refining Co.*, 5 Cir., 243 F. 2d 885; *Sidebotham v. Robinson*, 9 Cir., 216 F. 2d 816. This principle has not been questioned even in cases (perhaps now somewhat doubtful in view of the precedents cited in the text) requiring the pleading of injury to the public interest, interstate commerce, etc., such as *Feddersen Motors v. Ward*, 10 Cir. [1950-1951 TRADE CASES ¶ 62,579], 180 F. 2d 519, 522; *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 5 Cir. [1954 TRADE CASES ¶ 67,822], 214 F. 2d 891, certiorari denied 348 U. S. 912; *Beegle v. Thomson*, 7 Cir. [1940-1943 TRADE CASES ¶ 56,291], 138 F. 2d 875, 881, certiorari denied *Beegle v. Thomson*, 322 U. S. 743; *Black & Yates v. Mahogany Ass'n*, 3 Cir., 129 F. 2d 227, 148 A. L. R. 841, certiorari denied *Mahogany Ass'n v. Black & Yates*, 317 U. S. 672. See also Resolutions Adopted at Seminar on Long Cases in New York, Aug. 26-30, 1957, #7.

[6] *Baim & Blank, Inc. v. Warren-Connelly Co.*, D. C. S. D. N. Y. [1956 TRADE CASES ¶ 68,285], 19 F. R. D. 108, 109.

[7] *United Grocers' Co. v. Sau-Sea Foods, Inc.*, D. C. S. D. N. Y. [1957 TRADE CASES ¶ 68,661], 150 F. Supp. 267, 269.

[8] See cases referred to in notes 3, 6, and 7 *supra*.

clusions of both fact and law; it is far from that lean and terse allegation in sequence of events as they have happened which we have stressed.[9] But we are not conducting exercises in pleading; we must look beyond the mere mountain of words to the meaning sought to be conveyed. So looking we can have no doubt that plaintiffs say the supplier defendants have given their favored customers Vim and Davega price discounts and other special favors (listed in some detail) which have lost sales to the plaintiffs, destroyed their capacity to compete, and forced some of them out of business.

[*Statement of Claim*]

In testing whether this is a sufficient statement of claim upon which to base a lawsuit, we ought practically to consider the alternatives, both what can be expected and asked of antitrust plaintiffs and what can be accomplished by compulsive orders. Here seems to be the rock upon which attempts below to achieve more particularized pleading has definitely foundered; for the judges' directions double the bulk without increasing enlightenment, while they delay the cause and exhaust the time of several judges.[10] So in this case the district judge has stated several requirements which would seem either not feasible or not such as to advance the case toward adjudication. Most of them relate to details either not pertinent to the legal point or covered generally, such as addresses and location of defendants, the territory involved (the "Greater New York area"), the time (necessarily the period permitted by the applicable statutes of limitation to the date of filing of the complaint), and so on. Perhaps the nub of all of this is the conclusion that by "stating the claims of all the plaintiffs against all the defendants collectively, they have deprived the defendants of notice of the precise nature of the claims that each will be required to meet." But we note that a similar order in a companion case has resulted only in a complaint doubled in length, with separate paragraphs of iteration in general form of action by individual plaintiffs against individual defendants — a formal compliance, with no gain in useful information that we can perceive.[11]

[*Prima Facie Case*]

It is to be noted that this complaint meets certain difficulties sometimes adverted to in other cases, such as allegations as to interstate commerce or public injury occasionally found wanting.[12] It does lack a direct allegation that the defendants conspired together, although it assumes the defendants' "combinations and conspiracies" and the resulting damage to plaintiffs. But as to this the trier of facts may draw an inference of agreement or concerted action from the "conscious parallelism" of the defendants' acts of price cutting and the like, as the Supreme Court recognizes. *Theatre Enterprises v. Paramount Film Distributing Corp.* [1954 TRADE CASES ¶ 67,640], 346 U. S. 537, 541. So in dealing with an antitrust complaint of somewhat similar nature, Judge Smith in an informed decision refused a dismissal because of lack of a clear-cut assertion of concerted activity, since the plaintiff could rest on this conscious parallelism among the defendants. *Hathaway Motors v. General Motors Corp.*, D. C. Conn. [1955 TRADE CASES ¶ 67,996], 18 F. R. D. 283. On the other branch of the case, the Robinson-Patman Act makes price discrimination illegal unless it is within one of the exceptions stated in the statute, 15 U. S. C. § 13. But the burden of bringing the case within one of these exceptions is definitely upon the defendants. *F. T. C. v. Morton Salt Co.* [1948-1949 TRADE CASES ¶ 62,247], 334 U. S. 37, 45, 1 A. L. R. 2d 260; *Ruberoid Co. v. F. T. C.*, 2 Cir. [1950-1951 TRADE CASES ¶ 62,847], 189 F. 2d 893, 895, s. c. 191 F. 2d 294, affirmed *F. T. C. v. Ruberoid Co.*

[9] "A simple statement in sequence of the events which have transpired, coupled with a direct claim by way of demand for judgment of what the plaintiff expects and hopes to recover, is a measure of clarity and safety; and even the demand for judgment loses its restrictive nature when the parties are at issue, for particular legal theories of counsel yield to the court's duty to grant the relief to which the prevailing party is entitled, whether demanded or not." *Gins v. Mauser Plumbing Supply Co.*, 2 Cir., 148 F. 2d 974, 976, citing F. R. 54(c) and cases. See also *Siegelman v. Cunard White Star Limited*, 2 Cir., 221 F. 2d 189, 196.

[10] See examples in note 3 *supra*. The early assignment of a potentially protracted case to a single judge—as recommended by the authorities noted later in the text—would avoid this waste.

[11] *Baim & Blank, Inc. v. Warren-Connelly Co.*, D. C. S. D. N. Y. [1956 TRADE CASES ¶ 68,285], 19 F. R. D. 108; and see also *United Grocers' Co. v. Sau-Sea Foods, Inc.*, D. C. S. D. N. Y. [1957 TRADE CASES ¶ 68,661], 150 F. Supp. 267.

[12] See cases cited in note 5 *supra*.

[1952 TRADE CASES ¶ 67,279], 343 U. S. 470. It would seem therefore that the plaintiffs have set forth a prima facie case which, if proved, will force the defendants to their proof in rebuttal.

[*Pleading Evidence*]

In criticizing these complaints the trial judges have tended to see willful violations of precise instructions. We doubt if this is a profitable approach in any event; however willful seeming, lawyers must represent their clients in what they conceive the most effective way in the light of their knowledge, which must include that neither English nor American experience lends support to mere pleadings as a substitute for trial. But as we try to visualize practical substitutes we question the adverse implication. For actually this demand seems to come to a call for specific instances, as that Admiral made such and such a discount sale of specified goods to Davega on a particular day at a particular place. Anything short of this, as the practice below is demonstrating, will permit of the vagueness the judges are finding troublesome. And yet such pleading of the evidence is surely not required and is on the whole undesirable. It is a matter for the discovery process, not for allegations of detail in the complaint. The complaint should not be burdened with possibly hundreds of specific instances; and if it were, it would be comparatively meaningless at trial where the parties could adduce further pertinent evidence if discovered. They can hardly know all their evidence, down to the last detail, long in advance of trial.

[*More Definite Statement*]

The sad truth is that these cases are likely to prove laborious in any event and that there is no real substitute for trial, although pre-trial conferences and orders may greatly speed the result.[13] But a considerable part of federal litigation is of a lengthy and burdensome nature and we are not justified in frowning on a Congressional policy so definitely cherished as is this, a policy which is, after all, the cause of our troubles. And while as appellate judges we would help our brethern at the crucial trial stage where we could, the experience, as generally noted,[14] shows that attempts at special pleading are definitely not the remedy. This has a bearing on the alternative relief here asked, that of a more definite statement under F. R. 12(e). Trial judges should of course have some discretion to attempt improvements in particular pleadings before them where they have the available time and energy to do so. Yet it seems clear that "motions for particulars will not serve that purpose" of particularizing antitrust issues, Procedure in Anti-Trust and Other Protracted Cases, A Report Adopted by the Judicial Conference of the United States, September 26, 1951, page 10, and "Orders for more definite statements ordinarily do not result in furtherance of the solution of the big case." Resolutions Adopted at Seminar on Long Cases in New York, August 26-30, 1957, #8. The real solution—so far as there is one short of trial—would appear to be that recommended in these important and informed authorities, *viz.*, continuing pretrial conferences under the direction of a single judge who may thus avoid the duplicating efforts of various judges we have noted above.

[*Class Suit*]

The remaining issue involving joinder has two aspects, the striking of the allegations that the plaintiffs represent a class under F. R. 23(a)(3) and the holding that there is no common question of either law or fact supporting joinder of the defendants under F. R. 20(a). We are constrained to hold the court in error on both aspects. As to the first, we think the court has ascribed both too much and too little weight to this class-suit provision—too much in holding it so troublesome as to require striking at this stage and too little as destroying whatever efficacy it may have in a particular case. This is the form of class suit which at times is given the opprobrious epithet of "spurious" to distinguish it from the truly representative actions, for it is in actual effect really little more than an invitation to non-parties closely interested to intervene. As we have said of this provision:

[13] *Inter alia,* they might provide for the limitation of proof by plaintiff to establish only the prima facie case noted above in the text; this in turn would somewhat control the extent of the answering evidence.

[14] See the particular references in note 3 *supra,* and the more general ones in note 1 *supra.*

"It stands as an invitation to others affected to join in the battle and an admonition to the court to proceed with proper circumspection in creating a precedent which may actually affect nonparties, even if not legally *res judicata* as to them. Beyond this, as we in common with other courts have pointed out, it cannot make the case of the claimed representatives stronger, or give them rights they would not have of their own strength, or affect legally the rights or obligations of those who do not intervene."

All American Airways v. Elderd, 2 Cir., 209 F. 2d 247, 248, 249. This was said in holding an order partially dismissing counterclaims to the extent that they were based on this rule as "only an order for prettifying the pleadings in the eyes of the trial judge" and hence not appealable. See also *Oppenheimer v. F. J. Young & Co.,* 2 Cir., 144 F. 2d 387; *Bascom Launder Corp. v. Telecoin Corp.,* 2 Cir. [1953 TRADE CASES ¶ 67,472], 204 F. 2d 331, 336, certiorari denied 345 U. S. 994; *Kainz v. Anheuser-Busch, Inc.,* 7 Cir. [1952 TRADE CASES ¶ 67,221], 194 F. 2d 737, certiorari denied *Anheuser-Busch, Inc. v. Kainz,* 344 U. S. 820. It is difficult to see what harm the allegations do, since they will serve no function if the invitation is accepted by no one. On the other hand, they may serve a helpful function in leading in the consideration of substantially similar problems all at once. This is the function, too, of the joinder provisions to which we now turn.

[*Federal Rules*]

F. R. 20(a) provides:

"All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

This is a correlative provision to the similar one for the joinder of plaintiffs. The rule also provides that neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded, that judgment may be given for or against individual parties according to their respective rights and duties, and—in subdivision (b)—that the court may order separate trials or otherwise protect the parties and prevent delay or prejudice. Originating in modern English procedure, it came to this country by way of the New York Civil Practice Act of 1921 and has been widely adopted, as in the codes of such states as California, Connecticut, Illinois, and Pennsylvania, as well as in the fifteen jurisdictions which have adopted the federal rules *in toto.* It substitutes principles of trial convenience and efficiency for rigid rules of interrelationship of parties. Its range can be seen from an early and famous case in New York, *Akely v. Kinnicutt,* 1924, 238 N. Y. 466, 144 N. E. 682, upholding the joinder of 193 plaintiffs seeking individual damages caused by reliance upon a fraudulent stock prospectus. The same concept is stated, perhaps even more directly in the provision of F. R. 42(a) for consolidation of actions or joint hearings or trial "When actions involving a common question of law or fact are pending before the court." This provision is important here because the plaintiffs in their complaint state their intention to ask for consolidation of this case with another now pending before the district court.[15] Its broad scope is shown by cases such as *Gillette Motor Transport v. Northern Oklahoma Butane Co.,* 10 Cir., 179 F. 2d 711; *Plough v. Baltimore & O. R. Co.,* 2 Cir., 172 F. 2d 396, certiorari denied 337 U. S. 940; *McAfoos v. Canadian Pac. Steamships, Ltd.,* 2 Cir., 243 F. 2d 270, 274.

[*Questions of Law*]

There are various suggestions of common questions of fact or law which we need not separately explore, since we think that in any event the suggestion of concerted activity because of the "conscious parallelism" of the defendants' acts affords a clear ground of joinder without need of more. And if joinder is permissible on facts alleged, it cannot and should not be restricted to certain theories of relief only, as, for example, restraint of trade as opposed to price discrimination, when the facts alleged support both theories. For it is clear law that it is the duty of the court to grant the relief which the facts before it require; the legal theories which the parties may have suggested or relied on may be of help to the

[15] *Baim & Blank, Inc. v. Warren-Connelly Co.,* D. C. S. D. N. Y. [1956 TRADE CASES ¶ 68,285], 19 F. R. D. 108.

court, but do not control.[16] Hence there is no proper basis for distinguishing here between Sherman and Robinson-Patman claims, although the plaintiffs may have indulged in unnecessary and repetitious separate statements of "causes of action."

[*Policy*]

This problem necessarily dovetails into that of pleading first discussed, and the over-all considerations there pertinent have significance here also. Under settled Congressional policy, acts of discriminatory price cuttting are bound to give rise to a multitude of damage claims which federal courts cannot push aside. How shall they be handled—by fragmentation or by mass attack, so to speak? Modern procedure favors the trial and disposition of similar cases together as a matter of court efficiency; this is shown by the popularity of these extensive joinder provisions, the most widely accepted of all pleading reforms. This case would seem to promise gain in the employment, not repudiation, of the authority given. To force on this already overcrowded court the necessity of separate actions—with accompanying pleading, discovery, pre-trial, and trial activities—in all the various combinations possible among thirteen plaintiffs and twenty-six defendants, not to speak of other causes which could be consolidated with this, would be quite intolerable. On the other hand, at this preliminary stage joinder seems to have attractive possibilities. Conceivably it may lead to a fairly expeditious settlement of all issues and at the longest it calls for trial work of perhaps difficult, but not impospossible, character for an experienced trial judge. And there is always at hand the authority to order separate trials of particular issues. We believe the reversal and remand we find required by law will lead eventually to more definite and affirmative results than the course embarked on by the court below. As our discussion shows, we do not think amendment of the complaint necessary and are not making its reinstatement contingent thereon. So far as the appeal affects defendant The Wilcox-Gay Corporation, it is dismissed by consent as per affidavit on file. Otherwise the action is reversed and remanded.

[¶ 68,840] New Orleans Insurance Exchange v. United States.

In the Supreme Court of the United States. October Term, 1957. No. 399. Dated October 28, 1957.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division. J. SKELLY WRIGHT, District Judge.

Case No. 1182 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Group Boycott—Interstate Commerce —Insurance Business Under McCarran-Ferguson Act.—The United States Supreme Court affirmed a trial court's rulings that (1) the by-laws of an association of insurance agents and brokers which required the members of the association to boycott any stock company which plants through any except association agents, to boycott any stock company which sells directly to the public, to boycott mutual companies irrespective of how or by whom the insurance is sold, and to boycott nonmember agencies so that the facilities of companies planting exclusively through association outlets are denied such agents constituted violations of Sections 1 and 2 of the Sherman Act, (2) the business of insurance, when conducted across state lines, is interstate commerce, and (3) the McCarran-Ferguson Act does not render the Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.205, 2005.533, 2035.153, 2263; Monopolies, Vol. 1, ¶ 2610.720.

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[16] See cases cited in note 9 *supra* and the many cases applying F. R. 54(c); *Bowles v. J. J. Schmitt & Co.*, 2 Cir., 170 F. 2d 617; *Couto v. United Fruit Co.*, 2 Cir., 203 F. 2d 456; *Flynn v. United States*, 8 Cir., 205 F. 2d 756; Clark, Code Pleading 265-273 (2d Ed. 1947).

For the appellant: Murray F. Cleveland, New Orleans, La.

For the appellee: J. Lee Rankin, Solicitor General; Victor R. Hansen, Assistant Attorney General; and Charles H. Weston and Ernest L. Folk, III, Attorneys, Department of Justice.

Affirming a decision of the U. S. District Court, Eastern District of Louisiana, New Orleans Division, 1957 Trade Cases ¶ 68,616; for a prior decision of the Court, see 1955 Trade Cases ¶ 67,935.

[*Affirmed*]

PER CURIAM [*In full text*]: The motion to affirm is granted and the judgment is affirmed.

[¶ 68,841] Quentin Stroud, et al. v. Ezra T. Benson, United States Secretary of Agriculture; Flue Cured Tobacco Cooperative Stabilization Corporation of Raleigh, North Carolina, et al.

In the United States District Court for the Eastern District of North Carolina, New Bern Division. Civil No. 464. Filed September 26, 1957.

Sherman Antitrust Act

Combinations and Conspiracies—Contracts Requiring Identification of "Discount" Tobacco—Legality—Governmental Regulation—Restraint of Trade—Petition for Injunction—Lack of Equity.—Contracts between a tobacco cooperative stabilization corporation and tobacco warehousemen requiring that "discount" varieties of tobacco be identified on the warehouse floor at auction sales, pursuant to an order of the Secretary of Agriculture issued to implement its tobacco support program and to stabilize the tobacco market, did not constitute a restraint of trade in violation of the antitrust laws. A petition of certain tobacco growers to restrain the enforcement of the order was dismissed. The stabilization corporation and the warehousemen were agencies through which the Federal Government acted in carrying out its tobacco program, and the antitrust laws are not applicable to such governmental operations. The contracts were not agreements in restraint of trade, and, even if they were agreements in restraints of trade, they constituted a reasonable regulation of business. Furthermore, even if the antitrust laws were applicable to this governmental operation, equitable relief would not be granted since there was no equity in the plaintiffs' position. Any gain to the plaintiffs that might result by granting the equitable relief sought would be small when compared to the tremendous loss accruing to the thousands of tobacco growers whose welfare was dependent upon the continuation of the price support program. The plaintiffs seek the aid of a court of equity to prevent buyers from knowing the truth about the tobaccos which they are asked to buy.

See Combinations and Conspiracies, Vol. 1, ¶ 2005, 2005.760; Private Enforcement and Procedure, Vol. 2, ¶ 9023.

For the plaintiffs: J. A. Jones, Kinston, N. C.; and M. E. Cavendish, Greenville, N. C.

For the defendants: Julian T. Gaskill, United States Attorney, Raleigh, N. C.; Gerald O'Rourke, United States Department of Agriculture, Washington, D. C.; and William T. Joyner, Raleigh, N. C.

Memorandum, Findings of Fact, and Order

[*Nature of Action*]

DON GILLIAM, District Judge [*In full text except for omissions indicated by asterisks*]: This cause came on to be heard at Raleigh, North Carolina, on September 5, 1957, upon an order of August 15, 1957, directing the defendants and each of them to show cause why the prayer for relief should not be granted. Plaintiffs, each of whom resides within the Eastern District of North Carolina, are engaged in the raising of tobacco

and commenced this action by the filing of a complaint praying for an injunction restraining the defendants and each of them in their respective capacities from enforcing the rules and regulations of the Secretary of Agriculture providing for the support of flue-cured tobacco upon a variety basis; and the identification of tobacco of certain varieties upon the auction sale warehouse floor through the use of an identifying (striped) ticket, and also for a mandatory injunction ordering the Secretary of Agriculture to support tobacco produced by plaintiffs during 1957 upon a per grade basis at 90 percent of parity.

[*Motion to Dismiss*]

At the outset the defendants moved to dismiss for that: 1. The court lacks jurisdiction over the subject matter; 2. The Court lacks jurisdiction over the person of Ezra T. Benson, Secretary of Agriculture; 3. The venue as to the Secretary of Agriculture is improper; 4. The Secretary of Agriculture is an indispensable party; 5. The complaint fails to state a claim on which relief can be granted. The motion raised doubts in my mind, but believing it to be in the public interest to reach a consideration on the merits, the doubt was resolved in favor of the plaintiffs and the motion was denied.

[*Discount Tobacco*]

These facts are established by the evidence:

Historically one-third to one-half of this country's production of flue-cured tobacco has been consumed by the export trade which to a large extent desires our full-bodied, full-flavored and aroma tobaccos which are produced in no other country in the world.

Foreign buyers of tobacco have available to them in foreign countries all needed supplies of light-bodied tobacco which lacks the flavor and aroma traditionally found in the standard American varieties, and these foreign buyers can obtain such light-bodied tobaccos at from one-half to eighty percent of the net cost to them of the American produced light-bodied tobaccos.

The new American produced light-bodied tobaccos often simulate in appearance the various long established standard American varieties, but lack the flavor and aroma found in such standard varieties.

The grading of tobacco, under the Tobacco Inspection Act, (7 U. S. C. A. Sec. 511, et seq.) is based entirely on characteristics visible to the naked eye and the presence or absence of flavor and aroma is not a grading factor and cannot be established as a factor in the traditional marketing procedures followed in the tobacco industry.

Beginning with the 1955 tobacco marketing year and continuing with increasing intensity thereafter, the United States Department of Agriculture and the American tobacco producer and trade associations received complaints from foreign and domestic buyers and companies that the new light-bodied American produced tobaccos lacked the flavor and aroma which had been associated with American tobaccos and that such new varieties, which were identified by the complainants as Coker 139, 140, and Dixie Bright 244 (henceforth referred to as "discount" varieties), were not wanted by foreign tobacco buyers and companies.

In making complaints, foreign tobacco buyers and companies served notice that the "discount" varieties could not be identified readily from the standard American varieties on the auction sale warehouse floors in the cured leaf form, and that, unless steps were taken to identify these new varieties of tobacco at the market so as to inspire buying confidence and to encourage the production of American standard varieties, the foreign buyers and companies would sharply decrease and possibly cease buying American tobaccos.

The failure to distinguish on the warehouse floor between the full-bodied, full-flavored and aromatic standard American tobaccos and the new light-bodied American tobaccos would result in depressing the marketing prices for tobaccos generally because of the efforts of tobacco buyers and companies to offset the loss resulting to them by the inadvertent purchase of such new varieties by reducing the price they would pay for any and all American tobaccos.

[*Effects*]

The quantities of tobacco coming under Commodity Credit Corporation's 1955 and 1956 Tobacco Loan Programs, because of the buyer's unwillingness to purchase any tobacco which they believed might be of the light-bodied varieties, caused the Government's loan stocks of tobacco to reach

their highest point since the inception of the Tobacco Loan Program, and it is an economic fact that over-large inventories of any commodity have a depressing effect on the prices of such commodity.

The unwillingness of the tobacco buyers and companies to purchase any tobacco which they believe might be of the new light-bodied varieties resulted in a general depressing effect upon the tobacco market, penalizing all producers of the standard American varieties desired by foreign and domestic tobacco buyers and companies.

* * *

[*Government Program*]

The program, which the United States Department of Agriculture determined to put into effect to stabilize the prices of tobacco, to promote the orderly marketing of tobacco and preserve for the American tobacco producer his export markets, was announced to the tobacco industry and the public generally by the Department's press release dated December 18, 1956, which stated in part as follows:

> "Major changes in the 1957 flue-cured tobacco price support program—changes which are expected to discourage production of varieties viewed as undesirable under present demand conditions and to encourage an increase in the proportion of the crop having characteristics currently in demand—were announced today by the U. S. Department of Agriculture.
>
> "Today's changes, which are in accord with recommendations of grower organization and industry leaders in the flue-cured tobacco area, are as follows:
>
> "(1) 1957-crop flue-cured tobacco of varieties '139', '140', and '244', irrespective of grade, will be supported at one-half of the support rates for comparable grades of other varieties.
>
> "(2) Price support rates for individual grades of all flue-cured varieties will be adjusted to reflect current demand patterns. This action will support a program to encourage cultural practices that will increase the proportion of the crop which has desirable flavor and aroma characteristics.
>
> "The three varieties viewed as currently undesirable have been classified by Federal and State scientists of the flue-cured tobacco area as 'low to lacking in flavor and aroma, generally of light body, and/or currently with poor acceptance in the trade.'"

Copies of such press releases were mailed by representative agencies of the Department of Agriculture to each tobacco producer in the United States. By press release dated January 9, 1957, the Department of Agriculture further explained the program which it had entered upon, stating in part as follows:

> "Rigid enforcement of its announced 50% cut in price support on 1957 production of flue-cured tobacco varieties Coker 139, Coker 140, and Dixie Bright 244 was emphasized today by the U. S. Department of Agriculture . . .
>
> "Commenting on the Department's enforcement plans Assistant Secretary of Agriculture Marvin L. McLain said: 'We expect to spare no reasonable effort to carry out the purpose and intent of the variety discount program.'"

Further notice was given by press release dated April 26, 1957, wherein it was repeated that the discount varieties would be supported at one-half the rate of comparable grades of other varieties of American tobaccos and that the discount varieties had been determined to be lacking in flavor and aroma and had poor acceptance in the trade. On May 10, 1957, consistent with the notice given in the press release of January 9, 1957, that the Department would rigidly enforce its program with respect to the discount varieties, and that it would spare no reasonable effort to carry out the purpose and intent of the program, the Department announced that acceptable varieties of flue-cured tobacco, that is, those other than the discount varieties, would be identified on the auction sale warehouse floor for the reason as follows:

> ". . . in order to stimulate confidence in buyers, stimulate prices on the market, and protect the price support program."

The press release of May 10, 1957, further stated:

> "The floor identification plan was developed in cooperation with committees representing the Bright Belt Warehouse Association and the South Carolina Warehouse Association. Under the plan, auction warehouses will use regular basket tickets to identify baskets of tobacco 'certified' as from farms that produced none of the undesirable varieties but will use special, distinguishably different tickets to identify all baskets which are not so 'certified'."

The regulations of the Department of Agriculture pertaining to its variety identification program appeared in the Federal

Register of May 7, 1957 (22 F. R. 3201), in the form of a notice of proposed Rule Making, wherein all aspects of the program, excepting the actual level of support, and the matter of identification on warehouse floors which had not yet been determined upon was set out in detail and in the last paragraph of such Notice of Proposed Rule Making there appeared the statement as follows:

> "Prior to the final adoption and issuance of these regulations, consideration will be given to any data, views, and recommendations thereto which are submitted in writing to the director, Tobacco Division, Commodity Stabilization Service, United States Department of Agriculture, Washington 25, D. C. All submissions must be postmarked not later than ten days after date of publication of this notice in the Federal Register in order to be considered."

Pursuant to the notice of proposed Rule Making so given, there appeared in the Federal Register of June 11, 1957, (22 F. R. 4064) the terms of the Variety Identification Program and this Regulation, like the notice of proposed Rule Making previously given, showed that such program had been entered upon in connection with the Department's responsibilities under the price support legislation and there was cited for legal authority in both such Federal Register publications The Agriculture Act of 1949, 7 U. S. C. A. Sec. 1421, *et seq.* Thereafter, there appeared in the Federal Register of July 9, 1957, (22 F. R. 4777) the full terms of the 1957 Tobacco Loan Program, including the provisions with respect to the Variety Identification Program through the successive stages of production from the green plant growing in the field through the marketing on the tobacco auction warehouse floor. * * *

The Tobacco Loan Program in the flue-cured tobacco area is carried out by Commodity Credit Corporation, on behalf of the Secretary of Agriculture, through contracts between such Corporation and the Flue Cured Tobacco Cooperative Stabilization Corporation, Raleigh, North Carolina, and such contracts require that the contracts entered into between Stabilization and auction warehousemen through which the tobacco price support program is made available to producers be approved by Commodity Credit Corporation.

[*Contracts Requiring Identification*]

Consistent with the Variety Identification Program the Department of Agriculture required that contracts between Stabilization and auction warehousemen participating in the price support program contain provisions requiring differentiation on the warehouse floor between the standard varieties and the "discount" varieties. The foregoing contractual provisions have been complied with by the defendants.

* * *

[*Notice to Plaintiffs*]

The defendants, under the terms and provisions of the marketing regulations of June 11, 1957, determined that the plaintiffs had grown tobacco on their respective farms for the crop year of 1957, having growth characteristics or seed strains of the "discount" varieties, and notified the plaintiffs of their determination, upon which determination the tobacco would be identified on the warehouse floor at the time of sale.

* * *

[*Antitrust Violation Alleged*]

Finally, the plaintiffs contend that the contract between Flue Cured Stabilization and the defendant warehousemen requiring that the discount varieties be identified on the warehouse floor (pursuant to the order of the Secretary of Agriculture) is in restraint of trade and hence invalid as a violation of the Anti-trust laws.

[*Objection to Identification*]

The crux of plaintiffs' case lies in their objection to the identification on the warehouse floor of discount tobacco such as they propose to offer for sale. In other words, they seek to keep the buyers in the dark with respect to the tobacco which they do not desire, but being without such identification they may unwittingly buy; they hope and expect that without the information supplied by the striped card all or at least some of the buyers may be confused and that they may obtain better prices by reason of such confusion. Bluntly stated, they protest against the disclosure of the truth at the auction sale.

[*Sovereign Acts—Immunity*]

Anti-Trust acts are designed to insure competition and thereby promote the public interest; and as the sovereign acts in the

public interest the Courts have held that these acts do not suppress the sovereign. *Parker v. Brown* [1940-1943 TRADE CASES ¶ 56,250], 317 U. S. 341, 350:

> "We find nothing in the language of the Sherman Act . . . which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . . That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations abundantly appears from its legislative history."

The Court in this case also held that the Anti-Trust statutes did not apply to those individual defendants who were not officers of the Government but were individuals operating the grower marketing agency as is the case here. Actually, the initiation of the identification idea was that of the federal government, acting through the Secretary of Agriculture to whom authority was given by the Congress; Stabilization and the two warehousemen are merely the agencies through which the government itself acts to carry out its program of stabilizing the tobacco auction market and implementing the tobacco support program. *United States v. Edgerton & Sons,* 178 F. 2d, 763, cited by plaintiffs' counsel, is not applicable. On this ground I find the plaintiffs' position untenable, but there are other grounds.

[*Reasonableness—No Restraint*]

If there is restraint of trade here, it is not unreasonable and, therefore, not outlawed. In *Board of Trade v. United States,* 246 U. S. 231, 239, the Court said: "But the evidence admitted makes it clear that the rule was a reasonable regulation of business, consistent with the provisions of the Anti-Trust Law"; and at page 241: "The restraint imposed by the rule is less severe than that sustained in *Anderson v. United States,* 171 U. S. 604. Every board of trade and nearly every trade organization imposes some restraint upon the conduct of business by its members." It appears clear to me that if the certification of full support varieties is any restraint of trade, it is a reasonable restraint and, therefore, valid. But it is also clear, so far as I see, that there is no restraint of trade at all. The questioned contracts are not agreements in restraint of trade. The purpose of the striped ticket required by the contracts is to disclose the simple truth concerning the nature of the product offered for sale. There is no attempt to create a monopoly, no conspiracy to fix prices or limit production. If the knowledge of the true identity of the discount varieties tends to result in lower prices and smaller purchases, it is because the market, knowing the truth, has no desire for them. The truth of the matter seems to be that competition has been promoted since the discount must now compete with the standard varieties. Generally, complete and full knowledge on the part of both vendor and vendee is considered an element of perfect competition.

[*Equities*]

Furthermore, if it be assumed that the Anti-Trust statute applies to this governmental operation, and that the restraint of trade, if any, is not reasonable, the plaintiffs must fall since there is lack of equity on plaintiffs' side. Such must appear when injunctive relief is demanded. The plight of some of the plaintiffs arouses sympathy until it becomes apparent that they are seeking relief from present economic loss arising from a situation for which neither they nor defendants are to blame, by obtaining the aid of a court of equity to prevent buyers from knowing the truth about the tobaccos which they are asked to buy. Any gain to the plaintiffs that might result by granting the equitable relief which they demand would be small, indeed, when compared to the tremendous loss accruing to the thousands of tobacco growers whose welfare as tobacco raisers is so definitely dependent upon the continuation of the price support program, if such relief is granted. There is no equity in plaintiffs' position and, accordingly, a court of equity will not sustain it.

[*Dismissed*]

It is ordered that the relief asked be denied and that the petition be dismissed at plaintiffs' cost.

[¶ 68,842] Lawrence Capitol, Inc. v. Stanley-Warner Corporation, Stanley-Warner Circuit Management Corporation, Massachusetts Amusement Corporation, Warner Bros. Pictures Distributing Corporation, Warner Bros. Pictures Inc., T. C. F. Film Corporation, Twentieth Century-Fox Film Corporation, Loew's Incorporated, Paramount Film Distributing Corporation, Paramount Pictures Inc., RKO Radio Pictures, Inc., Columbia Pictures Corporation, Universal Film Exchanges, Inc., United Artists Corporation, and Republic Pictures Corporation.

In the United States District Court for the District of Massachusetts. Civil Action No. 55-332-S. Dated July 1, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—When Recovery May Be Barred—General Release—Validity.—In an action charging that motion picture companies conspired to deny first run pictures to a motion picture exhibitor, a general release, which was given by the exhibitor to certain of the defendant companies in settlement of a prior similar action, barred the exhibitor from asserting its present claims (accruing prior to the date of the release) against the companies named in the release. The exhibitor failed to prove that the release was obtained by fraud and duress. There was no evidence that the companies failed to keep their promise to give the exhibitor the opportunity of competing for first run pictures, and the exhibitor failed to establish that the companies promised to supply first run pictures to it without competitive bidding. Also, the exhibitor failed to establish that the companies switched settlement papers, and the exhibitor introduced no evidence to support its claim that it was subjected to duress during the settlement negotiations. The exhibitor did not establish its right to cancel the release.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.700, 9010.775.

For the plaintiff: Jean C. Campopiano, Lawrence, Mass., and Russell Hardy, Sr., Washington, D. C.

For the defendants: Robert W. Meserve and John R. Hally, of Nutter, McClennen & Fish, Boston, Mass., for Twentieth Century-Fox Film Corp., Paramount Film Distributing Corp., Republic Pictures Corp., Columbia Pictures Corp., United Artists Corp., Loew's Inc., RKO Radio Pictures, Inc., and Universal Film Exchanges, Inc.; and Richard L. Brickley, of Brickley, Sears & Cole, Boston, Mass., for Stanley-Warner Corp., Massachusetts Amusement Corp., Stanley-Warner Circuit Management Corp., Warner Bros. Pictures Distributing Corp., and Warner Bros. Pictures Inc.

Opinion

[*Motion for Directed Verdict*]

SWEENEY, Chief Judge [*In full text*]: This proceeding arises out of a motion picture antitrust action, the complaint of which charges a conspiracy to deny first run pictures to the plaintiff. Counts 6 and 7 of the complaint further allege that the settlement of a prior similar action against all but two of these defendants (Twentieth Century-Fox Film Corporation and Republic Pictures Corporation) and the general release given by the plaintiff were obtained by fraud and duress. The court had granted a motion of the defendants to try counts 6 and 7 separately and prior to the substantive counts of the complaint, and it is this proceeding which is in issue now. The matter to be decided is the defendants' motion, presented at the close of the plaintiff's evidence, for a directed verdict pursuant to Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A.

[*General Release*]

All parties concede that the settlement negotiations were completed on June 5, 1952, with the payment to the plaintiff of $100,000, the execution of a general release by him, and the subsequent filing of a dismissal with prejudice. The plaintiff now alleges in substance the following.

Mr. Abe Montague, the general sales manager of Columbia Pictures Corporation (hereinafter referred to as Columbia) in New York, and a friend of Mr. Campopiano, the president and principal shareholder of the plaintiff corporation, initially telephoned Campopiano on March 12, 1952 and suggested discussing a possible settlement of

the then pending case. There followed a number of conferences between Montague and Campopiano during which it was finally agreed that the settlement should consist of a guaranteed supply of A pictures and the payment of $100,000. A meeting was arranged on May 23 with two of Columbia's lawyers who also agreed that the plaintiff was to have an adequate supply of first run A pictures without competitive bidding and that this agreement was to be reduced to writing. A delay was necessary to collect the money and draft the requisite papers and on June 2, 1952 Campopiano was again told to return the following day to close the matter. On June 3, Campopiano allegedly signed a general release, a memorandum of guaranties for pictures, and a notice of dismissal with prejudice and was told to return the following day to receive the checks which were not yet ready. When Campopiano came back to collect he was told that it was inadvisable to execute the memorandum of guaranties and that instead the plaintiff was to get oral assurances from all the defendants and as a token of their good faith a notice of dismissal without prejudice was to be filed. On June 5, Campopiano alleges, he signed a notice of dismissal without prejudice and initialled a memorandum incorporating the oral assurances. He was given checks totalling $100,000 and an unsealed envelope supposedly containing copies of these settlement papers which in fact, however, contained a copy of the notice of dismissal with prejudice and no copy of the "oral memorandum." Campopiano, without first inspecting its contents, deposited the envelope in a safe deposit box at the Irving Trust Company in New York where it remained until November 1954.

[*Alleged Fraud*]

The alleged fraud consists of the substituting of these papers and the failure to comply with the agreement to supply A pictures without bidding and, indeed, having had no intention of complying with these promises at the time they were made.

[*Evidence*]

The only evidence adduced on the first point was Campopiano's testimony and some self-serving documents prepared by him. In view of the fact that the general release which Campopiano admittedly executed, would bar a subsequent action in any event and since his statements at the trial were markedly different from his statements on depositions in a number of very crucial respects, I cannot and do not give this evidence very much weight.

On the second allegation of fraud the evidence indicates that the promise made was a promise to permit the plaintiff to compete on an equal basis with other exhibitors in Lawrence. Plaintiff's exhibit 11, a letter from Columbia's counsel to all defendants reads in part:

> "You are reminded of the oral assurances given Mr. Campopiano by representatives of each of the defendant distributors that the Capitol Theatre in Lawrence, Mass., will be afforded an equal opportunity to license pictures for first run exhibition."

Mr. Campopiano himself never interpreted the promise to be anything other than an assurance of equal opportunities to compete, as he indicated by his letter to R K O Radio Pictures Corporation (hereinafter referred to as R K O) dated June 14, 1952, defendants' exhibit T:

> "At a conference we held on June 4th at your office in New York you requested I write you a written request for the opportunity of bidding on your pictures for first run in the city of Lawrence, Mass. I hereby now make this request in writing with this letter. . . ."

Campopiano wrote similar letters to Columbia, defendants' exhibit C, and the two Warner Brothers corporations, defendants' exhibit U, requesting "the opportunity of bidding for pictures." The plaintiff has presented no evidence to show that he was not given the opportunity of competing as promised.

[*Burden of Proof*]

The burden of proof is on the plaintiff to show by clear and convincing evidence that the alleged promises were made with the present intention of not keeping them and that they were not kept. *Woods v. Barnes et al.*, 84 F. Supp. 155, 158. This burden the plaintiff has not sustained. The plaintiff has also failed to meet his burden of proof on the issue of the switching of the settlement papers.

[*No Evidence of Duress*]

The plaintiff introduced no evidence to support the allegations of count 7, that it or its agents were subjected to duress during the settlement negotiations.

[*Claims Barred*]

Accordingly and pursuant to Rule 41(b) of the Federal Rules of Civil Procedure counts 6 and 7 of the amended complaint are dismissed with prejudice. Since the plaintiff has not established its right to cancel the release, that instrument is valid and constitutes a bar to all claims prior to the date thereof, June 5, 1952 in favor of the parties named therein. Counts 1 through 5 are therefor dismissed with respect to all claims which accrued prior to June 5, 1952 against all defendants except T. C. F. Film Corporation, Twentieth Century-Fox Film Corporation and Republic Pictures Corporation. The remainder of the complaint shall stand.

[¶ 68,843] Independent Productions Corporation and IPC Distributors, Inc. v. Loew's Incorporated, et al.

In the United States District Court for the Southern District of New York. Civil 110-304. Filed October 18, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Pretrial Procedures—Motion for More Definite Statement.—A more definite statement filed by plaintiffs was held inadequate because it failed to specify the nature of the interstate commerce in which two individual defendants were engaged, either individually or in connection with their union positions; failed to define the relationship of the individual defendants with the motion picture industry, either personally or in connection with their union positions; and, as to both the individual and one of the corporate defendants, failed to specify in which of the alleged conspiracies referred to in the amended complaint the defendants participated, or the time during which each defendant participated in the alleged conspiracies. Also, the statement that the corporate defendant participated in a conspiracy with some or all of the defendants and co-conspirators named in the complaint was held indefinite.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.170.

For the plaintiffs: Rosston, Hort & Brussel, New York, N. Y., for Independent Productions Corp.; and George Brussel, Jr. (George Brussel, Jr., and Eugene G. King, of counsel), New York, N. Y., for IPC Distributors, Inc.

For the defendants: Cahill, Gordon, Reindel & Ohl (Oleg Peter Petroff, of counsel), New York, N. Y., for Radio Corp. of America; and Spivak & Kantor (Louis Kantor, of counsel), New York, N. Y., for Richard F. Walsh and John J. Francavilla.

For a prior opinion of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,615.

Opinion

RICHARD H. LEVET, District Judge [*In full text*]: Defendant Radio Corporation of America and defendants Walsh and Francavilla move for reargument of motions of said respective defendants, decided by memorandum of the undersigned dated July 28, 1957.

[*Procedural Background*]

The procedural background herein is as follows:

1. On or about September 20, 1956, the plaintiffs instituted this action for treble damages under the anti-trust laws of the United States and for injunctive relief. Subsequently, an amended complaint was filed.

2. By Notice of motion dated October 24, 1956, the defendants Walsh and Francavilla moved this court for an order under Rule 12(e) of the Federal Rules of Civil Procedure directing the plaintiffs to file a more definite statement of the following matters:

(a) The nature of the interstate commerce in which the defendants Richard F. Walsh and John J. Francavilla engaged.

(b) The relationship of said defendants to the motion picture industry.

(c) In which of the alleged conspiracies referred to in the amended complaint did these defendants participate.

(d) The time when or during which said defendants allegedly participated in the alleged conspiracy or conspiracies.

(e) The respects in which said defendants participated in the alleged conspiracies and with whom.

The defendant Radio Corporation of America made a motion for similar relief and the motions were jointly argued.

3. By an order filed February 11, 1957, Judge Palmieri granted the motions of said defendants and directed the plaintiffs to serve upon the attorneys for the defendant Radio Corporation of America and upon the attorneys for the defendants Richard F. Walsh and John J. Francavilla an amendment to the amended complaint, a more definite statement of the items referred to above as to each defendant.

4. On or about May 6, 1957, plaintiffs served upon said defendants an allegedly more definite statement.

5. By notice of motion dated May 13, 1957, defendants Walsh and Francavilla moved under Rule 12(e) of the Federal Rules of Civil Procedure to dismiss and strike the amended complaint as against them upon the grounds that the plaintiffs had failed and refused to serve a more definite statement in accordance with the said order of Judge Palmieri filed February 11, 1957. Radio Corporation of America made a similar motion. Both motions were denied by me on June 28, 1957 by memorandum decisions. The plaintiffs contended that the statement served by them on or about May 6, 1957 was sufficient since the defendants could answer the pleading as thus augmented.

[*Reargument Granted*]

The motion for reargument is granted. Upon such reargument, the motions are determined as hereinafter set forth.

I will first consider the motion of the defendants Richard F. Walsh and John J. Francavilla.

[*Interstate Commerce*]

The order of February 11, 1957, subdivision (a), required a more definite statement as to "The nature of the interstate commerce in which the defendants Richard F. Walsh, John J. Francavilla and Radio Corporation of America engaged." The more definite statement of May 6, 1957 as to defendants Walsh and Francavilla is as follows:

"(a) 1. The nature of the interstate commerce engaged in by defendant Richard F. Walsh is as follows: said defendant is acting as the chief executive officer of International Alliance of Theatrical State Employees and Moving Picture Machine Operators of the United States and Canada, a labor union representing almost all persons employed by producers and exhibitors of motion pictures throughout the United States and Canada in connection with the conditions of their employment; the amount of wages they receive, and the making of contracts with such producers and exhibitors throughout the United States concerning their working conditions, hours and salaries.

"2. Defendant John J. Francavilla is engaging in interstate commerce by virtue of the duties he performs as business agent of one of the locals of said Union."

This statement is inadequate as it fails to specify the nature of the interstate commerce in which the individual defendants themselves are engaged either individually or in connection with their union positions.

[*Relationship to Industry*]

Item (b) of the order requires a more definite statement as to "The relationship of each of said defendants to the motion picture industry."

Item (b) of the statement as to defendants Walsh and Francavilla is:

"(b) The relation of defendants Richard F. Walsh, John J. Francavilla and Radio Corporation of America to the motion picture industry is as set forth in paragraph (a) above."

This statement read in conjunction with item (a) of plaintiffs' statement is inadequate since it fails to define the relationship of defendants Walsh and Francavilla with the motion picture industry, either personally or in connection with their labor union positions.

[*Conspiracy*]

Item (c) of the order reads:

"(c) In which of the alleged conspiracies referred to in the amended complaint did each of these defendants participate."

Plaintiffs' statement is:

"(c) Defendants Richard F. Walsh, John J. Francavilla and Radio Corporation of America joined in the conspiracy described in paragraph 16 of the amended complaint in 1952 and became participants therein as alleged in paragraphs 19 through 22 of the amended complaint."

This statement multiplies rather than diminishes ambiguity. Paragraph 16 of the amended complaint may be termed the "blacklisting conspiracy." However, by the terms of the amended complaint, paragraph 16 appears to exclude these individual defendants. Do plaintiffs now intend to include such defendants? Moreover, the reference to allegations in paragraphs 19 through 22 generally does not suffice. If plaintiffs intend to allege only one conspiracy rather than two, they should so state. Item (c) does not at present in fact comply with the order.

[*Time of Participation*]

Item (d) of the order requires a more definite statement as to "The time when or during which each of said defendants allegedly participated in the alleged conspiracy or conspiracies." Item (d) of the statement is:

> "1. Defendants Richard F. Walsh and John J. Francavilla participated in the alleged conspiracy beginning in 1952 down to the present time."

Which "conspiracy" is not stated. The time should be fixed for each conspiracy in which these defendants are alleged to be connected. Hence, this is insufficient compliance unless plaintiffs intend to charge only one conspiracy. If so, plaintiffs should so state.

Item (e) of the order deals with "The respects in which each of said defendants participated in the alleged conspiracies and with whom." Item (e)1. of the statement is:

> "(e)1. Defendant Richard F. Walsh and John J. Francavilla participated in the alleged conspiracy by preventing plaintiffs and each of them from producing, distributing and exhibiting Salt of the Earth and by making the production, distribution and exhibition thereof difficult and unremunerative in that they committed the overt acts described in paragraph 21 of the amended complaint together with some or all of the defendants and co-conspirators named in the amended complaint."

The statement is no more definite than the pleading.

[*Other Rulings*]

As to the defendant Radio Corporation of America, without repeating the items of the order, the statements as to this defendant are as follows:

> "(a)3. Defendant Radio Corporation of America is engaged in interstate commerce by receiving across state lines motion picture film negatives, processing the same for sound in various parts of the United States, shipping such processed film throughout the United States and manufacturing and selling and/or leasing motion picture film sound processing equipment throughout the United States."
>
> "(b) The relation of * * * Radio Corporation of America to the motion picture industry is as set forth in paragraph (2) above."
>
> "(c) * * * Radio Corporation of America joined in the conspiracy described in paragraph 16 of the amended complaint in 1952 and became [a] participant(s) therein as alleged in paragraphs 19 through 22 of the amended complaint."
>
> "(d)2. Defendant Radio Corporation of America participated in the alleged conspiracy during 1953.
>
> "(e)2. Defendant Radio Corporation of America participated in the alleged conspiracy by interfering with and preventing plaintiffs from processing 'Salt of the Earth' for sound and by refusing to process said film for sound without valid reason or justification other than the desire to prevent said film from being produced, distributed and exhibited, and to restrain plaintiffs from carrying on their business of producing, distributing and exhibiting motion pictures. Defendant Radio Corporation of America participated in the conspiracy with some or all of the defendants and co-conspirators named in the complaint."

In my opinion, the statements to Radio Corporation of America as to items (a) and (b) are adequate; (c) is little, if any, more enlightening to defendant Radio Corporation of America than the other defendants here concerned; (d) is equally lacking unless plaintiffs intend to allege only one conspiracy. If so, they should so state. The statement in (e) that this defendant "participated in the conspiracy with some or all of the defendants and co-conspirators named in the complaint" is woefully indefinite.

[*Issue*]

It might be well to observe at this point that this is not a motion to dismiss a complaint on the ground that it fails to state a claim. Therefore, the cases cited by counsel with respect to the adequacy of pleadings have no direct bearing here. The sole ques-

tion, as I now see it, is whether the statement is in accordance with the order of February 11, 1957. The last sentence of Rule 12(e) of the Federal Rules of Civil Procedure provides that the court, when the order is not obeyed, may strike the pleading to which the motion is directed or make such other order as it deems just.

Dismissal is rarely justifiable unless the parties have been given another opportunity to serve a proper pleading. *2 Moore's Federal Practice,* Vol. 2, p. 2310; see *Seaboard Midland Petroleum Corp. v. Socony Vacuum Oil Co.* (S. D. N. Y. 1941) 5 FR Serv. 12e.54, Case 1.

[*More Definite Statement*]

Each motion is therefore granted to the extent that the plaintiffs are directed to serve upon the defendants Richard F. Walsh and John J. Francavilla and upon the defendant Radio Corporation of America a more definite statement as above specified and in accordance with the February 11, 1957 order of Judge Palmieri. Such statement shall be served within ten days after entry and service of copies of respective orders herein and without prejudice to motions by said defendants to dismiss the complaint herein as to said defendants in the event of plaintiffs' failure to serve such statement.

Settle orders on notice.

[¶ 68,844] A. B. C. Distributing Company v. Distillers Distributing Corporation, et al.

In the California District Court of Appeal, Second District, Division Two. Civ. No. 22084. Dated October 4, 1957.

Appeal from a judgment of the Superior Court of Los Angeles County. ARTHUR CRUM, Judge. Affirmed.

California Cartwright Act

Combinations and Conspiracies Under State Laws—Practices—Refusal To Deal—Refusal To Renew Distributorship—Legality.—A distiller of alcoholic beverages did not violate the California Cartwright Act when it refused to renew a distributorship contract with a wholesaler because the wholesaler intended to distribute the products of one of the principal competitors of the distiller. Unless the distiller had agreed with another party not to deal with the wholesaler, there was no restraint of trade. The fact that the wholesaler had contracted with one of the distiller's competitors to distribute the competitor's products also was not sufficient to render the refusal to proceed with the wholesaler a monopoly. From the mere fact of the distiller's refusal to sell to the wholesaler, no inference of unlawful agreement can arise for the reason that a producer may lawfully select his own customers. Statistics that the distiller distributed not in excess of seven per cent of the nation's consumed distilled spirits and not over three per cent of those consumed in California disproved that the distiller was a monopoly. Also, an importer had the right to refuse to distribute its products through the wholesaler, and there was no evidence of a conspiracy between the distiller and the importer to restrain trade. The wholesaler had no perennial right to deal with the customers to whom it had sold the distiller's products.

See Combinations and Conspiracies, Vol. 1, ¶ 2337.

Combinations and Conspiracies Under State Laws—Practices—Exclusive Dealing—Legality.—In a wholesaler's action charging that a distiller of alcoholic beverages unlawfully refused to renew its distributorship contract, the question whether the provisions of the contract illegally prevented the wholesaler from purchasing and selling products of competitors of the distiller was held to be immaterial. The wholesaler approved the questioned provisions of the contract when it signed the contract and subsequently when it demanded a renewal of the contract. There was no showing that the wholesaler suffered injury by reason of the questioned provisions of the contract.

See Combinations and Conspiracies, Vol. 1, ¶ 2323.

Combinations and Conspiracies Under State Laws—Procedure—Right to Sue—Right to Damages for Antitrust Violations.—The Cartwright Act authorizes a person injured in his business or property by reason of anything forbidden by the Act to recover twofold the damages sustained, but the right to double damages is not exclusive. The Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law. Therefore, under the common law of California, combinations entered into for the purpose of restraining competition and fixing prices are unlawful, and one whose business has been injured by the activities of a combination in restraint of trade is entitled to damages, not only under the Cartwright Act, but also under the common law. Also, in the absence of injury, a violation of the Act is not actionable by a private party. In the instant case, the plaintiff failed to prove that it was injured by the non-renewal of its distributorship contract or by certain provisions of such contract.

See Combinations and Conspiracies, Vol. 1, ¶ 2403.

Fair Trade—Alcoholic Beverage Industry—Legality of Resale Price Fixing.—A distiller of alcoholic beverages did not violate the Federal or California fair trade act when it fixed no prices upon its products except the prices at which it sold to a wholesaler and the prices at which the wholesaler sold to retailers. The distiller had specified that the retail prices to be charged by the wholesaler to retailers should be in accordance with the Fair Trade Act of California. Such control by the distiller over resale prices was in accordance with the California Alcoholic Beverage Control Act, which prevails in the event it should conflict with other statutes.

See Fair Trade, Vol. 1, ¶ 3480.05.

For the appellant: J. Albert Hutchinson.

For the respondents: Lawler, Felix & Hall and John M. Hall.

Action for an accounting, damages and injunctive relief. Judgment of dismissal affirmed.

MOORE, Presiding Justice [*In full text except for omissions indicated by asterisks*]: Appeal from a judgment or order of dismissal entered after motion for nonsuit had been granted and from the judgment for costs.

[*Plaintiff*]

Plaintiff is a licensed importer. It purchases from manufacturers and other distributors alcoholic beverages for resale to retail dealers.

[*Defendants*]

Defendant Distillers Distributing Corporation, herein referred to as "Distillers," is, by virtue of successive mergers, successor to Calvert Distillers Corporation. Both are herein referred to as "Calvert." Defendant Chivas Brothers Import Corporation is referred to as "Chivas."

[*Causes of Action*]

There are five causes of action which compositely seek an accounting, damages and injunctive relief by reason of alleged unfair competition and, also, damages for alleged breach of contract. Count 1 charges an unlawful restraint of trade and unfair competition on the part of both defendants; counts 2 and 4 seek declarations of plaintiff's rights as to each of the defendants but both counts were on motion of plaintiff dismissed.[1] Count 3 alleges damages caused by Calvert by reason of its repudiation of its written contract; count 5 alleges damages caused by Chivas for breach of its oral agreement. The gravamen of the several counts "is the appropriation of plaintiff's business by defendants and certain of their favored customers, pursuant to a pre-existing and continuing combination and conspiracy to restrain trade in, and to monopolize the distribution of, alcoholic beverages—in general and in plaintiff's area of operation

[1] Plaintiff urges that the dismissal was forced by the court's stated intention to try the declaratory relief issues first and in the absence of the jury. Plaintiff urges error in the ruling of the court in view of the decision of the Supreme Court in *State Farm etc. Ins. Co. v. Superior Court*, 47 Cal. 2d 428, 431 [304 P. 2d 13], filed after the trial in the instant action. But it is not necessary to pass upon that question in view of our conclusion. Even if the declaratory relief issues had been presented to the jury and they had returned a verdict declaring that plaintiff had an option to renew the contract, such verdict would have been patently erroneous. Therefore, even if the court's ruling was erroneous, plaintiff suffered no prejudice thereby.

—and the deprivation of profits and good will by means of wrongful refusal to deliver supplies for resale in accordance with contracts between the immediate parties."

COUNT 1

[*Activities of Parties*]

Count 1 alleges the corporate existence of Distillers and its authority to do business in California; its successorship to Calvert by way of merger and declares that the transactions alleged were had with Calvert and Chivas; that plaintiff is the holder of all licenses necessary to permit it "to engage in the wholesale distributing of alcoholic beverages within the State of California"; and is so engaged in such business principally within the county of Los Angeles; that defendants are licensed to be and "are engaged in the manufacture, importation, exportation and sale of alcoholic beverages in foreign and interstate commerce within the United States" and to the extent licensed have so engaged in such lines in the State of California; that defendants do not manufacture distilled spirits within California; that defendants are not authorized to conduct or participate in transactions respecting alcoholic beverages "with persons licensed to sell alcoholic beverages at retail to unlicensed persons."

That defendants import and manufacture a large number of "distilled spirits products" of the varieties customarily purchased by the consuming public and competitive with defendants' principal competitors as to variety, quality and price range; that such products are sold in containers bearing labels and trade-marks owned and controlled by defendants and unavailable from any other source; that defendants distribute and sell a substantial proportion of all the potable distilled spirits sold and consumed in the United States; that certain of said products have been advertised and have customer acceptance whereas others have not been so advertised; that there is a tendency of the purchasing public to continue the use of products known to it and a reluctance to accept new products of the same general kind as a substitute therefor; that from time to time certain of defendants' products have been in short supply and have been allocated to their wholesale customers by some means unknown to plaintiff; that defendants have adopted the policy of distributing their products "as a group sometimes known as each respective defendant's 'line,' indifferently to the demand, customer acceptance, quality, price and competitive advantage or particular products" and have attempted to require the purchase of unpopular products as a condition to the purchase or allocation of acceptable products and have required their distributors to maintain in advance large stocks; "that at all times defendants have determined, declared and controlled the prices from time to time to be charged by them of their immediate purchasers and by their purchasers upon resale thereby by means of contract provisions, implied agreements, arrangements, recording, and causing the recording thereof, and by other means."

That at all times defendants distributed their products through licensed wholesale distributors; that defendants employed salesmen known as "specialty" men who visited customers of the distributors, solicited orders and submitted the same to the distributors for delivery; that for this purpose defendants sought to discover the identity of the customers of such distributors.

[*Distributorship*]

That prior to 1945, one Moyer was doing business as A. B. C. Distributing Company and was the distributor for Calvert; that during 1945 plaintiff entered into negotiations with Moyer "for the purchase of the business, stocks, good will, accounts, customer lists and physical properties and distributorships of Moyer"; that during such negotiations, in response to plaintiff's inquiry, "defendants expressly and affirmatively assured and represented to plaintiff that, in the event of the purchase of said business of Moyer by plaintiff, said defendants would appoint plaintiff their distributor in place and instead of Moyer and would continue the distribution of their said products by and through plaintiff as such distributor"; that on July 2, 1945, plaintiff purchased the business of Moyer and on the same day entered into an oral contract of distributorship with "said defendants"; that thereafter the contract was renewed from time to time to and including January 21, 1952; that on January 1, 1951, plaintiff entered into a similar oral distribution agreement with defendant Chivas for the distribution of Chivas products; that the Chivas contract was renewed, from time to time, to and including February 5, 1954; that both contracts have been duly performed by plaintiff.

That plaintiff, at its own expense, used its best efforts to increase the volume of sales of defendants' products and "to this end . . . expanded its facilities, increased and numbers of its employees and established additional suitable facilities"; that the purchase of defendants' products by plaintiff's customers progressively increased in volume and amount, "exceeding on the 1st day of January, 1952, annual purchases from plaintiff of defendants' products in excess of fifteen thousand five hundred (15,500) cases at sales prices in excess of plaintiff's cost of acquisition of One Hundred Thousand Dollars ($100,000) per year; and would have continued to so progressively increase in volume and amount in the absence of defendants' wrongful conduct, as hereinafter set forth."

[*Alleged Combination*]

That defendants are, and each of them, is "an affiliate and member of a combination of in excess of twenty corporations . . . engaged in the importation, manufacture and sale of alcoholic beverages in foreign and interstate commerce in the United States and in trade and commerce within the State of California"; that such combination "imports, manufactures and sells . . . in excess of twenty-five per cent (25%) of all alcoholic beverages" and that the aggregate gross sales of the alleged combination are in excess of $700,000,000 per year; that each member of the combination is in competition with other persons and in "pretended competition" with each of the other members of the combination; that the combination "is organized, carried out and managed by stock ownership, common directors and officers, planned common courses of action, conferences, committees, correspondence and exchange of information"; that each member of the combination was "created and acquired by Distillers Corporation-Seagrams, Ltd. . . . and is owned by Distillers Corporation-Seagrams, Ltd. directly and through subsidiary corporations of said combination."

That the members of the combination, including the defendants, "have combined, agreed, conspired and acted together as a combination of capital, skill and acts for the purpose . . . and effect of unfairly competing with other persons engaged" in the same business, and of "restraining, restricting and hindering competition, trade and commerce therein by means of said combination"; that this has been accomplished by placing the following conditions upon the sale to, and resale by, distributors such as plaintiff: (1) allocation of customers; (2) allocation of territories; (3) requirements for minimum purchases and stated percentages of the distributor's aggregate business in the products of members of the combination, and (4) the enforcement of agreements, expressed and implied, "requiring distributors and other purchasers to give notice to members of said combination in advance of dealing in any alcoholic beverage product produced or sold by any person other than a member of said combination."

[*Termination of Distributorship*]

That on July 1, 1951, "defendants wrongfully demanded that plaintiff surrender its said distributorship with respect to substantial areas of said county in which plaintiff was then defendants' said distributor . . . and permit competitors of plaintiff in said areas to appropriate plaintiff's customers . . . as a condition to the continuation of said distributorship in other areas of said county"; that they demanded that unless plaintiff acceded to their proposal, defendants would repudiate the contract. That thereupon plaintiff did accede to such demand and on January 21, 1952, Calvert required the execution of an instrument in writing designating the areas in which plaintiff would continue as distributor and providing that plaintiff would be sole distributor in those areas for a "period of one year from and after the 1st day of March, 1952, and subject to renewal from year to year, for like periods, at the option of plaintiff." That plaintiff complied with the demand and executed such instrument.

That prior to March 1, 1953, "plaintiff duly exercised its said option to renew said distributorship" whereupon Calvert presented to plaintiff for execution a distributorship agreement dated February 5, 1953, which will hereinafter be designated as the 1953 contract; that about June 1, 1953, Calvert allowed others of its distributors to operate in the territory assigned to plaintiff; that the contract contained a provision requiring plaintiff to "spend no less than 22.1 per cent of its time and effort" and "of the money spent by it on advertising and sales promotion" in the sale and promotion of Calvert products; that this provision was intended by Calvert to prevent plaintiff from dis-

tributing the products of other manufacturers and as a means of requiring minimum purchases of Calvert's products; that the contract provided also that plaintiff "will not undertake the distribution of any additional brands of alcoholic beverages without giving Calvert 90 days' written notice of its intention so to do" and that "in the event this contract is not renewed" plaintiff "agrees that within 30 days after March 1, 1954, it will return to Calvert at its invoice price all of the Calvert merchandise remaining in its inventory"; that the foregoing provisions were intended to prevent plaintiff from dealing in the products of persons other than members of the alleged combination.

[*FTC Proceeding*]

That on November 19, 1953, defendants stipulated with the United States Federal Trade Commission in a proceeding pending before that agency entitled "In the Matter of Distillers Corporation-Seagrams, Ltd. and its subsidiaries" (1) that defendants (respondents in that proceeding) had required its distributors to give notice in advance of an intention to deal in products of defendants' competitors and (2) that the Commission might make its order declaring such to be "unfair methods of competition" and that defendants "cease and desist" from such practices; that the order pursuant to the stipulation was entered March 2, 1954.[2]

[*Refusal To Sell*]

That on January 28, 1954, plaintiff advised Calvert that it had entered into negotiations with a competitor of Calvert looking toward the distribution of the products of such competitor in addition to those of Calvert; that thereupon Calvert notified plaintiff that it repudiated its 1953 contract and the alleged option to renew it after March 1, 1954; that Calvert gave as its reason for such repudiation plaintiff's intention to distribute the products of a competitor; that thereafter Calvert refused to fill orders placed with it by plaintiff after March 1, 1954; that this repudiation had the effect of restraining competition in alcoholic beverages in violation of state and federal laws; that thereafter "defendants commenced a systematic course of solicitation of orders for alcoholic beverages of plaintiff's customers"; that in such solicitation defendants used confidential information previously obtained from plaintiff; that plaintiff has been damaged by this course of conduct.

* * *

Was Refusal to Deal With Plaintiff Lawful?

[*State Antitrust Law*]

The Cartwright Anti-Trust Law, Statutes of 1907, chapter 530, was incorporated into the Business and Professions Code, sections 16700 through 16758, in 1941. Section 4[3] of the federal Clayton Act (15 U. S. C. A. § 15) is substantially like section 16750,[4] Business and Professions Code, which authorizes a person injured in his business or property by reason of anything forbidden to recover twofold the damages sustained. But the right to double damages is not exclusive. The local statute "merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law. Thus, under the common law of this state combinations entered into for the purpose of restraining competition and fixing prices are unlawful . . . One whose business has been injured by the activities of a combination in restraint of trade is entitled to damages, not only under the Cartwright Act (Bus. & Prof. Code, § 16750), but also under the common law. (Civ. Code, § 3281, see cases cited in 36 Am. Jur. 660, n. 9.)" (*Speegle v. Board of Fire Underwriters* [1946-1947 Trade Cases ¶ 57,493], 29 Cal. 2d 34 at 44 and 46 [172 P. 2d 867].) We must therefore inquire whether the proof presents substantial evi-

[2] This order, herein referred to as the "consent decree," was refused admission into evidence at the trial. Plaintiff's claim of error in this respect is considered below.

[3] Clayton Act, section 4, 15 U. S. C. A. § 15.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[4] Business and Professions Code, section 16750.

"Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where services may be obtained, without respect to the amount in controversy, and to recover twofold the damages sustained by him, and the costs of suit."

dence of an unreasonable restraint of trade on the part of defendants.

[*Non-Renewal of Contract*]

Calvert's alleged reason for not renewing its contract because plaintiff was taking on the line of Schenley, one of Calvert's principal competitors, is not sufficient to make it guilty of antitrust law violation. Where a defendant had refused to renew a contract with the plaintiff, the plaintiff charged a violation of section 1 of the Sherman Act and section 3 of the Clayton Act. It contended that the defendant had declined to renew their contract because plaintiff had refused to give up the handling of a competing product. A judgment for plaintiff was reversed, because "plaintiff had no tenure, no right to renewal of his contract as master dealer. Defendant on the other hand had an absolute right either to renew or not to renew it, and the exercise by it of that right did not, it could not form the basis of a suit under section 15." (*Hudson Sales Corp. v. Waldrip* [1954 TRADE CASES ¶ 67,694], 211 F. 2d 268. See *Nelson Radio & Supply Co. v. Motorola* [1952 TRADE CASES ¶ 67,386], 200 F. 2d 911.)

Plaintiff's position is not unlike that of one Brosious who sued Pepsi-Cola Company and its distributor for treble damages under the antitrust act after he had purchased such product from Cloverdale for six years. When Cloverdale conditioned its sale of Pepsi-Cola to Brosious upon the latter's agreement to sell only Pepsi-Cola, and after the Pepsi-Cola Company refused to approve Cloverdale's conduct, Brosious charged a conspiracy between the producer and its distributor. But the court found no evidence that would support the finding of a conspiracy to violate the antitrust laws. "It is the right, long recognized of a trader engaged in a strictly private business, freely to exercise his own independent discretion as to the parties with whom he will deal." (*Brosious v. Pepsi-Cola Co.* [1946-1947 TRADE CASES ¶ 57,459], 155 F. 2d 99, 102.)

Other federal courts have announced the same doctrine with clarity and finality.

"In general, it seems a necessary part of our business mores for a manufacturer to have free selection in dealing with its distributors. Upon the recognition of this fact, why may he not refuse to do business with one who deals in a closely competitive product?" (*Camfield Mfg. Co. v. McGraw Electric Co.* (Del., 1947) [1946-1947 TRADE CASES ¶ 57,570], 70 F. Supp. 477.)

"Every manufacturer has a natural and complete monopoly of his particular product, especially when sold under his own private brand or trade name." (*Schwing Motor Co. v. Hudson Sales Corp.* (Md., 1956) [1956 TRADE CASES ¶ 68,292], 138 F. Supp. 899, 902.)

"We have not yet reached the stage where the selection of a trader's customers is made for him by the government." (*Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.* (C. C. A. 2, 1915), 227 F. 46, 49.)

"Likewise a wholesale dealer has the right to stop dealing with a manufacturer 'for the reasons sufficient to himself.'" (*Federal Trade Com. v. Raymond Bros.-Clark Co.* (1924), 263 U. S. 565 [44 S. Ct. 162, 68 L. Ed. 448, 30 A. L. R. 1114].)

"It requires no argument to demonstrate that appellant [plaintiff] had the right to decline to sell any but its own product upon the leased property." (*Associated Oil Co. v. Myers* (1933), 217 Cal. 297, 306 [18 P. 2d 668].)

[*No Agreement*]

From the foregoing authorities and the pronouncements of the several courts, it is clear that unless Calvert had agreed with another party not to deal with plaintiff there was no restraint of trade in Calvert's refusing to use plaintiff as its distributor. The fact that plaintiff had contracted with one of Calvert's competitors to distribute the latter's products also, was not sufficient to render the refusal to proceed with plaintiff a monopoly. (*Rolley, Inc. v. Merle Norman Cosmetics* [1955 TRADE CASES ¶ 67,937], 129 Cal. App. 2d 844, 851 [278 P. 2d 63, 282 P. 2d 991].) From the mere fact of Calvert's refusal to sell plaintiffs, no inference of unlawful agreement can arise for the reason that a producer "may lawfully select his own customers." (*Johnson v. J. H. Yost Lbr. Co.* [1940-1943 TRADE CASES ¶ 56,088], 117 F. 2d 53, 61; *Theatre Enterprises v. Paramount Distrib. Corp.* [1954 TRADE CASES ¶ 67,640], 346 U. S. 537, 541 [74 S. Ct. 257, 98 L. Ed. 273]; *Speegle v. Board of Fire Underwriters, supra,* 29 Cal. 2d 34, 38. See *Webster Motor Car Co. v. Packard Motor Car Co.* [1955 TRADE CASES ¶ 68,171], 135 F. Supp. 4, 8; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons* [1950-1951 TRADE CASES ¶ 62,737], 340 U. S. 211, 213 [71 S. Ct. 259,

95 L. Ed. 219].) Conspiracy was proved in the *Kiefer-Stewart* case by showing the conferences between the officials of Seagram and Calvert, "concerning sales of liquor to" Kiefer-Stewart and sales were made to other wholesalers who abided by the conditions but no shipments were made to Kiefer-Stewart. It was proved that the agreement *worked an injury to the public.*

[*Lack of Monopoly*]

The statistics that from 1951 to 1954, inclusive, Calvert distributed not to exceed 7 per cent of the nation's consumed distilled spirits and not over 3 per cent of those consumed in California disprove that it was a monopoly. Judge Hand held that "it is doubtful whether sixty or sixty-four per cent would be enough and certainly thirty three per cent is not." (*United States v. Aluminum Co. of America* [1944-1945 TRADE CASES ¶ 57,342], 148 F. 2d 416, 424.)

[*Fair Trade Pricing*]

Further to show that Calvert did not act violative of either the federal or state fair trade act, it fixed no prices upon its product except those which it sold to plaintiff and the prices at which the latter sold to retailers. In its 1953 contract with plaintiff, it specified the retail prices to be charged by plaintiff to retailers should be in accordance with the Fair Trade Act of California. Such control by Calvert over resale prices to be charged by plaintiff is in accordance with the law. (Cal. Alcoholic Beverage Control Act, Bus. & Prof. Code, §§ 24750, 24756.) The cited act prevails in the event it should conflict with other statutes. (*Nelson v. Reilly* [1948-1949 TRADE CASES ¶ 62,326], 88 Cal. App. 2d 303, 306 [198 P. 2d 694].)

[*Legality of Contract*]

With meticulous severity plaintiff arrays three paragraphs (2, 9 and 12)[5] of the 1953 contract and seeks to have them declared illegal. The purpose of this action is to determine whether plaintiff by defendants' refusal to extend the term of the 1953 contract suffered detriment and whether the refusal to renew the contract caused damage to the plaintiff. Plaintiff has striven valiantly to establish the affirmative of both questions. Now, whether paragraph 2 was designed to prevent plaintiff from purchasing and selling the products of other manufacturers, competitors of Calvert, or whether paragraph 9 was used to prevent plaintiff from purchasing and selling the products of other manufacturers in competition with Calvert, or whether paragraph 12 was a punitive and unlawful covenant running with the goods is immaterial. Plaintiff approved those paragraphs along with the others when it signed the contract in 1953 and subsequently when it demanded a renewal of such contract. There is no showing that plaintiff suffered injury by reason of such paragraphs from March 1952 to March 1954.

[*Damage*]

Moreover, the law is against plaintiff's contention. In the absence of injury to the plaintiff, a violation of the anti-trust statute is not actionable by a private party. (*Wolfe v. National Lead Co.* [1955 TRADE CASES ¶ 68,094], 225 F. 2d 427, 432; *Karseal Corp. v. Richfield Oil Corp.* [1955 TRADE CASES ¶ 68,020], 221 F. 2d 358, 362; *Sargent v. National Broadcasting Co.,* 136 F. Supp. 560, 566.)

Plaintiff contends that Calvert misused information it gained from plaintiff during the tenure of their contract. The record discloses no instance in which Calvert used any information gained from plaintiff except when it used information relative to its own business and the information was used with plaintiff's consent. (See *Alex Foods, Inc. v. Metcalfe,* 137 Cal. App. 2d 415, 427 [290 P.

[5] "2. Distributor hereby accepts the appointment as such distributor and agrees to sell and distribute to retail licensees such alcoholic beverages within the designated territory. Distributor warrants that during the year ending December 31st, 1952, the proportion of its total sales of alcoholic beverages represented by Calvert products was 22.1 per cent. Distributor agrees that during the term of this contract, it will spend no less than 22.1 per cent of its time and effort on the sale of Calvert products and not less than 22.1 per cent of the money spent by it on advertising and sales promotion shall be expended on Calvert products."

"9. Distributor represents that at the time of the execution of this agreement, it is acting as a distributor of the brands of alcoholic beverages listed on Exhibit B attached hereto.

"Distributor agrees that it will not undertake the distribution of any additional brands of alcoholic beverages without giving Calvert 90 days' written notice of its intention so to do."

"12. In the event this contract is not renewed, Distributor agrees that within 30 days after March 1, 1954, it will return to Calvert at its invoice price all of the Calvert merchandise remaining in its inventory."

2d 646].) The solicitation of business from those concerns made known to Calvert through information furnished by plaintiff after the distributorship had been terminated "is not unlawful and does not constitute . . . trade secrets." (*J. C. Millett Co. v. Park Tilford Distillers Corp.*, 123 F. Supp. 484, 496.)

Plaintiff was not injured in any way by Calvert's use of information gained from plaintiff.

[*Right to Customers*]

Plaintiff asserts an exclusive perennial right to deal with customers to whom it had sold Calvert's products during the period of the contract. No such right is upheld by law. When plaintiff's 1953 contract terminated, Calvert was at liberty to advise any other distributor with reference to retailers within his area. There is "no vested and indefeasible right to monopolize customers." (*Corica v. Ragen*, 140 F. 2d 496, 498.) Customers are not things to be owned by anyone. They are the life-stream of trade and commerce; are free to choose for themselves and to be chosen by those whose only motive is to advance their own welfare and to do no harm to others. So long as his competition is fairly and legally conducted and he is not restrained by negative covenants, a former employee is free to solicit business from his former employer's customers. (*Aetna Building Maintenance Co. v. West*, 39 Cal. 2d 198, 203 [246 P. 2d 11]; *Avocado Sales Co. v. Wyse*, 122 Cal. 627, 634 [10 P. 2d 485].)

[*Alcoholic Beverage Control Act*]

Plaintiff contends that Calvert violated the Alcoholic Beverage Control Act (Bus. & Prof. Code, § 23366) by selling its products directly to retailers. Not only is such claim negatived by the declarations of the complaint but there is no evidence that Calvert sold its products to retailers, and if Calvert's employees had made an illegal sale to a retailer, such illegality would not justify an action against Calvert unless it was the proximate cause of injury to plaintiff. It will be readily conceded that a sale by Calvert made after plaintiff's relations with Calvert had terminated could not have proximately caused injury to plaintiff.

[*Conspiracy Not Shown*]

Inasmuch as we have concluded that Calvert in refusing to sell to plaintiff had not acted in violation of any anti-trust statute, it follows that Chivas also had a right to refuse to distribute its products through plaintiff. There is no evidence of an unlawful conspiracy, as plaintiff contends, between Chivas and Calvert. Both corporations were justified in distributing their products through the same distributors. There is no evidence that they conspired unlawfully to restrain trade. There was no error in granting the nonsuit as to Chivas.

Judgment affirmed.

Fox, J., and ASHBURN, J., concurred.

[¶ 68,845] Socony Mobil Oil Company, Inc. v. Louis Tavares, Sr., d.b.a. Warren Filling Station.

In the Supreme Court of Rhode Island. Equity No. 2598. Dated October 23, 1957.

Rhode Island Fair Trade Act

Fair Trade—Fair Trade Enforcement Suits—Preliminary Injunction—Appeal—Suspension of Fair Trade Prices—Mootness.—On an appeal from a preliminary injunction enjoining a gasoline station from selling an oil company's gasoline below its fair trade prices, the Rhode Island Supreme Court refused to answer questions certified to it because the oil company's suspension of its fair trade prices for gasoline rendered the questions moot.

See Fair Trade, Vol. 1, ¶ 3350.

For the complainant: Francis I. McCanna; Tillinghast, Collins & Tanner; Harold E. Staples, and Edwin H. Hastings, all of Providence, R. I.; Herman J. Schmidt, John J. Scott, and H. Francis Shattuck, Jr., all of New York, N. Y.; H. G. Gilbert, Boston, Mass.

For the respondent: Leo Patrick McGowan and John P. Bourcier, Providence, R. I.

Opinion

[*Mootness*]

Per Curiam [*In full text*]: This is a bill in equity to enjoin the respondent from selling gasoline bearing the complainant's trade name below the prices fixed in a contract between the complainant and another dealer. The respondent has not signed a similar contract but he has knowledge of the prices fixed in the signed contract. After a hearing in the superior court a preliminary injunction was granted, and the parties then signed an agreed statement of facts and asked that court to certify to us three questions. Such request was granted.

Since the case was heard here, complainant has furnished us with a copy of a notice issued to all its gasoline dealers in this state that it has suspended its "fair trade" prices for gasoline in this state. In these circumstances we are of the opinion that between these parties the questions certified have become moot and, such being the case, we decline to answer them.

The papers in the case are ordered sent back to the superior court.

[¶ 68,846] Bowden Concrete Products, Inc., and J. E. Bowden v. Besser Company.

In the United States Court of Appeals for the Sixth Circuit. No. 13071. Decided and filed October 31, 1957.

Appeal from the United States District Court for the Western District of Tennessee, Western Division. Boyd, District Judge.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Injunctive Decree—Effect of Decree on Machinery Lease.—A trial court, in entering a judgment against a lessee of concrete block-making machinery for rental payments owed to the lessor under their lease agreement, did not erroneously disregard the effect of a decree entered against the lessor in a Government antitrust action. The decree in the Government action had the effect of modifying the lease agreement by giving the lessee an option to cancel it within a specified period of time and a further option to purchase the leased machinery as mutually satisfactory to the parties. The lessee did not exercise the option to cancel the lease, and, although the lessee sought to purchase the leased machinery, no mutually satisfactory terms of purchase were agreed upon by the parties. Therefore, the rights of the parties were properly determined by the terms of the original lease agreement.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.275, 8233.800.

For the appellants: Argued by Caruthers Ewing, Memphis, Tenn., and Irving W. Coleman, Northampton, Pa. (Caruthers Ewing, Memphis, Tenn., and Irving W. Coleman, Northampton, Pa., on brief).

For the appellee: Argued by John M. Heiskell, Memphis, Tenn. (John M. Heiskell, Memphis, Tenn., and Carl R. Henry, Alpena, Mich., on brief).

Before Simons, Chief Judge, Martin and Stewart, Circuit Judges.

[*Appealed Judgment*]

Per Curiam [*In full text*]: This is an appeal from a judgment of the United States District Court for the Western District of Tennessee for rental payments which the court held were owed by the appellants to the appellee under a contract of lease.

[*Lease*]

The contract in question was executed by the parties in 1949. Under its provisions the appellee Besser Company leased to the appellants certain machinery for the manufacture of concrete blocks. The lease was for a five year term at a stipulated monthly rental computed on the basis of appellants' production.

[*Government Antitrust Decree*]

Shortly before the execution of this lease the United States had instituted proceedings against Besser and others in the United States District Court for the Eastern District of Michigan, charging a conspiracy to restrain and monopolize interstate com-

merce in concrete block making machinery in violation of the Sherman Act. These proceedings resulted in a judgment against Besser and others in 1951, holding that they had violated the antitrust laws [1950-1951 TRADE CASES ¶ 62,773], 96 F. Supp. 304. This judgment was affirmed by the United States Supreme Court in 1952. [1952 TRADE CASES ¶ 67,280] 343 U. S. 444. To effectuate its judgment, the district court in Michigan required Besser to notify each of its lessees that the lessee might, at its option, (1) terminate its lease agreement on or before a specified date, or (2) continue under the terms of the lease, or (3) enter into an agreement to purchase the leased machinery "as mutually satisfactory to the parties concerned."

In compliance with this decree Besser notified the appellants in writing of these options available to them. The appellants did not exercise their option to cancel the lease, but continued to make monthly payments under the lease agreement. They did, however, advise Besser that they wished to purchase the machinery. Negotiations looking towards the purchase of the machinery were carried on intermittently for a long period, but the parties did not agree upon mutually satisfactory terms of purchase.

[*Expiration of Lease*]

In the meantime the five-year term of the lease expired, and shortly thereafter the appellants wrote a letter to Besser stating,

> "At this time we would like to advise you that it is our desire to discontinue the lease, and ask that you give us instructions to return the equipment to your plant or some other designated point that you might make."

The machinery was not returned to Besser, however, but remained in the possession of the appellants, who continued to use it.

The lease agreement provided:

> "If this agreement expires and the Equipment is not returned by User or retaken by Besser then User shall continue to make regular monthly reports and payments as called for herein."

The appellants made no payments after the lease expired in 1954, and Besser, with the consent of the district court in Michigan, filed this action in the Tennessee district court asking judgment for unpaid rentals after 1954.

[*Effect of Decree*]

The appellants contend that in entering judgment against them in this case the district court erroneously disregarded the effect of the decree entered by the Michigan district court in the anti-trust proceedings brought by the United States. We do not agree. So far as these parties were concerned the effect of the anti-trust decree was to modify the lease agreement by giving the appellants an option to cancel it within a specified time and a further option to purchase the leased machinery "as mutually satisfactory to the parties concerned." Concededly the first option was not exercised. With respect to the second option, no mutually satisfactory terms of purchase were agreed upon by the parties.

The district court found upon substantial evidence that, "neither fraud nor bad faith on the part of the Besser Company in its negotiations to agree on mutually satisfactory price for the machinery herein, is shown by evidence which is clear, cogent, and convincing, or otherwise sufficient." In view of this finding the district court correctly held that the rights of the parties were to be determined by the terms of the original lease agreement.

The judgment is affirmed.

[¶ 68,847] Arrow Metal Products Corporation; Awnair Corporation of America; and Alex Levine, James V. Cosman, and William N. Gurtman, individually and as officers of each of said corporations v. Federal Trade Commission.

In the United States Court of Appeals for the Third Circuit. No. 12,224. Argued October 25, 1957. Filed November 7, 1957.

Appeal from the Federal Trade Commission.

Federal Trade Commission Act

Unfair Practices—Use of Misleading Trade Name—Tendency To Deceive Public—Survey—Validity of Order Prohibiting Use of Term.—A Federal Trade Commission

order prohibiting the use of the trade name "porcenamel" to describe awning products that are not finished with porcelain enamel was affirmed. There was sufficient evidence to support the finding that the use of the term "porcenamel" to describe awning products which were not coated with porcelain enamel, but with an organic plastic resin quite different from porcelain enamel, had a tendency to deceive a substantial portion of the purchasing public. The Federal Trade Commission, in prohibiting the use of this term, made "an allowable judgment in its choice of the remedy". Also, the Commission did not err in receiving a report of a survey made to find out whether the use of the term was capable of and did deceive members of the public.

See Unfair Practices, Vol. 2, ¶ 5081, 5201.341, 5201.481, 5201.661; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.55, 8611.71.

For the petitioners: Aaron Z. Schomer, Passaic, N. J.

For the respondent: E. K. Elkins, Federal Trade Commission, Washington, D. C.

Affirming a Federal Trade Commission cease and desist order in Dkt. 6471.

Before GOODRICH, KALODNER and STALEY, Circuit Judges.

Opinion of the Court

[*FTC Order*]

PER CURIAM [*In full text*]: The petitioners seek reversal of a cease and desist order issued against them by the Federal Trade Commission. The petitioners use the term "porcenamel" to describe their awning products. It is charged that the use of this term carries a representation that the awning products are coated with porcelain enamel. They are not coated with porcelain enamel but with an organic plastic resin quite different from porcelain enamel. It was found by the hearing examiner that the use of the term "porcenamel" had a tendency to deceive a substantial portion of the purchasing public. The examiner made a cease and desist order which was affirmed on appeal by the Commission following an opinion fully discussing the questions involved. *Arrow Metal Products Corp.*, CCH TRADE REGULATION REPORTER (10th ed.) ¶ 26,386 (FTC 1957).

[*Findings Supported—Survey*]

The findings of the Commission are adequately supported. There was no error in receiving a report of a survey made to find out whether the use of petitioners' term was capable of and did deceive members of the public. See *United States v. 88 Cases, More or Less, etc.*, 187 F. 2d 967, 974 (3rd Cir.), cert. denied, 342 U. S. 861 (1951); *Household Finance Corp. v. Federal Finance Corp.*, 105 F. Supp. 164, 166 (D. Ariz. 1952).

[*Scope of Order*]

The petitioners complain that the cease and desist order is too drastic and that some other manner of preventing deception, if any, should be adopted. But the matter of shaping a remedy is for the Commission. Our function is simply, in the words of the Supreme Court, to find whether the Commission has made "an allowable judgment in its choice of the remedy." *Jacob Siegel Co. v. Federal Trade Commission* [1946-1947 TRADE CASES ¶ 57,451], 327 U. S. 608, 612 (1946). The Commission did make an allowable judgment in this instance.

[*Affirmed*]

The order of the Commission will be affirmed.

[¶ 68,848] Wometco Television and Theatre Company v. United States and Miami Beach Theatre Corp.

In the Supreme Court of the United States. October Term, 1957. No. 438. Dated November 12, 1957.

Appeal from the United States District Court for the Southern District of New York.

Case No. 434 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Consent Decrees—Intervention by Private Party.—The United States Supreme Court affirmed a trial court judgment (1)

denying a television and theatre company's motion for leave to intervene in the hearing and determination of a theatre company's petition, which was made pursuant to Paragraph III 7(b) of a consent decree entered in *U. S. v. Loew's Inc.* (1952 TRADE CASES ¶ 67,228), for leave to acquire and operate a theatre to be erected in Florida, and (2) granting the theatre company's petition to acquire and operate the theatre.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8381, 8421.

For the appellant: Monroe E. Stein (Richard F. Wolfson, of counsel), New York, N. Y.

For the appellees: J. Lee Rankin, Solicitor General; Victor R. Hansen, Assistant Attorney General; and Charles H. Weston and Maurice Silverman, Attorneys, Department of Justice. Albert R. Connelly (Archie Weltman and Donald Cronson, of counsel), New York, N. Y., for Miami Beach Theatre Corp.

[*Affirmed*]

PER CURIAM [*In full text*]: The motions to affirm are granted and the judgment is affirmed.

[¶ 68,849] International Boxing Club of New York, Inc., et al. v. United States.

In the Supreme Court of the United States. October Term, 1957. Dated October 29, 1957.

On Application for a Stay of Judgment of the United States District Court for the Southern District of New York. RYAN, District Judge.

Case No. 1122 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Judgment—Appellate Review—Supreme Court—Stay of Judgment Pending Appeal.—An application for a stay of a District Court judgment pending the defendants' appeal to the Supreme Court was granted in part and denied in part by a Justice of the Supreme Court. The Justice was of the opinion that the application should be granted in substantial part in view of (1) the fact that the suit was the first Government antitrust case involving professional sports to be reviewed by the Supreme Court after a trial on the merits and (2) the "drastic" character of some aspects of the relief granted by the District Court. The stay would become effective upon the expiration of the stay previously granted by the District Court and would continue until the Supreme Court's final determination of the defendants' pending appeal.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8235.

For the appellants: Kenneth C. Royall, New York, N. Y.; John F. Caskey, New York, N. Y.; and Charles H. Watson, Chicago, Ill.

For the appellee: J. Lee Rankin, Solicitor General, and Richard B. O'Donnell, New York, N. Y.

For prior opinions of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,759 and 68,649, and 1954 Trade Cases ¶ 67,758; for a prior opinion of the U. S. Supreme Court, see 1955 Trade Cases ¶ 67,941.

[*Stay of Judgment*]

MR. JUSTICE HARLAN, Circuit Justice [*In full text*]: The fact that this is the first Government antitrust case involving professional sports to be reviewed by this Court after trial on the merits and the admittedly "drastic" character of some aspects of the relief granted by the District Court combine to lead me to the conclusion that the appellants' application for a stay of the judgment below, pending appeal, should be granted in substantial part. Indeed, the Government concedes, with commendable frankness, that such parts of the judgment "which

would result in substantial and irreparable injury [to appellants] in the event of a reversal" and "which could substantially affect the property interests of the appellants" should not be put into effect pending review. Accepting the premises on which the Government suggests this application should be decided, *cf. Breswick & Co. v. United States,* 75 S. Ct. 912, I shall make the following disposition of the application for a stay, to become effective upon the expiration of the stay heretofore granted by the District Court and to continue until this Court's final determination of appellants' pending appeal:

(1) As to paragraphs "8," "9," "10," "11," "13," "14," "15," "16," "17," "18," "19," "20," "21," and "22" of the judgment, the application for a stay is granted. To this relief the Government has no objection.

(2) As to paragraphs "3," "5," "6," and "7" of the judgment, the application for a stay is granted to the extent that such provisions relate to the exercise of subsisting contract rights acquired by any of the appellants prior to March 8, 1957, the date on which the District Court filed its opinion holding that the Sherman Act had been violated. Although the Government opposes any stay of these provisions, I consider that this limited stay is in keeping with the formula which the Government has recognized should govern the disposition of this application.

(3) In all other respects the application for a stay is denied.

An appropriate order may be submitted to me for signature on or before November 4, 1957.

[¶ 68,850] **United States v. National Cranberry Association; A. D. Makepeace Co.; United Cape Cod Cranberry Co.; Marcus L. Urann; and John C. Makepeace.**

In the United States District Court for the District of Massachusetts. Civil Action No. 55-418-S. Filed October 28, 1957.

Case No. 1232 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Exclusive Marketing Agreements—Cranberries.—An association engaged in the manufacturing and marketing of cranberry products was prohibited by a consent decree, (1) for a period of five years, from entering into any contract for the marketing of cranberries for a term of more than one year, unless such contract is terminable by the other party between June 1st and July 31st of any year, and (2) after the five-year period, from entering into any such contract for a term of more than three years, unless such contract is terminable by the other party between June 1st and July 31st of the third year and each subsequent third year of its term.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.690; Monopolies, Vol. 1, ¶ 2610.300.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Interlocking Officers or Directors.—An association engaged in the manufacturing and marketing of cranberry products was prohibited by a consent decree from having as one of its officers or directors any person whom it knows to be engaged in, or to be an officer, director, or agent of, any other person engaged in, the marketing of cranberries or cranberry products in competition with the association.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.735; Monopolies, Vol. 1, ¶ 2610.420.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Allocation of Markets.—An association engaged in the manufacturing and marketing of cranberry products was prohibited by a consent decree from entering into any agreement, with any other person engaged in the marketing of cranberries, to allocate or divide markets.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.468; Monopolies, Vol. 1, ¶ 2610.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Production and Sale Control.—An association engaged in the manufacturing and market-

ing of cranberry products was prohibited by a consent decree from (1) contracting for the processing of any of its cranberries by any other processor at any time when it has available capacity and could process such cranberries itself, without incurring substantially greater expense, (2) receiving from any association member, for marketing, any cranberries which it knows to have been grown by a person not a member of the association, (3) exchanging with any person cranberries suitable for the fresh market for cranberries suitable only for processing to prevent such cranberries from being acquired by any competitor, or (4) entering into any agreement for the destruction of cranberries with any other person engaged in the marketing of cranberries. Also, growers of cranberries were prohibited from purchasing cranberries from others and reselling or otherwise disposing of them to artificially raise, depress, or stabilize market price levels of fresh or processed cranberries; or from delivering to the association any cranberries other than those grown by them or their subsidiaries.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.760; Monopolies, Vol. 1, ¶ 2610, 2610.800.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Discriminations—Rebates and Preferences.—An association engaged in the manufacturing and marketing of cranberry products was prohibited by a consent decree from (1) following any sales policy which includes any element of rebate or discount from the purchase price, unless the amount or mathematical formula for calculating the amount is disclosed to the customer, or which grants any bonus or allowance to customers on the basis of business done prior to the period to which such bonus or allowance applies, (2) granting any allowance or subsidy on account of losses incurred by its customers on resale of products purchased from the association, (3) granting any manufacturers' discount to anyone other than a manufacturer, (4) receiving from any person not a member of the association any cranberries, except on the same terms or conditions as would apply if such person were a member, or (5) discriminating among members in the administration of any pooling of cranberries. Also, growers of cranberries were prohibited from inducing or compelling any financial institution to take any action with respect to the granting or calling of loans for the purpose of discriminating against any borrower who is a competitor of the association.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.630, 2005.768; Monopolies, Vol. 1, ¶ 2610.280.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Use of Stock Voting Rights.—In an action against an association engaged in the manufacturing and marketing of cranberry products, two growers of cranberries, and two individuals, a consent decree prohibited the growers and individuals from exercising voting rights on common stock of the association for a period of three years, except in two specified situations.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.833; Monopolies, Vol. 1, ¶ 2610.

Department of Justice Enforcement and Procedure—Consent Decrees—Modification—Further Relief—Government Petition.—A consent decree provided that the Government could, within one year after the expiration of five years after the entry of the decree, petition the court for such further relief as it might deem necessary or appropriate. Also, the decree provided that, if the Government's petition prays for relief requiring a defendant association to divest itself of any processing facilities, the association and other defendants in the action would have the burden of showing cause why the requested relief should not be granted. The decree would not constitute a bar or estoppel as to any issue of law or fact raised in such proceeding.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8361.15, 8421.

Department of Justice Enforcement and Procedure—Consent Decrees—Modification—Legality of Marketing Agreements or Orders—Modification by Defendant.—A consent decree entered against an association engaged in the manufacturing and marketing of cranberry products provided that, in the event that any of the provisions of the decree

should conflict with any provision of any marketing agreement with, or marketing order of, the Secretary of Agriculture, the association could petition the court for such modification of the decree as to permit compliance with such marketing agreement or order.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.48, 8361.37.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Foreign Activities.—A consent decree entered against an association engaged in the manufacturing and marketing of cranberry products, two growers of cranberries, and two individuals provided that the provisions of the decree should not be deemed to relate to activities or operations outside of the United States, its territories, and its possessions not affecting the domestic commerce of the United States.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.33.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; Worth Rowley, W. D. Kilgore, Jr., Richard B. O'Donnell, William J. Elkins, and John J. Galgay, Attorneys, Department of Justice; and Anthony Julian, United States Attorney.

For the defendants: Charles B. Rugg of Ropes, Gray, Best, Coolidge & Rugg; and Whitney, North, Seymour, Simpson, Thacher & Bartlett for Natl. Cranberry Assn. Francis A. Brick, Jr., of Donovan, Leisure, Newton & Irvine; and Fletcher Clark, Jr., for A. D. Makepeace Co. and John C. Makepeace. Claude B. Cross, of Withington, Cross, Park & McCann, for United Cape Cod Cranberry Co. Lothrop Withington, of Withington, Cross, Park & McCann, for Marcus L. Urann.

Final Judgment

George C. Sweeney, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on May 10, 1955, and the defendants herein, by their attorneys, having appeared and filed their answers to such complaint denying the substantive allegations thereof; and the plaintiff and each of defendants by their attorneys having severally consented to the making and entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without admission by any party with respect to any such issue;

Now, Therefore, before any testimony has been taken, and without trial or adjudication of any issue of fact or law herein, and upon consent as aforesaid of all the parties hereto, it is hereby Ordered, Adjudged and Decreed as follows:

I

[*Sherman Act*]

The Court has jurisdiction of the subject matter herein and of the parties hereto. The complaint states a claim for relief against the defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "NCA" shall mean the defendant National Cranberry Association, a cooperative corporation organized and existing under the laws of the State of Delaware, and with its principal office and place of business at Hanson, Massachusetts;

(B) "ADM" shall mean the defendant A. D. Makepeace Co., a corporation organized and existing under the laws of the Commonwealth of Massachusetts, and with its principal place of business at Wareham, Massachusetts;

(C) "United" shall mean the defendant United Cape Cod Cranberry Co., a corporation organized and existing under the laws of the Commonwealth of Massachusetts, and with its principal place of business at Hanson, Massachusetts;

(D) "Urann" shall mean the defendant Marcus L. Urann, an individual;

(E) "Makepeace" shall mean the defendant John C. Makepeace, an individual;

(F) "Person" shall mean any individual, partnership, firm, corporation, association, trustee, cooperative or any other legal or business entity.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its successors, assigns, officers, directors, servants, employees and agents and to all persons in active concert or participation with such defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Association—Practices Enjoined*]

Defendant NCA is enjoined and restrained from:

(A) Entering into, renewing, maintaining or adhering to, (1) during the five years immediately following the date of entry of this Final Judgment, any agreement for the marketing of cranberries for any person, for a term of more than one year unless any such agreement shall on its face be terminable by such person by written notice delivered between June 1st and July 31st of any year, and (2) after such five year period, from entering into any agreement for the marketing of cranberries for any person for a term of more than three years unless any such agreement shall on its face be terminable by such person by written notice delivered between June 1st and July 31st of the third year and each subsequent third year of its term;

(B) Having, or allowing to serve, as one of its officers or directors, any person whom it knows to be engaged in, or to be an officer, director or agent of, any other person engaged in, the processing or marketing of cranberries or cranberry products in competition with NCA;

(C) Entering into, renewing, maintaining or adhering to any agreement or arrangement with any other person engaged in the marketing of cranberries to allocate or divide markets;

(D) Contracting for or otherwise arranging for the processing of any of NCA's cranberries by any other processor at any time when NCA has available capacity and could process such cranberries itself without incurring substantially greater expense;

(E)(1) Following any sales policy on cranberry products which includes any element of rebate or discount from the purchase price unless the amount of mathematical formula for calculating the amount is disclosed to the customer at or before the time of purchase by him, or which grants any bonus or allowance to customers on the basis of business done prior to the period to which such bonus or allowance applies;

(2) Granting any allowance or subsidy on account of losses incurred by NCA customers on resale of cranberry products purchased from NCA, except that this provision shall not apply to guarantees against, or allowances for, general NCA price declines on floor stocks, or to guarantees against, or allowances for, losses due to damage or defects in quality;

(3) Granting any manufacturers' discount to anyone other than a manufacturer;

(F)(1) Receiving from any member for marketing any cranberries which it knows to have been grown by a person not a member of NCA or receiving from any person not a member of NCA for marketing any cranberries except on the same terms or conditions as to payment therefor as would apply if such person were a member;

(2) Discriminating among members in the administration of any pooling of cranberries;

(3) Exchanging with any person cranberries suitable for the fresh market for cranberries suitable only for processing, to prevent such cranberries from being acquired by any person engaged in the marketing of cranberry products in competition with NCA;

(G) Entering into, enforcing or adhering to any agreement or arrangement for the destruction of cranberries with any other person engaged in the processing or marketing of cranberries.

V

[*Further Relief*]

The plaintiff may, within one year after the expiration of five years immediately following the date of entry of this Final Judgment, and without the necessity of showing any change in circumstances occurring subsequent to the entry hereof, petition this Court for such further relief as it may then deem necessary or appropriate with respect to the marketing by defendant NCA of cranberries for processing and processed cranberries. In such event, if plaintiff's petition prays for relief requiring NCA to divest itself of any processing facilities, the defendants NCA, ADM and United shall be required to assume the

burden of showing cause why the requested relief on the facts and the law should not be granted. Also in such event, neither the entry of this Final Judgment nor any of the provisions hereof shall operate as a bar or estoppel as to any issue of law or fact raised in such proceeding or bar or estop the plaintiff or the defendants NCA, ADM and United from introducing any evidence or testimony therein with respect to any such issue.

VI

[*Other Defendants—Practices Enjoined*]

Defendants ADM, United, Makepeace and Urann are jointly and severally enjoined and restrained from:

(A) Purchasing cranberries from others and reselling or otherwise disposing of them to artificially raise, depress or stabilize market price levels of fresh or processed cranberries;

(B) Delivering to NCA any cranberries other than those grown by them or their subsidiaries, or for them or their subsidiaries pursuant to agreement;

(C) Exercising voting rights on common stock of NCA for a period of three years immediately following the date of entry of this Final Judgment, except that:

(1) ADM, United, Makepeace and Urann may individually exercise their voting rights on common stock of NCA during the aforesaid three-year period for the election of directors of NCA, *provided, however,* that none of them may vote for more than 10% of the total number of directors to be elected in each such election; and

(2) ADM, United, Makepeace and Urann may individually exercise their voting rights on common stock of NCA during the aforesaid three-year period in connection with any matter under NCA's charter or by-laws or applicable Delaware statutes requiring a stockholders' vote and which is directly connected with the transfer, assignment, pledging, sale, liquidation or other disposition of capital assets of NCA, or with any amendment of the Certificate of Incorporation of NCA.

Provided, however, that this subsection (C) shall not be deemed to apply to any person acquiring in good faith common stock of NCA from any of said defendants by transfer or by operation of law, if such person is not an officer, director, servant, employee or agent of any of said defendants;

(D) Inducing or compelling, or attempting to induce or compel any financial institution to take any action with respect to the granting or calling of loans for the purpose of discriminating against any borrower who is a competitor of NCA.

VII

[*Government Marketing Orders*]

In the event that any of the provisions of this Final Judgment shall conflict with any provision of any marketing agreement with, or marketing order of, the Secretary of Agriculture, the defendant NCA, without showing any other change in circumstances and upon notice to the Assistant Attorney General in charge of the Antitrust Division, may petition this Court for such modification of such of the terms of this Final Judgment as is necessary to permit compliance with such marketing agreement or order.

VIII

[*Effective Date—Compliance*]

(A) This Final Judgment shall take effect upon the expiration of ten (10) days after the date of its entry.

(B) For the purpose of securing compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any consenting defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(1) Access, during the office hours of said defendant, to those books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant which relate to any matter contained in this Final Judgment;

(2) Subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of the defendant, who may have counsel present, regarding any such matters.

Upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, said defendant shall submit such reports in writing with respect to the matters contained

in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means permitted in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

IX

[*Foreign Activities*]

The provisions of this Final Judgment shall not be deemed to relate to activities or operations outside of the United States, its territories and possessions not affecting the domestic commerce of the United States.

X

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions herein and for the enforcement of compliance therewith and punishment of violations thereof.

[¶ 68,851] **United States v. Lyman Gun Sight Corporation, W. R. Weaver, M. Jackson Stith, John Unertl, National Rifle Association of America, Popular Science Publishing Company, Inc., and Henry Holt and Company, Inc.**

In the United States District Court for the District of Columbia. Civil Action No. 890-56. Dated November 8, 1957.

Case No. 1269 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Resale Price Fixing—Consent Decree—Practices Enjoined—Resale Price Agreements—Cancellation of Fair Trade Contracts—Telescopic Rifle Sights.—Manufacturers of telescopic rifle sights were prohibited by a consent decree from entering into any understanding to maintain or stabilize resale prices and, for a period of seven years, from entering into or enforcing any fair trade contract. Also, the manufacturers were required to cancel all of their existing fair trade contracts.

See Resale Price Fixing, Vol. 1, ¶ 3015.20, 3015.80; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.45, 8421.

Resale Price Fixing—Consent Decree—Practices Enjoined—Resale Price Fixing—Coercion—Boycott.—Manufacturers of telescopic rifle sights were prohibited by a consent decree from entering into any understanding to coerce (1) dealers or jobbers to observe suggested prices or prices in consumer advertisements, (2) jobbers to refuse to sell to off-list dealers, or (3) publishers of outdoors magazines to reject advertisements offering sights for sale by off-list dealers. Also, the manufacturers were prohibited from entering into any understanding to establish cooperative means and methods to accomplish the exclusion, from outdoors magazines, of advertisements offering sights for sale by off-list dealers; or to enforce boycotts against advertisements for the sale of sights by off-list dealers. The manufacturers were further prohibited, for a period of two years, from publishing any suggested prices or from engaging in any consumer advertisements, unless any reference to prices is limited to suggesting that sights may be purchased from other persons for approximately a stated number of dollars and advising that local dealers should be consulted to determine the actual prices.

See Resale Price Fixing, Vol. 1, ¶ 3015.80.

Resale Price Fixing—Consent Decree—Practices Enjoined—Resale Price Fixing—Refusal To Deal.—Manufacturers of telescopic rifle sights were prohibited by a consent decree from entering into any understanding to refuse to sell sights to off-list dealers,

and publishers of outdoors magazines were prohibited from entering into any understanding whereby any defendant publisher refuses to accept, publish, or carry advertisements for sights offered by any dealer or jobber at prices less than the manufacturer's list prices. Also, each of the publishers was prohibited, for a period of ten years, from refusing to publish advertisements for sights from any dealer or jobber, where the advertiser and the advertisements meet the reasonable standards uniformly applied by the publisher without regard to the fact that the advertiser offers sights for sale at prices less than the manufacturer's list prices.

See Resale Price Fixing, Vol. 1, ¶ 3015.70.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Sale of Product—Contingent Provision.—A consent decree entered against manufacturers of telescopic rifle sights provided that, in the event that any defendant manufacturer (during a period of seven years) elects to engage in consumer advertising, such manufacturer, during the time of the publication of such advertisements, must either sell sights or cause jobbers to sell sights to any off-list dealer with satisfactory credit standing.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.50, 8341.20.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Notice of Decree.—Manufacturers of telescopic rifle sights were required to mail a copy of a consent decree entered against them to each of their jobbers and dealers on their current distribution lists for sales or advertising materials or to each of their jobbers or dealers with whom they had a fair trade contract. Also, publishers of outdoors magazines were required to mail a copy of the consent decree entered against them to each off-list dealer who had been refused, since a specified date, advertising of sights.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.60.

Department of Justice Enforcement and Procedure—Consent Decrees—Contingent Provision.—A consent decree provided that a former distributor of telescopic rifle sights would become subject to specified provision of the decree if and when he either engaged in the manufacture of sights or in the sale of sights manufactured exclusively for him.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8341.20.

For the plaintiff: Victor R. Hansen, Assistant Attorney General, and W. D. Kilgore, Jr., Baddia J. Rashid, Max Freeman, James L. Minicus, William H. Crabtree, and Forr A. Ford.

For the defendants: Rodney J. McMahon for Lyman Gun Sight Corp.; Alan Y. Cole for M. Jackson Stith; J. J. Wilson for Natl. Rifle Assn. of America; Saterlee, Warfield & Stephens, by William E. Stockhausen and Webb C. Hayes, III, for Henry Holt and Co., Inc.; Cahill, Gordon, Reindel & Ohl, by Jerrold G. Van Cise, for W. R. Weaver; Gerald L. Phelps for John Unertl; and Parker, Duryee, Benjamin, Zuning & Malone, by Vincent J. Malone and Arthur B. Carton, for Popular Science Publishing Co., Inc.

Final Judgment

F. Dickinson Letts, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on February 29, 1956; the defendants having appeared and filed their answers to the complaint denying the material allegations thereof; and the plaintiff and the defendants, by their attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or an admission by any party hereto in respect of any such issue;

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[*Sherman Act*]

This Court has jurisdiction of the subject matter herein and of all the parties hereto. The complaint states a claim upon which relief against the defendants may be granted under Section 1 of the Act of Congress of

July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Manufacturing defendants" means defendants Lyman Gun Sight Corporation, W. R. Weaver and John Unertl;

(B) "Publishing defendants" means defendants National Rifle Association of America, Popular Science Publishing Company, Inc., and Henry Holt and Company, Inc.;

(C) "Scopes" means all telescopic sights, utilizing optical glasses, to be secured or mounted on rifles for the purpose of aiming more accurately than would be possible with metallic sights. Scopes usually contain a reticule in the form of cross hairs, a dot or a post;

(D) "Manufacturer's suggested prices" means any prices determined by a manufacturing defendant and suggested to any jobber or dealer as prices to be charged by a person or persons other than such defendant on sales of scopes manufactured by such defendant;

(E) "Consumer advertisements" means any advertisements by a manufacturing defendant in any outdoors magazine or in any sales literature sent directly to consumers which suggest prices to be charged by a person or persons other than defendant on sales of scopes manufactured by such defendant;

(F) "Person" means an individual, partnership, firm, corporation, or any other legal entity [for the purpose of this definition a manufacturing defendant, its subsidiaries, officers, directors, agents and employees shall be deemed to be one person];

(G) "Fair trade agreement" means any resale price maintenance contract, or supplement thereto, pursuant to which the resale price of scopes is fixed, established or maintained under state fair trade laws in accordance with either Section 1 of the Sherman Act or Section 5(a) of the Federal Trade Commission Act, as amended;

(H) "Jobber" means any person who purchases scopes from manufacturers thereof and resells them to other distributors or retailers;

(I) "Dealer" means any person who buys scopes from manufacturers or jobbers and retails them to the ultimate consumer;

(J) "Off-list dealer" means any person who, in making sales to ultimate consumers, fails to adhere to manufacturer's suggested prices or prices in manufacturer's consumer advertisements;

(K) "Outdoors magazine" means any periodical having interstate circulation and devoted, principally, to outdoors activities such as marksmanship, hunting and fishing.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its subsidiaries, successors and assigns and to each of its or their officers, directors, agents and employees, and to all persons in active concert or participation with any defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

[*Concerted Activity*]

The manufacturing defendants are jointly and severally enjoined and restrained from entering into, adhering to, maintaining or furthering any contract, agreement, understanding or concerted plan of action with or among themselves, with any publisher of any outdoors magazine, with any jobber or dealer in scopes or with any other person:

(A) to maintain or stabilize resale prices on scopes;

(B) to coerce or compel dealers to observe, or adhere to manufacturer's suggested prices or prices in consumer advertisements;

(C) to coerce or compel jobbers to observe, or adhere to manufacturer's suggested prices or prices in consumer advertisements;

(D) to refuse to sell scopes to off-list dealers;

(E) to coerce or induce jobbers to refuse to sell scopes to off-list dealers;

(F) to coerce or induce publishers of outdoors magazines to reject advertisements offering scopes for sale by off-list dealers or by any other person;

(G) to establish cooperative means and methods to accomplish the exclusion from outdoors magazines of advertisements offer-

ing scopes for sale by off-list dealers or by any other person;

(H) to cause, initiate or enforce boycotts against advertisements for the sale of scopes by off-list dealers or by any other person.

V

[*Individual Activity*]

The manufacturing defendants are jointly and severally enjoined and restrained from:

(A) coercing or compelling dealers to observe, or adhere to, manufacturer's suggested prices or prices in consumer advertisements;

(B) coercing or compelling jobbers to observe, or adhere to, manufacturer's suggested prices or prices in consumer advertisements for scopes;

(C) coercing or compelling jobbers to refuse to sell scopes to off-list dealers;

(D) coercing or compelling publishers of outdoors magazines to reject advertisements offering scopes for sale by off-list dealers;

(E) establishing cooperative means and methods to accomplish the exclusion from outdoors magazines of advertisements offering scopes for sale by off-list dealers;

(F) causing, initiating or enforcing boycotts against advertisements for the sale of scopes by off-list dealers.

VI

[*Fair Trade Contracts Cancelled*]

The manufacturing defendants are jointly and severally ordered and directed to cancel forthwith all fair trade agreements to which such defendants are now a party, and any such defendant who is a party thereto shall give notice to plaintiff, within ninety days from the date of entry of this Final Judgment, that such fair trade agreements have been cancelled.

VII

[*Fair Trade Contracts Prohibited*]

The manufacturing defendants are jointly and severally enjoined and restrained, for a period of seven years from the date of entry of this Final Judgment, from entering into, adhering to, or enforcing any fair trade agreement. After this seven year period of time, nothing contained in this Final Judgment shall prevent any manufacturing defendant from entering into, adhering to, or enforcing any fair trade agreement, valid and enforceable in the state where to be enforced, or from taking any lawful action permitted or required by any such fair trade law.

VIII

[*Suggested Prices—Publication*]

The manufacturing defendants are jointly and severally enjoined and restrained for a period of two years commencing ninety days from the date of entry of this Final Judgment from:

(A) publishing any manufacturer's suggested prices, or

(B) engaging in any consumer advertisements unless any reference therein to prices is limited to suggesting that scopes manufactured by such defendant may be purchased from persons other than defendant for approximately a stated number of dollars and advising that local dealers should be consulted to determine the actual prices for such scopes.

IX

[*Sale of Scopes*]

In the event that any manufacturing defendant during the period of seven years from the date of entry of this Final Judgment shall elect (subject to Section VIII herein) to engage in consumer advertisements, such defendant during the time of the publication of such consumer advertisements is ordered and directed either to sell scopes or cause jobbers to sell scopes to any off-list dealer with satisfactory credit standing, who makes application in writing to such defendant, without discrimination as to availability, price, terms and conditions of sale, or credit requirements; provided, however, that nothing contained in this Section IX shall be interpreted to prevent such defendant or a jobber of such defendant from giving to any person, purchasing scopes for resale, functional or quantity discounts otherwise lawful.

X

[*Notice of Decree—Manufacturers*]

Each of the manufacturing defendants is ordered and directed within ninety days after the date of entry of this Fnal Judgment to mail a true and complete copy of this Final Judgment to each jobber and

dealer on such defendant's current distribution list for sales or advertising materials relating to scopes, or with whom such defendant has in effect on the date of entry of this Final Judgment a fair trade agreement relating to scopes.

XI

[*Contingent Provision*]

Defendant M. Jackson Stith shall become subject to all provisions in Sections I-X, and XV and XVI of this Final Judgment if and when he either engages in the manufacture of scopes, or sells scopes manufactured exclusively for him which he sells under his own name.

XII

[*Concerted Refusal To Accept Ads*]

The publishing defendants are jointly and severally enjoined and restrained from entering into, adhering to or claiming any rights under any contract, agreement, understanding or common course of conduct with any manufacturer, jobber or dealer of scopes or any publisher of outdoors magazines whereby any publishing defendant refuses to accept, publish, carry or run advertisements for scopes offered by any dealer, jobber, off-list dealer or other person at prices less than the manufacturer's list prices therefor, if the advertisements otherwise meet the reasonable standards uniformly applied by the defendants.

XIII

[*Individual Refusal To Publish Ads*]

Each publishing defendant is enjoined and restrained, for a period of ten years commencing ninety days from the date of entry of this Final Judgment, from refusing to publish or threatening to refuse to publish advertisements for scopes from any dealer, jobber, off-list dealer or other person advertising such scopes for sale, where the advertiser and the advertisements meet the reasonable standards uniformly applied by the defendant without regard to the fact that the advertiser offers scopes for sale at prices less than the manufacturer's list prices therefor.

XIV

[*Notice of Decree—Publishers*]

Each of the publishing defendants is ordered and directed within ninety days after the date of entry of this Final Judgment to mail a true and complete copy of this Final Judgment to each off-list dealer who has been refused, since March 1, 1949, advertising of scopes by such defendant.

XV

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, upon reasonable notice to the defendants made to their principal offices, be permitted: (a) reasonable access, during the office hours of said defendants, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession of or under the control of said defendants relating to any of the matters contained in this Final Judgment; and (b) subject to the reasonable convenience of said defendants and without restraint or interference from them, to interview the officers and employees of defendants, who may have counsel present, regarding any such matters. For the purpose of securing compliance with this Final Judgment, any defendant, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and upon reasonable notice made to its principal office, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the enforcement of this Final Judgment. No information obtained by the means provided in this Section XV shall be divulged by a representative of the Department of Justice to any person other than a duly authorized representative of such Department except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

XVI

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders

and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

[¶ 68,852] United States v. Combustion Engineering, Inc.

In the United States District Court for the Southern District of New York. Civil No. 126-230. Filed November 1, 1957.

Case No. 1367 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Restrictive Patent Licensing Agreements with Foreign Companies—Restrictive Agreements with Foreign Companies.—A manufacturer of steam generating equipment was prohibited by a consent decree from enforcing those provisions of its existing equipment licensing agreements with foreign companies which allegedly had the effect of allocating world markets for the manufacture and sale of such equipment. The manufacturer was further prohibited from entering into any future agreement with any foreign company (1) allocating or dividing territories or markets, (2) requiring any foreign company to purchase any equipment from any designated source or to use the equipment installation service of any other foreign company, (3) restricting imports into or exports from the United States, (4) not to buy or use equipment manufactured or sold by anyone other than the manufacturer, or (5) giving the manufacturer the continuing right to take title under any United States letters patent owned by the foreign company and licensed to the manufacturer exclusively.

Also, the manufacturer was prohibited from giving any foreign company any commission or other credit when the manufacturer exports equipment into any country or market except for actual services rendered in connection with a specific sale or a negotiation for a specific sale; or using any United States patent right, acquired by the manufacturer pursuant to any agreement prior to such acquisition, from a foreign company having at the time an equipment patent license from the manufacturer, to prevent such foreign company itself from importing into, and selling in, the United States to an ultimate consumer equipment covered by such patent.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.055, 2005.718, 2013.275.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Foreign Activities.—A consent decree entered against a manufacturer of steam generating equipment provided that a specified provision of the decree should not be construed to prohibit the manufacturer from making a specific sale of equipment to a foreign company.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.33, 8421.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Notice Requirements.—A manufacturer of steam generating equipment was required by a consent decree to furnish a copy of the decree (1) to each of its officers and directors, (2) to each of its employees engaged in licensing equipment, and (3) to each foreign company having an equipment licensing agreement with the manufacturer.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.60.

For the plaintiff: Victor R. Hansen, Assistant Attorney General, and W. D. Kilgore, Jr., Baddia J. Rashid, Richard B. O'Donnell, John D. Swartz, John V. Leddy, Charles F. B. McAleer, David Schwartz, John H. Clark, III, and Bernard A. Friedman, Attorneys, Department of Justice.

For the defendant: Thomas F. Fennell of Shearman & Sterling & Wright.

Final Judgment

RICHARD H. LEVET, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein; defendant, Combustion Engineering, Inc., having appeared and filed its answer to the complaint denying any violation of law charged therein; and plaintiff and defendant by their attorneys having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without admission by defendant in respect of any such issue;

Now, Therefore, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon consent as aforesaid of plaintiff and defendant, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[*Sherman Act*]

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a claim upon which relief may be granted against defendant under Section I of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," as amended, commonly known as the Sherman Act.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Defendant" shall mean Combustion Engineering, Inc., a corporation organized and existing under the laws of the State of Delaware, having an office at 200 Madison Avenue, New York, N. Y.;

(B) "Foreign Company" or "Foreign Companies" shall mean any, some or all of the following:

1. *France Tosi, S.p.A.,* a company organized under the laws of the Italian Republic, having an office in the city of Legnano, Italy.

2. *Stein et Roubaix, S.A.,* a company organized under the laws of the French Republic having an office in the city of Paris, France.

3. *International Combustion, Ltd.,* a company organized under the laws of the United Kingdom, having an office at 19 Woburn Place, London W.C. 1, England.

4. *Meller-Goodwin, S.A.,* a company organized under the laws of the Republic of Argentina, having an office in the city of Buenos Aires, Argentina.

5. *A. S. Kvaerner Brug,* a company organized under the laws of the Kingdom of Norway, having an office in the city of Oslo, Norway.

6. *Kohlenscheidungs-Gesellschaft, m.b.H.,* a company organized under the laws of the German Federal Republic, having an office in the city of Stuttgart, Germany.

7. *Mitsubishi Nippon Heavy-Industries, Ltd.,* a company organized under the laws of Japan, having an office in the city of Tokyo, Japan.

8. *Mitsubishi Heavy-Industries, Reorganized, Ltd.,* a company organized under the laws of Japan, having an office in the city of Kobe, Japan.

9. *Mitsubishi Zosen-Kabuski Kaisha,* a company organized under the laws of Japan, having an office in the city of Tokyo, Japan.

10. *N. V. Koninkliijke Maatschappij De Schelde,* a company organized under the laws of the Kingdom of the Netherlands, having an office in the city of Vlissingen, the Netherlands.

11. *The Superheater Company Limited,* a company organized under the laws of the United Kingdom, having an office at 53 Haymarket, London S.W. 1, England.

12. *A. B. Svenska Maskinverken,* a company organized under the laws of the Kingdom of Sweden, having an office at Sodertalje. Sweden.

13. Any other Company, organized and existing under the laws of any foreign country, and having its office and principal place of business in such foreign country, which is engaged in the manufacture of Equipment;

(C) "Equipment" shall mean all apparatus, equipment, materials and parts therefor, of the types manufactured commercially by Defendant for the purpose of steam generation and fuel burning.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment shall apply to the Defendant and to its officers, servants, employees, agents and attorneys, and to all persons in active concert or participation with the Defendant

who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Equipment Licensing Agreements*]

Defendant is hereby enjoined and restrained from the further performance or enforcement of those provisions in any existing Equipment licensing agreement between Defendant and any Foreign Company by which:

(A) The Foreign Company agrees not to export equipment to the United States or Defendant agrees not to export Equipment to any foreign country, or

(B) The Foreign Company agrees to cross-license Defendant by granting to Defendant the exclusive right to manufacture, use and sell Equipment in the United States under any United States Letters Patent or application therefor presently owned by such Foreign Company, or

(C) The Foreign Company grants Defendant the right to acquire title to any United States Letters Patent, relating to Equipment, which patent is presently owned by the Foreign Company and under which patent Defendant has been granted by the Foreign Company an exclusive license to manufacture, use and sell in the United States, or

(D) Defendant agrees, when it exports Equipment into any country, to give the Foreign Company (i) any credit against any royalty based upon the value of the Equipment exported and payable by such Foreign Company to Defendant or (ii) any other credit, or

(E) The Foreign Company agrees when it exports Equipment into any country in which there is another Foreign Company which is licensed by Defendant to manufacture, use and sell Equipment:

1. To secure parts for such Equipment from any designated source, or

2. To use the Equipment installation service of such licensee in connection with the erection of such Equipment, or

(F) The Foreign Company agrees not to use the products manufactured or sold by anyone other than Defendant.

V

[*Future Agreements*]

Defendant is enjoined and restrained from entering into or adhering to any future contract, agreement or understanding with any Foreign Company:

(A) Allocating or dividing territories or markets for the manufacture, installation or sale of Equipment;

(B) Restricting or limiting imports into or exports from the United States of Equipment;

(C) Requiring any Foreign Company to purchase any Equipment from any designated source or requiring any Foreign Company to use the Equipment installation service of any other Foreign Company; provided, however, that this subsection shall not be construed to prohibit a specific sale of Equipment by Defendant to a Foreign Company;

(D) Not to buy or use Equipment manufactured or sold by anyone other than Defendant;

(E) Giving Defendant the continuing right to take title under any United States Letters Patent owned by the Foreign Company, and relating to Equipment, and licensed to the Defendant exclusively.

VI

[*Practices Prohibited*]

Defendant is enjoined and restrained from:

(A) Giving any Foreign Company any commission or other credit when Defendant exports Equipment into any country or market except for actual services rendered in connection with a specific sale or a negotiation for a specific sale;

(B) Using any United States patent right, acquired by Defendant pursuant to any agreement prior to such acquisition, from a Foreign Company having at the time an Equipment patent license from Defendant, to prevent such Foreign Company itself from importing into, and selling in, the United States to an ultimate consumer Equipment covered by such patent; provided that this provision shall not be applicable if such Foreign Company comes under the direct or indirect control of any domestic Equipment competitor of Defendant.

VII

[*Notice of Judgment*]

(A) Defendant is ordered and directed within ninety days after the entry of this Final Judgment to furnish a true and complete copy of this Final Judgment to each

of its officers and directors and to each of its employees engaged in licensing Equipment, and within fifteen days thereafter to file with the Clerk of this Court a statement as to the fact and manner in which Defendant has complied with the foregoing terms of this subsection (A) of Section VII;

(B) Defendant is ordered and directed within one hundred and twenty days after the entry of this Final Judgment to furnish a true and complete copy of this Final Judgment to each Foreign Company having at that time an Equipment licensing agreement with Defendant, and within fifteen days thereafter to file with the Clerk of this Court a statement as to the fact and manner in which Defendant has complied with the foregoing terms of this subsection (B) of Section VII.

VIII

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Access, during office hours of Defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Defendant relating to any matters contained in this Final Judgment;

(B) Subject to the reasonable convenience of Defendant and without restraint or interference from Defendant, to interview officers or employees of Defendant, who may have counsel present regarding any such matters.

Upon such written request, Defendant shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means permitted in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

IX

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

X

[*Effective Date*]

The provisions of this Final Judgment shall become effective thirty days from the date of entry hereof.

[¶ 68,853] Dura Electric Lamp Company, Inc. v. Westinghouse Electric Corporation, Tungsol Electric, Inc., Sylvania Electric Products, Inc., and Consolidated Electric Lamp Company.

In the United States Court of Appeals for the Third Circuit. No. 12,196. Argued October 21, 1957. Filed November 8, 1957.

Appeal from the United States District Court for the District of New Jersey.

Clayton and Sherman Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Defenses—General Release—Joint Tortfeasors.—Defendants, charged with engaging in a conspiracy, were properly granted a judgment in a private antitrust action, where it was established that the plaintiff had given a valid and unconditional release to one of the parties to the alleged conspiracy. Under the applicable state and federal case law, the release of one

joint tortfeasor is a release to all. The fact that the plaintiff did not intend to release all of its claims based on the alleged conspiracy did not change the application of the rule. There was nothing in the release by which it could be interpreted as a covenant not to sue, there was nothing which indicated a reservation of rights, and there was nothing in the facts to indicate mutual mistake or that the release was obtained by fraud.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.700.

For the appellant: Burton R. Thorman, Washington, D. C.

For the appellees: Edward J. O'Mara, Jersey City, N. J.

Before GOODRICH, STALEY and HASTIE, Circuit Judges.

Opinion of the Court

[*Appeal*]

By GOODRICH, Circuit Judge [*In full text*]: This is an appeal from a judgment for the defendant rendered on motion for summary judgment in an antitrust case. The basis for the district court's ruling was that the plaintiff had given a valid and unconditional release to one of the parties to a joint tort and that this release discharged the obligation of all.

[*Suit*]

It appears that plaintiff in this case had, at the conclusion of a government action against important producers in the incandescent electric lamp industry, started a suit against General Electric Company naming Corning Glass as a coconspirator. This suit was dismissed by the plaintiff upon receiving a payment of $50,000 from General Electric and giving to the defendant a general release. Subsequently the plaintiff brought action against the defendants named here, alleging conspiracy under the Sherman and Clayton Acts and naming as coconspirators General Electric and Corning Glass Works but not naming them as defendants.

[*Effect of Release*]

The single question for decision here is whether the release given by the plaintiff in the General Electric suit bars the action against alleged coconspirators.

[*Applicable Law*]

The plaintiff says this question is to be settled by federal law and federal law is in its favor. We are not so sure that what we have here is a federal law question. The right is created under federal law, true. But whether subsequent things which the plaintiff has done destroys the right is not necessarily a federal law question. Cf. *Bank of America v. Parnell,* 352 U. S. 29 (1956), reversing, 226 F. 2d 297 (3d Cir. 1955). But see *Stella v. Kaiser,* 221 F. 2d 115 (2d Cir.), cert. denied, 350 U. S. 835 (1955). See also Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision,* 105 U. Pa. L. Rev. 797 (1957). We do not need to decide that issue because we think by either route the plaintiff cannot now recover.

[*Scope of Release*]

The common-law rule on the subject was perfectly clear. It is accurately expressed in Restatement, Torts, § 885(1) (1939) as follows:

> "(1) A valid release of one tortfeasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, unless the parties to the release agree that the release shall not discharge the others and, if the release is embodied in a document, unless such agreement appears in the document."

Some of the applications of the rules have been severely criticized by law teachers. See Prosser, Torts, 1107-11 (1941). Much of this criticism, however, has come from refusal of courts in some instances to give effect to language reserving rights against parties not released or in interpreting language sounding in terms of a covenant not to sue as a general release.[1] Here we have no such complication. The document of release, which sounds as though it had been taken from an old form book, is as broad as all out of doors and typical of the wasteful use of words in the English language in which lawyers sometimes indulge. It is set out verbatim in the margin because it is the heart of the case but setting it out does not

[1] In *McKenna v. Austin,* 134 F. 2d 659 (D. C. Cir. 1943), which discusses the evils of the common-law rule the document under consideration was couched in terms of a covenant not to sue and was accompanied by an express reservation against other parties.

carry the court's approval of it as a piece of English composition.[2]

It is to be noted that the language of the release is as general as language can be. There is nothing by which it may be interpreted as a covenant not to sue. There is nothing which even hints at a reservation of rights. There is nothing in the facts here which looks to a reexamination of the release based upon fraud or mutual mistake or anything of the sort. *Michael Rose Productions v. Loew's Inc.* [1956 TRADE CASES ¶ 68,307], 143 F. Supp. 606 (S. D. N. Y. 1956); *McDermott v. Botwick,* 38 N. J. Super. 528, 119 A. 2d 776 (App. Div. 1956). The transaction was one conducted between lawyers so we do not have an instant where a court may strive to extricate an uninformed layman from the consequences of a hasty settlement. As the court below said at the conclusion of the argument upon the motion for summary judgment, "[I]f there ever was [a] case . . . which seems to come within the confines of the general rule that release of one tortfeasor is a release to all, this is it." That is our view also.

[*State and Federal Law*]

The New Jersey authorities are clear in their enunciation of the common-law rule as to the effect of a release as applied to a situation like this. See, *e. g., Moss v. Cherdak,* 114 N. J. L. 332, 176 Atl. 333 (E. & A. 1935); cf. *Aljian v. Ben Schlossberg, Inc.,* 8 N. J. Super. 461, 73 A. 2d 290 (App. Div. 1950). So, too, we think are the federal cases. See, *e. g., Combined Bronx Amusements v. Warner Bros. Pictures* [1955 TRADE CASES ¶ 68,123], 132 F. Supp. 921 (S. D. N. Y. 1955); *Solar Elec. Corp. v. General Elec. Co.,* Civil No. 14157, W. D. Pa., Oct. 2, 1957; *cf. Stella v. Kaiser,* 218 F. 2d 64, 68 (2d Cir. 1954); *Save Elec. Corp. v. General Elec. Co.,* Civil No. 7146, N. D. Ohio, March 28, 1957.

[*Affidavit—Intention*]

One more point should be noted. There is an affidavit by the president of the plaintiff company which figures in the district court proceedings. This affidavit does not claim that the company was lured into making this settlement. It simply says that it was not the intention of the president to release all claims against other conspirators. We think this affidavit does not change the application of the rule. When a man uses words which have a given legal effect he is bound by that effect in the absence of fraud or mistake none of which there is here. *Combined Bronx Amusements v. Warner Bros. Pictures, supra; Save Elec. Corp. v. General Elec. Co., supra;* Restatement, Torts § 885, Com. *d* (1939); 3 Williston, Contracts § 647 (rev. ed. 1936).

[*Affirmed*]

The judgment of the district court will be affirmed.

[¶ 68,854] Frank Riggall v. Washington County Medical Society; Stanley Applegate, Individually and as President of Washington County Medical Society; Fount Richardson; Friedman Sisco; Ruth Ellis Lesh; and Alfred Hathcock.

In the United States Court of Appeals for the Eighth Circuit. No. 15,804. Dated November 15, 1957.

Appeal from the United States District Court for the Western District of Arkansas.

[2] "Dura Electric Lamp Company, Inc., a corporation organized and existing under the laws of the State of New Jersey, on its own behalf and on behalf of the individuals and corporation who have executed assignment of claims to it, a copy of which assignment is annexed hereto as Exhibit 'A,' for and in consideration of the sum of Fifty Thousand Dollars ($50,000), lawful money of the United States of America, and other good and valuable consideration, to it in hand paid by General Electric Company, the receipt whereof is hereby acknowledged, has remised, released and forever discharged, and, by these presents, does, for itself, its predecessors, successors and assigns, remise, release and forever discharge General Electric Company and all its subsidiary and successor companies, all its past, present and future officers, directors, stockholders, agents, employees, and each and every one of the aforesaid jointly and severally, of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which it, or any of its predecessors or assignors, ever had, now has or which it or any of its predecessors or assignors or its successors or assigns hereafter can, shall or may have, for, upon and by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents."

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief —Necessary Averments To State Cause of Action—Injury to Public—Interstate Commerce.—A doctor's antitrust suit alleging that a county medical society wrongfully denied him membership, and that, as a result, his practice was less profitable, was properly dismissed. The complaint failed to allege that the defendants' act cast any burden upon interstate commerce. The practice of medicine, as disclosed by the complaint, did not constitute either trade or commerce within Section 1 of the Sherman Act. The mere fact that a doctor in one state may be treating patients from other states who must travel interstate does not result in practicing medicine in interstate commerce as the transportation of such patients is incidental. Furthermore, the complaint contained no charge that the defendants' acts imposed an economic burden upon the public or that the rejection of the doctor's membership application resulted in the raising or fixing of fees charged the public by other physicians, and there were no allegations indicating that the defendants' actions resulted in a monopoly within the provisions of Section 2 of the Sherman Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2035.213; Private Enforcement and Procedure, Vol. 2, ¶ 9009.475, 9009.600.

For the appellant: James R. Hale.

For the appellees: Eugene R. Warren (Rex W. Perkins and Bailey, Warren & Bullion on the brief).

Before GARDNER, Chief Judge, and VOGEL and VAN OOSTERHOUT, Circuit Judges.

[*Nature of Action*]

GARDNER, Chief Judge [*In full text*]: Appellant, a duly licensed physician and surgeon, brought this action against the defendants to recover treble damages for alleged violations of the Sherman Anti-Trust Act, Title 15, U. S. C., Secs. 1, 2, 12 and 15. We shall refer to the parties as they were designated in the trial court.

Plaintiff was duly licensed as a physician and surgeon by the licensing authorities of the State of Arkansas in 1935 and at and since said time has been practicing his profession in Washington County, Arkansas. The defendant Washington County Medical Society is an unincorporated professional, economic organization and institution with at least thirty-six dues-paying or active members, and the other named defendants are members of the Washington County Medical Society and are also physicians and surgeons. Plaintiff in his complaint alleged that he was a citizen of Arkansas and that the defendants were also citizens of the State of Arkansas; that jurisdiction of the court was dependent upon provisions of the Sherman Anti-Trust Act, Title 15, U. S. C., Secs. 1, 2, 12 and 15; that he had received various degrees from educational institutions and had thorough training and wide experience in the field of medicine and its practice; that while he was located at Prairie Grove, Arkansas, where he had practiced his profession since 1935, he received, accepted, treated and administered to patients from Arkansas, Oklahoma, Kansas, Missouri, Texas and other states and that had he been a member of the Washington County Medical Society he would in the past have received, accepted, treated and administred to a great many more patients and would in the future receive, accept, treat and administer to a great many more patients than in the past, not only from Arkansas but from many other states; that he was qualified for membership in the society but that notwithstanding such qualifications he had applied for membership in due form on four different occasions; that his applications had been wrongfully, unlawfully, capriciously and arbitrarily rejected, no reason for such rejections being given therefor; that he had exhausted his administrative remedies by appeal to the Arkansas Medical Society and the American Medical Association but was unable to secure any redress and would in the future be unable to secure any remedy for the injuries suffered by reason of the arbitrary rejection of his applications for membership in the Washington County Medical Society, that the Constitution and By-Laws of the Washington County Medical Society provided that "Every legally registered physician residing and practicing in Washington County

who is of good moral and professional standing and who does not support or practice, or claim to practice, any exclusive system of medicine, shall be eligible for membership," and "The Society shall judge of the qualifications of its members, but as it is the only door to the state medical society and the American Medical Association, for physicians within its jurisdiction, every reputable and legally qualified physician of Washington County who does not support, or practice or claim to practice sectarian medicine, or who does not claim to have exclusive or special medicines not available to the general profession, and who adheres carefully to the principles of medical ethics, shall be eligible to membership," and "This Society shall have general direction of the affairs of the medical profession of the county, and its influence shall be constantly exerted to better the scientific, material and social condition of every physician within its jurisdiction. Systematic efforts shall be made by each member, and by the Society as a whole, to increase the membership until it embraces every reputable physician in the county;" that the Washington County Medical Society was a component member of the Arkansas Medical Society and held a charter from that society, that the Arkansas Medical Society was a constituent member of the American Medical Association; that the American Medical Association is the only medical association or society of national prominence, influence or importance in the United States and that membership in the American Medical Association is of great economic importance and benefit; that because of his denial of membership in the Washington County Medical Society he had been and was prevented from doing a number of enumerated things all of which would be of great economic benefit and importance to him as well as to his patients and the public and society in general, all of which substantially affected trade and commerce between the State of Arkansas and other states, territories and foreign countries, and that the defendants had combined, confederated, and conspired among themselves and with other persons in disregard of the provisions of the constitution and by-laws of the Washington County Medical Society not to admit plaintiff to membership in said society and that defendants had stated publicly that they were not required to give plaintiff any reason for refusing or denying him membership. In his prayer he asked for $100,000 damages, that this amount be trebled pursuant to provisions of the Sherman Anti-Trust Act, that the defendants be enjoined and restrained from collusive or concerted action in respect to his application for membership, and that mandatory injunction issue commanding the defendant Washington County Medical Society to admit him to full membership. Other specific relief was also demanded.

[*Defenses*]

Defendants filed answer denying that the court had jurisdiction of the cause of action or that the Sherman Anti-Trust Act was applicable to the allegations of plaintiff's complaint.

[*Dismissal of Complaint*]

On hearing the court determined that it was without jurisdiction and entered judgment dismissing the complaint.

[*Issue*]

On this appeal it is urged that the court erred in holding that it was without jurisdiction and that is the sole issue.

[*Sherman Act*]

Sections 1 and 2 of the Sherman Anti-Trust Act, so far as here pertinent, read as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * * (Sec. 1, Title 15, U. S. C.)
>
> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." (Sec. 2, Title 15, U. S. C.)

Section 3 of the Sherman Anti-Trust Act is confined in its operation to territories or the District of Columbia and has no bearing on the issues here presented.

[*Trade or Commerce—Public Injury*]

We must accept as true all well-pleaded facts in the complaint, but not conclusions.

Section 1 of the Sherman Act was enacted by Congress pursuant to the commerce clause of the Constitution vesting in Congress the power to regulate interstate commerce. It is to be noted that the complaint is confined to plaintiff's private medical practice. It charges no economic burden on the public by reason of the alleged acts of the defendants. There is no charge that the rejection of plaintiff's application for membership in the Washington County Medical Society resulted in the raising or fixing of fees charged the public by other physicians. There is no allegation in the complaint remotely suggesting that the acts of defendants cast any burden upon interstate commerce. The mere fact that plaintiff at his location in Arkansas may be treating patients from other states who must travel interstate does not result in practicing his profession in interstate commerce as the transportation of such patients is incidental. The practice of his profession as disclosed by the allegations of his complaint is neither trade nor commerce within Section 1 of the Sherman Anti-Trust Act, nor are there any allegations in the complaint indicating that the actions of defendants here complained of resulted in a monopoly within the provisions of Section 2 of the Act. Plaintiff has not been prevented from practicing his profession, but in the final analysis his complaint is that he could practice it more profitably but for the acts of the defendants. The Sherman Anti-Trust Act was not primarily to protect the individual but to protect the general public economically, and a private party may not recover under the act unless there has been an injury to the general public economically. *Apex Hosiery Co. v. Leader* [1940-1943 TRADE CASES ¶ 56,039], 310 U. S. 469; *Spears Free Clinic and Hospital v. Cleere,* 10 Cir. [1952 TRADE CASES ¶ 67,276], 197 F. 2d 125; *United States v. Oregon State Medical Society,* Ore. [1950-1951 TRADE CASES ¶ 62,703], 95 F. Supp. 103; *United States v. Oregon Med. Soc.* [1952 TRADE CASES ¶ 67,264], 343 U. S. 326; *Northern California M. D. Ass'n. v. Interment Ass'n.,* S. D. Cal. [1954 TRADE CASES ¶ 67,715], 120 F. Supp. 93; *Kolb v. Pacific Maritime Association,* N. D. Cal. [1956 TRADE CASES ¶ 68,363], 141 F. Supp. 264. In *Apex Hosiery Co. v. Leader, supra,* the Supreme Court has pointed out the scope and purpose of the Sherman Anti-Trust Act. In the course of the opinion in that case the court in referring to the purpose of the enactment of the Sherman Anti-Trust Act said:

> "It was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the goods and services, all of which had come to be regarded as a special form of public injury."

Again, it is said:

> "In the cases considered by this Court since the *Standard Oil* case in 1911 some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition."

[*Related Rulings*]

In *United States v. Oregon State Medical Society, supra,* the United States brought suit against the Oregon State Medical Society and others to restrain alleged violation by defendants of the Sherman Anti-Trust Act. The court in holding that the defendants were not guilty of any of the charges against them, among other things, said:

> "The practice of medicine as conducted within the State of Oregon by doctors of Oregon, including defendants, is not trade or commerce within the meaning of Section 1 of the Sherman Anti-Trust Law, 15 U. S. C. A. Sec. 1, nor is it commerce within the meaning of the constitutional grant of power to Congress 'To regulate Commerce * * * among the several States'."

On direct appeal to the Supreme Court this decision was affirmed and the Supreme

Court in the course of its decision, in referring to the finding that the practice of medicine was not trade or commerce within the meaning of Section 1 of the Sherman Act, said:

> "If that finding in both aspects is not to be overturned as clearly erroneous, it, of course, disposes of this charge * * *."

The decision of the Supreme Court is of significance in another aspect. Plaintiff here relies quite strongly on *American Medical Association v. United States* [1940-1943 Trade Cases ¶ 56,254], 317 U. S. 519. The decision of the Supreme Court in *United States v. Oregon State Medical Society, supra,* points out that that decision is clearly distinguishable because it arose under Section 3 of the Sherman Act. Referring to this question the court said:

> "*American Medical Assn. v. United States* [1940-1943 Trade Cases ¶ 56,254], 317 U. S. 519, does not stand for the proposition that furnishing of prepaid medical care on a local plane is interstate commerce. That was a prosecution under Section 3 of the Sherman Act of a conspiracy to restrain trade or commerce in the District of Columbia. Interstate commerce was not necessary to the operation of the statute there."

In *Spears Free Clinic and Hospital v. Cleere, supra,* action was brought against the Medical Society of Denver City and County, former and present members of the State Board of Health and former and present officials and trustees of the Medical Society based on alleged violations of Sections 1 and 2 of the Sherman Anti-Trust Act. There it was alleged that "numerous persons from all of the United States and from many foreign countries" regularly came to the plaintiff institution for treatment. The complaint further alleged that the defendants combined and conspired to prevent the licensing of the institution and to prevent the operation and maintenance of the institution and to further allocate to various members of the medical profession within the State the entire practice of the healing arts to the exclusion and restraint of the practice of chiropractic. There were further allegations that the defendants did certain acts to prevent the maintenance of the hospital as a chiropractic institution and to monopolize the entire practice of the healing arts within the State of Colorado in the medical profession. Referring to these charges the court among other things said:

> "The practice of the healing arts in Colorado, including chiropractic, is wholly local in character. The alleged conspiracy and the acts alleged to have been done in furtherance thereof had for their purpose and object the monopolization and restraint of purely local activities. No price fixing or price maintenance for professional or other services was involved. There was no intent to injure, obstruct or restrain interstate or foreign commerce. The mere fact that a fortuitous and incidental effect of such conspiracy and acts may be to reduce the number of persons who will come from other states and countries to the Spears Hospital for chiropractic treatments does not create such a relation between interstate and foreign commerce and such local activities as to make them a part of such commerce.
>
> "To come within the purview of the Sherman Act the restraint of commerce or the obstruction of commerce must be direct and substantial and not merely incidental or remote."

[*Conclusion*]

As has been observed, plaintiff's complaint in substance is that the practice of his profession would have been more profitable to him had the defendants not deprived him of membership in the Washington County Medical Society. Plaintiff was not prevented from practicing his profession and the complaint, we think, is wholly lacking in allegations essential to a cause of action under the Sherman Anti-Trust Act.

[*Affirmed*]

The judgment appealed from is therefore affirmed.

[¶ 68,855] John P. Kinsey, individually, and as a Director and Stockholder of Monroe Paper Products Company; Lawrence G. Kunkel and The Waterbury Corrugated Container Co., individually and as Stockholders of said Monroe Paper Products Company v. Burton S. Knapp, Charles E. Raney, George A. Blum, Don B. Leathers, and Arthur W. Sempliner, individually and as Directors and Stockholders of said Monroe Paper Products Company, and as Trustees under Voting Trust Agreement dated as of December 31, 1953

pertaining to stock herein; George J. Huber, individually and as Chairman of Stockholders' Committee of Monroe Paper Products Company stock, and said Monroe Paper Products Company.

In the United States District Court for the Eastern District of Michigan, Southern Division. No. 13179. Filed July 30, 1957.

Sherman Antitrust Act

Combinations and Conspiracies—Price Fixing—Voting Trust—Agreement Not To Sell Below Specified Price—Refusal To Deal—Legality.—A voting trust agreement, under which stockholders agreed that the deposited stock could not be sold for less than $15.00 per share and only if a purchaser buys all of the deposited stock, was not, as a matter of law, void under the Sherman Act. Price fixing under the Sherman Act is illegal per se, if it affects commerce among the states. The Act does not restrict the right of a trader to exercise his own independent discretion as to the parties with whom he will deal. In the instant case, the stockholders simply authorized the trustees not to sell to any person who would not buy all of their stock at $15.00 per share. Such authority of the trustees to sell only upon certain conditions or to refuse to sell at all is a feature indispensable to the existence of such agreements. The Sherman Act should not be construed to prohibit such agreements. Furthermore, it was doubtful whether the activity involved could be characterized as commerce among the states.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785, 2011.181.

Michigan Antitrust Law

Combinations and Conspiracies Under State Laws—Price Fixing—Voting Trust—Agreement Not To Sell Below Specified Price—Legality.—A voting trust agreement, under which stockholders agreed that the deposited stock could not be sold for less than $15.00 per share and only if a purchaser buys all of the deposited stock, was not, as a matter of law, void under the Michigan antitrust laws. Only contracts embodying unreasonable price fixing provisions are illegal under Michigan law. The trust agreement was not unreasonable; it was designed for the protection of legitimate interests of the parties and it was not specially injurious to the public.

See Combinations and Conspiracies, Vol. 1, ¶ 2335.

For the plaintiffs: George E. Brand and George E. Brand, Jr., Detroit, Mich.

For the defendants: Hugh Francis, Detroit, Mich., for Monroe Paper Products Co.; Stanton, Sempliner, Dewey & Knight, Detroit, Mich. (Fischer, Sprague, Franklin & Ford, Detroit, Mich., of counsel), for Knapp et al.; Weipert & Weipert, Monroe, Mich., substituted for Knapp et al.

Opinion of the Court

[*Motion*]

FRANK A. PICARD, District Judge [*In full text except for omissions indicated by asterisks*]: Plaintiffs move this court, pursuant to Rule 54(b) FRCP, to invalidate a voting trust agreement while reserving judgment on damages and other related issues of fact raised by their complaint.

Findings of Fact

[*Parties*]

All plaintiffs are stockholders of Monroe Paper Products Company, and plaintiff Kinsey is, in addition, a director. Defendants, Knapp, Blum, Raney, Leathers and Sempliner are directors and also trustees under the above voting trust agreement. Defendant Huber, neither a trustee nor director, was chairman of the stockholders' committee which allegedly participated in creating the trust agreement.

[*Voting Trust Agreement*]

The controversial trust, which empowered defendant trustees to vote 95,244 shares of Monroe's stock was created at a time when plaintiffs and defendants were waging a fight to gain financial and managerial control of the corporation. The fight followed the death of Alex J. Groesbeck, its president, on May 10, 1953, owning 32,814½ of the 190,000 shares of Monroe stock and who

had been for years the dominant figure in the company's operation, control and management. Ex-Governor Groesbeck died in 1953 and in September, 1953 National Container Corporation made a public offer to purchase all, but not less than 55.6% of Monroe's outstanding stock thus precipitating the battle for control, which first stage began in September, 1953 with the establishment of an escrow agreement by defendants and was augmented in December, 1953, when the voting trust agreement was consummated.

Defendants' escrow agreement, which was put into effect immediately after National Container's purchase offer, but shortly before the 1953 stockholders' meeting, was designated to defeat acceptance of that offer. That escrow agreement provided that any person wishing to purchase company stock for $10.00 per share could deposit money in a fund to be held by the Monroe State Bank for that purpose. Plaintiffs allege that defendants, by soliciting company customers, suppliers, employees, and by contributions of $15,000.00 by Raney, $15,000.00 by Leathers and $5,000.00 by Blum, were able to secure deposit of $162,000.00 in escrow with which was purchased 15,538 shares of company stock both through means criticized by plaintiffs as fraudulent and with these secured proxies as well as other stock controlled by them, along with their individual holdings, enabled them to defeat the National Container offer and secure their own re-election as directors.

But the threat that plaintiffs might still be able to purchase controlling interest in Monroe shortly, remained, so to neutralize this possibility the voting trust agreement was executed on December 31, 1953, as a permanent proxy to defendants for a period of five years. Plaintiffs claim that the voting trust, thus created again by alleged devious means, is void or at least voidable as a matter of law and they have enumerated the following five reasons why that voting trust is void and one reason why it is voidable.

Void—because it

(1) Violates the Michigan Restraint of Trade Law M. S. A. 28.31(5) and 28.36;

(2) Violates the Sherman Antitrust Act 15 U. S. C. 1;

(3) Violates Michigan Common Law against restraints on the alienation of property;

(4) Places each director in an inconsistent position as director and trustee in violation of his fiduciary duties as the former; and

(5) Defendants, in creating the trust violated 15 U. S. C. 78cc and Rule X 10B-5 of the Securities Exchange Commission.

Voidable—because

(1) Neither the agreement, nor certificates issued pursuant thereto, were registered as required by the Securities Act of 1933, 15 U. S. C. 77a et seq., and Michigan Blue Sky Law M. S. A. 19.747.

Conclusions of Law

We briefly discuss and decide these contentions seriatim.

[*Michigan Antitrust Law*]

1. Is trust agreement void because in violation of Michigan's laws against Restraint of Trade?

Sub-paragraph (5) of M. S. A. 28.31 provides *inter alia,* that it shall be unlawful for two or more persons to agree not to sell any article or commodity below a common fixed price, or in any manner establish or settle the price of any article so as to directly or indirectly preclude free and unrestricted competition for the purchase thereof. M. S. A. 28.36 declares that any contract violation of sub-paragraph (5) is against public policy and absolutely void.

True, under the trust the stockholders agreed that the stock deposited thereunder could not be sold for (a) less than $15.00 per share and (b) only if the purchaser would purchase all of the stock so deposited. But we do not agree with plaintiffs' claim that all price fixing is illegal under Michigan law; on the contrary only contracts embodying unreasonable price fixing provisions. *S-K Oil Co. v. Mac's Auto Mart, Inc.,* 329 Mich. 351. In *Hubbard v. Miller,* 27 Mich. 14 at p. 19, Chief Justice Christiancy narrowed the prohibition to the reasonableness of any contract encompassing price fixing. He said:

> ". . . if, considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed,

reasonable as between them and not specially injurious to the public, the restraint will be held valid."

We hold that at this point this trust agreement is not unreasonable from any angle, "business situation," "objects of the parties" designed "for the protection of the legitimate interests of the parties" or "not specially injurious to the public" as a matter of law.

[*Sherman Act*]

2. Does the trust agreement violate the Sherman trust law?

Here again plaintiff bases invalidity upon alleged price fixing and restraint of trade features of the agreement. Section 1 of the Sherman Antitrust Act condemns as illegal

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations."

While the Sherman Act, like the Michigan Restraint of Trade Act, does not encompass and condemn all activity that may restrain trade (*Apex Hosiery Co. v. Leader* [1940-1943 TRADE CASES ¶ 56,039], 310 U. S. 469) unlike the Michigan Act, price fixing under the Sherman Act is illegal per se (*U. S. v. McKesson and Robbins* [1956 TRADE CASES ¶ 68,368], 351 U. S. 305) if it affects commerce among the States, and is not exempt by the law,[1] the good intentions of the parties to the agreement, and the reasonableness thereof to the contrary notwithstanding.

Here we are not concerned with reasonableness, dependent upon circumstances and facts surrounding the execution of the trust agreement, but only with whether the agreement fixes prices so that it restrains commerce among the states.

And again we find that plaintiffs' contention that the trust agreement in question fixed prices is not well founded. As stated in *U. S. v. Bausch & Lomb Co.* [1944-1945 TRADE CASES ¶ 57,224], 321 U. S. 707 p. 722, quoting *U. S. v. Colgate & Co.*, 250 U. S. 300,

> ". . . the Sherman Act 'does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.'"

It may be appreciated, therefore, that limitation upon exercise of this right is that the seller may not, under the Sherman Act, go beyond exercise of the right, and unduly hinder, by contract or other means, the free natural flow of interstate commerce. In the case at bar the stockholders under the trust agreement simply authorized the trustees not to sell to any person who would not buy all of their stock at $15.00 per share. They went no further. Such authority of trustees to sell only upon certain conditions, or indeed, to refuse to sell at all, is a feature indispensable to the existence of such agreements. Voting trusts are authorized in nearly all, if not all, of the forty-eight states. We do not divine the congressional intent, at the time the Sherman Act was enacted, to have been to outlaw such agreements by implication and we will not make that result possible by abuse of the power of judicial construction.

Aside from the foregoing, we entertain grave doubts as to whether the trustees and the stockholders under the trust agreement limited activity that may be characterized as "commerce among the several states." The trust was consummated in Michigan, and it is clear that, for the most part, economic repercussions therefrom will not reach beyond the borders of this state. See *Lawson v. Woodmere* [1954 TRADE CASES ¶ 67,904], 217 F. 2d 151; *Spears Free Clinic and Hospital v. Cleere* [1952 TRADE CASES ¶ 67,276], 197 F. 2d 125.

We deny the motion insofar as it is based upon the instant contention.

* * *

[*Scope of Decision*]

We do not in this opinion decide anything on the facts. We do not hold that it is not possible that the proof might alter our decision as to whether or not this trust agreement is void or voidable on the facts. We do not pass upon any of the alleged wrongful acts of these directors.

* * *

There is nothing in this decision that prevents any stockholder or anyone else from now purchasing the stock of the Monroe Paper Products Company wherever he may find it or for whatever price. This

[1] Miller-Tydings Act 50 Stat. 693 and the McGuire Act 66 Stat. 632.

partial judgment is aimed to free the stock of this corporation as much as we can in view of the circumstances under which we find the corporation at the present time and to temporarily, at least, dispose of the alleged double and triple damage claims of plaintiff based on the trust agreement by being void as a matter of law.

[¶ 68,856] United States v. Parke, Davis and Company, G. L. Walker and S. M. Dripps.

In the United States District Court for the District of Columbia. Criminal Action No. 444-57. Dated November 4, 1957.

Case No. 1339 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Resale Price Fixing—Price Fixing Through Refusal To Deal—Legality—Agreement To Fix Resale Price—Sufficiency of Evidence.—A manufacturer of drugs and two of its officers were acquitted of charges that they conspired with drug wholesalers and retailers to establish, maintain, and enhance the prices at which the manufacturer's products were sold to retailers and to the public in the District of Columbia and the State of Virginia. On a motion for a judgment of acquittal, the court held that there was a complete lack of evidence indicating any conspiracy and that the evidence did not establish the existence of any agreement to control prices. The manufacturer and its officers did not prohibit retailers or wholesalers from disposing of the manufacturer's products; they merely said to them, if you sell the products below our recommended list price or retail price, we will not, in the future, deal with you. The fact that a dealer, looking to his own future business and his future financial interest, decides that he is going to maintain the recommended price does not constitute an agreement.

See Resale Price Fixing, Vol. 1, ¶ 3015.20, 3015.70, 3060.

For the plaintiff: Edward R. Kenney, Department of Justice; Richard C. Shadyac; and Herbert F. Peters, Jr.

For the defendants: Gerhard A. Gesell and John H. Schafer, both of Covington & Burling, Washington, D. C.; and James E. Tobin, of Miller, Canfield, Paddock, and Stone, Detroit, Mich.

Ruling of the Court

[*Motion*]

The Court [EDWARD A. TAMM, District Judge, *In full text*]: The present motions for judgment of acquittal of all defendants are addressed to the court under Rule 29-A of the Federal Rules of Criminal Procedure which provides that such a motion may be made at the termination of the Government's case and that the Court may, if it believes the evidence is insufficient to sustain a conviction of such offense, grant the motion.

The Court has taken the opportunity over the weekend of reading the well-written memoranda which counsel for the Government and counsel for the Defendant have filed with the Court in this case. I have read the majority of the cases cited in those memoranda.

[*Colgate Decision*]

There are two cases in the Supreme Court that have caused me considerable concern because I had some difficulty, at least in the first reading, in reconciling the ruling in the case of *U. S. v. Bausch & Lomb* with the case of *U. S. v. Colgate and Company.* I do think, however, that the *Bausch & Lomb* case is readily distinguishable from the present case as Mr. Gesell has pointed out, by the factual situations.

In the *Bausch & Lomb* case there was a complicated series of licensing agreements, a system of franchises to retail dealers. In addition, the manufacturer, Bausch & Lomb, was the majority stockholder in the intermediate wholesale corporations with whom the defendant Soft-Lite was alleged to be conspiring.

It does seem to me in the present case that there is a complete lack of evidence

indicating any conspiracy. I cannot conclude upon the basis of the evidence that there is factually any agreement between the manufacturer and the wholesalers. The *Colgate* case is pretty well summarized in the last paragraph appearing on page 304 wherein the Supreme Court in quoting from the trial court's opinion said, and I quote:

> "In the view taken by the Court, the indictment here fairly presents the question of whether a manufacturer of products shipped in interstate trade, is subject to criminal prosecution under the Sherman Act, for entering into a combination in restraint of such trade and commerce, because he agrees with his wholesale and retail customers, upon prices claimed by them to be fair and reasonable, at which the same may be resold, and declines to sell his products to those who will not thus stipulate as to prices. This, at the threshold, presents for the determination of the court how far one may control and dispose of his own property; that is to say, whether there is any limitation thereon, if he proceeds in respect thereto in a lawful and bona fide manner. That he may not do so fraudulently, collusively, and in unlawful combination with others, may be conceded. But it by no means follows that, being a manufacturer of a given article, he may not, without incurring any criminal liability, refuse absolutely to sell the same at any price, or to sell at a named sum to a customer, with the understanding that such customer will resell only at an agreed price between them, and, should the customer not observe the understanding as to retail prices, exercise his undoubted right to decline to further deal with such person."

The *Colgate* opinion emphasizes the fact that under the Colgate system of distribution the retailer could do anything that he wanted with the product when he received it. He could sell it at a high price or a low price, he could keep it or he could throw it away, and he suffered no penalty. But, if he sold it at a price lower than the recommended retail price, the manufacturer would not in the future do business with him.

[*Evidence*]

It seems to me in the present case factually that the same situation exists. The defendants do not prohibit the retailer or the wholesaler from disposing of products purchased from the manufacturer, but they say to him, if you sell them below our recommended list price or retail price, we will not in the future deal with you.

I am of the further opinion that rather than there being any agreement to control prices between these defendants and the wholesalers, that legally the attitude of the defendants—the defendant Parke, Davis Company—towards the wholesaler was and is the same as that attitude towards retailers.

In other words, when representatives of Parke, Davis Company went to the Gilpin people or to the District Wholesale Drug Company, they said in effect, you can dispose of these goods as you see fit but if you sell them to retailers that are not maintaining our prices, we will not sell to you in the future. I think that doesn't constitute an agreement when the wholesaler, looking to his own future business and his future financial interest, decides that he is going to maintain this price.

[*Motion Granted*]

I believe, upon the basis of the evidence before the Court, that it is insufficient to sustain a conviction of the offenses charged in the first and third counts of the indictment. I believe that the Court must grant the defendant's motion for judgment of acquittal as to all three defendants.

Mr. Gesell: If your Honor please, should we be here tomorrow when the jury is back?

The Court: It is not necessary. When the jury returns in the morning, the Court will advise them as to the nature of the motion that was made, of the Court's ruling upon the motion and will tell the jurors that they are relieved from further responsibility in the case. You may be present if you desire to do so. It is not required.

[¶ 68,857] United States v. The Kansas City Star Company, Roy A. Roberts, as President, and Emil A. Sees, as Director of Advertising of said corporate defendant.

In the United States District Court for the Western District of Missouri. Civil No. 7989. Filed November 15, 1957.

Case No. 1152 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Acquiring Control of Competitor or Related Company—News and Newspaper Advertising.—A newspaper company, its president, and its advertising director were prohibited by a consent decree from acquiring any interest in any commercial radio or television broadcasting station in Metropolitan Kansas City, except upon application to the court and establishing that such acquisition will not unduly restrain competition or tend to create a monoply in the dissemination of news and advertising in the area. They were further prohibited from acquiring any interest in or assets of any person engaged in the publication of a newspaper having a circulation in Metropolitan Kansas City.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.833; Monopolies, Vol. 1, ¶ 2610.120.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Exclusive Dealing and Tying Arrangements.—A newspaper company, its president, and its advertising director were prohibited by a consent decree from negotiating for publication, accepting for publication or publishing advertisements, or entering into contracts for the publication of advertisements, on or accompanied by the condition, agreement, or understanding that the advertiser shall not use, or shall limit or restrict his use of, other advertising media. Refusals to deal and discriminatory practices having as their purpose exclusive dealing or tying arrangements also were prohibited.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.690, 2005.848; Monopolies, Vol. 1, ¶ 2610.300, 2610.850.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Discriminations.—A newspaper company, its president, and its advertising director were prohibited by a consent decree from discriminating as to space, location, or arrangement of advertisements, except as such discrimination may be necessitated by the objective dictates of the make-up of the paper; discriminating or threatening to discriminate as to credit having been made or to be made available to an advertiser unless the company is able to establish that the advertiser has a poor credit rating, or otherwise fails to meet reasonable standards promulgated and uniformly applied, without regard to whether the advertiser advertises or proposes to advertise in or through any other advertising medium, expends any particular portion of its advertising funds for advertising through any other medium, or refuses to spend on advertising in media of the defendants any amounts specified or set by the defendants.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.630; Monopolies, Vol. 1, ¶ 2610.280.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Refusal To Deal.—A newspaper company, its president, and its advertising director were prohibited by a consent decree from refusing to publish advertisements where the advertiser and the advertisements meet reasonable standards promulgated and uniformly applied by the defendants or from refusing to sell general advertising separately in the morning, evening or Sunday newspapers published by the defendants. There was a similar prohibition as to classified advertising. The defendants were not, however, prohibited from granting discounts, not to exceed a stated per cent, on multiple insertions in two or more of the defendants' newspapers.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785; Monopolies, Vol. 1, ¶ 2610.720.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Retention of Security Interest.—A consent decree requiring a newspaper to sell physical assets and good will connected with a radio and television station did not prohibit the newspaper from retaining a security interest to secure payment of the purchase price or from reacquiring such assets upon default by the purchaser.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.48, 8421.

Department of Justice Enforcement and Procedure—Consent Decrees—Nature and Use—Applicability of Provisions.—A consent decree entered against a newspaper company, its president, and its advertising director provided that the provisions of the decree

should be applicable to each individual defendant only for so long as he retains a financial interest in or is employed by the defendant company.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8241.15.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief —Divestiture.—A newspaper was required to sell to a person or persons, having no interest in the newspaper and having been approved by the Federal Communications Commission, all physical assets and good will connected with a radio station and a television station. The transfer of licenses also had to be approved by the Commission.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.10.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief —Newspaper Subscription Options.—A newspaper was required to permit, on other than sales of single copies of its newspapers through newsstands and news vendors, every person at his election to subscribe to its morning, evening, and Sunday newpapers on the following options: morning and Sunday; evening and Sunday; or morning, evening, and Sunday. The subscription price of the morning and Sunday option or of the evening and Sunday option should bear a fair differential from the price of the morning, evening, and Sunday option.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.50.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief —Notice Requirements.—A newspaper was required (1) to publish, for four weeks, once a week, the full terms of the decree entered against it in all editions within one twenty-four hour period, and to publish for the following six months, once a month, the substantive terms of the decree in all editions within one twenty-four hour period; (2) to notify all regular advertisers in its newspapers that it will sell advertising space in its morning, evening, and Sunday papers at rates, terms, and conditions which comply with the terms of the decree; (3) and to advise, in writing, all officers, advertising agents, advertising solicitors, and all other employees in its advertising department of the terms of the decree and that each is subject to the provisions of the decree.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.60.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; and Earl A. Jinkinson, W. D. Kilgore, Jr., George D. Reycraft, Charles F. B. McAleer, Raymond P. Hernacki, Attorneys, Department of Justice.

For the defendants: Henry N. Ess, Elton L. Marshall, Carl E. Enggas, and Colvin A. Peterson, Jr.

Final Judgment

RICHARD M. DUNCAN, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on January 6, 1953; the defendants being represented by their respective counsel having appeared and filed their answer to said complaint denying the substantive allegations thereof, and the plaintiff and said defendants by their respective attorneys having severally consented to the entry of this Final Judgment without adjudication of any issue of fact or law herein and without admission by any party with respect to any such issue,

Now, Therefore, before taking of any testimony and without trial or adjudication of any fact or law herein, and upon consent as aforesaid of all the parties hereto,

It Is Hereby Ordered, Adjudged and Decreed as follows:

I

[*Sherman Act*]

This Court has jurisdiction of the subject matter hereof and of all parties hereto. The complaint states claims upon which relief may be granted against said defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Metropolitan Kansas City" shall mean the area comprising the Counties of

Jackson and Clay in Missouri and the Counties of Johnson and Wyandotte in Kansas;

(B) "Person" shall mean any individual, partnership, firm, corporation, association or other business or legal entity;

(C) "Classified advertising" shall mean the advertising carried in the classified columns of defendants' newspapers;

(D) "General advertising" shall mean all display advertising carried in defendants' newspapers except that placed by stores located in Metropolitan Kansas City quotting items and prices or otherwise promoting their retail sales.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its subsidiaries, directors, agents, employees, successors and assigns, and to all persons in active concert or participation with a defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Divestiture—Acquisitions*]

(A) Defendant The Kansas City Star Company is ordered and directed within a reasonable time to sell to a person or persons having no interest in The Kansas City Star Company and being approved by the Federal Communications Commission all physical assets and good will connected with the Radio Station WDAF and the Television Station WDAF-TV, and upon approval of the Federal Communications Commission to transfer the licenses to such stations to the approved person or persons;

(B) Defendants are jointly and severally enjoined and restrained from acquiring any interest in any commercial radio or television broadcasting station in Metropolitan Kansas City except upon application to this Court and establishing to the satisfaction of this Court that such acquisition will not unduly restrain competition or tend to create a monopoly in the dissemination of news and advertising in Metropolitan Kansas City;

(C) Provided, however, that nothing contained in this Section IV shall prohibit defendant The Kansas City Star Company from retaining a security interest in the physical assets and good will connected with Radio Station WDAF and Television Station WDAF-TV to secure the payment of the purchase price thereof or from reacquiring the physical assets and good will connected with Radio Station WDAF and Television Station WDAF-TV upon default by the purchaser or purchasers thereof in which event defendant The Kansas City Star Company shall have a further reasonable time to sell such assets and good will to another qualified person or persons as provided in subsection (A) of this Section IV.

V

[*Practices Enjoined*]

Defendants are jointly and severally enjoined and restrained from:

(A) Refusing to publish or threatening to refuse to publish advertisments where the advertiser and the advertisements meet the reasonable standards promulgated and uniformly applied by defendants;

(B) Discriminating as to space, location or arrangement of advertisements except as such discrimination may be necessitated by the objective dictates of the make-up of the paper; provided, however, that this subsection (B) shall not be deemed to require defendants necessarily to give an advertiser a location which has heretofore historically been accorded to another advertiser;

(C) Discriminating or threatening to discriminate as to credit having been made or to be made available to an advertiser unless the defendant is able to establish that the advertiser has a poor credit rating, or otherwise fails to meet the reasonable standards promulgated and uniformly applied by defendants; without regard to whether the advertiser:

(1) advertises or proposes to advertise in or through any other advertising medium,

(2) expends any particular portion of its advertising funds for advertising through any other advertising medium, or

(3) refuses to spend on advertising in media of defendants any amounts specified or set by defendants;

(D) Negotiating for publication, accepting for publication or publishing advertisements, or entering into contracts for the

publication of advertisements, on or accompanied by the condition, agreement or understanding that the advertiser shall not use, or shall limit or restrict his use of, other advertising media;

(E) Acquiring any interest in or assets of any person engaged in the publication of a newspaper having a circulation in Metropolitan Kansas City.

VI

[*Refusals to Deal*]

Defendants are enjoined and restrained from, directly or indirectly:

(A) Refusing to contract to sell, or refusing to sell, general advertising separately in the morning, evening or Sunday newspapers published by defendants; provided, however, that nothing in this Section VI shall prohibit defendants from granting discounts on such advertising on multiple insertions in two or more of defendants' morning, evening or Sunday newspapers except that such discounts in no event shall exceed thirty percent (30%) of the sum of the rates for the same amount of advertising space when purchased separately;

(B) Refusing to contract to sell, or refusing to sell, classified advertising separately in the morning, evening or Sunday newspapers published by defendants except as to the following classifications: cards of thanks; personals; situations wanted; farm and dairy products; antiques and pottery; household goods; wanted-rooms or board; wanted to rent-farms; wanted to rent; and other non-commercial classified advertising designed to satisfy human wants; provided, however, nothing in this subsection (B) shall prohibit defendants from granting discounts on such advertising on multiple insertions in two or more of defendants' morning, evening or Sunday newspapers, provided that such discounts shall not exceed thirty-five percent (35%) of the sum of the rates for the same amount of advertising when purchased separately.

VII

[*Subscription Options*]

Other than sales of single copies of defendants' newspapers through newsstands and news vendors, defendants shall permit every person at his election to subscribe to the morning, evening and Sunday newspapers published by defendants on the following options:

(A) Morning and Sunday;

(B) Evening and Sunday;

(C) Morning, evening and Sunday.

The subscription price of the morning and Sunday option or of the evening and Sunday option shall bear a fair differential from the price of the morning, evening and Sunday option.

Provided, however, that nothing in this Section VII shall be deemed to require any change in defendants' present plan of publishing approximately 12 hours of news coverage in each of their morning and evening newspapers; and provided, further, that in determining what is a fair differential, consideration must be given (except as to Section VI) to the injunctive, divestiture and other provisions of this Final Judgment, and to defendants' sound business judgment considering the objective of defendants to continue their present plan of publishing as referred to above.

VIII

[*Notice of Decree*]

Defendant, The Kansas City Star Company, is ordered and directed upon entry of this Final Judgment to:

(A) (1) publish for four weeks, once a week, the full terms of this Final Judgment in all editions within one twenty-four hour period; and

(2) publish for the following six months, once a month, the substantive terms of this Final Judgment in all editions within one twenty-four hour period.

(B) Notify promptly all regular advertisers now carrying national advertising, general advertising, resort advertising, legal advertising, classified automobile advertising, and classified help wanted advertising in The Kansas City Star that it will contract to sell and sell advertising space in its morning paper, its evening paper and its Sunday paper at rates, terms and conditions which comply with Section VI of this Final Judgment:

(C) Advise promptly, in writing, all officers, advertising agents, advertising solicitors and all other employees in its advertising departments of the terms of this Final Judgment and that each and every such person is subject to the provisions of this

Judgment; and it shall make readily available to such persons a copy of this Final Judgment and shall inform them of such availability.

IX

[*Individual Defendants*]

The Provisions of this Final Judgment applicable to the individual defendants Roberts and Sees shall be applicable to each such defendant only for so long as he retains a financial interest in or is employed by the defendant The Kansas City Star Company.

X

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its or his principal office, be permitted:

(A) Access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and records and documents in the possession or under the control of such defendant relating to any matters contained in this Final Judgment;

(B) Subject to the reasonable convenience of such defendant and without restraint or interference from it or him, to interview officers or employees of such defendant who may have counsel present regarding any such matters.

Upon such request said defendants shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment. No information obtained by the means provided in this Section X shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XI

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the carrying out of this Final Judgment or the modification of any of the provisions thereof and for the purpose of enforcement of compliance therewith and punishment for violation thereof.

XII

[*Effective Date*]

This Final Judgment shall become effective ninety (90) days after the date of entry thereof.

[¶ 68,858] Bernard Fein, Harry B. Leslie and Warren S. Schoenthaler, individually and as directors of Security Banknote Company v. Security Banknote Company, Columbian Bank Note Company, James A. Austin, Dudley E. Dawson, Jr., George W. Goldsworthy, Jr., Oswald Maland, Horatio W. Manning, Charles H. Sulzberger, William P. Hunt, Charles R. Koerwer, Jr., Ricardo H. Kriete and Latin American Investment Corporation, S. A.

In the United States District Court for the Southern District of New York. Civil 126-6. Filed November 13, 1957.

Clayton Antitrust Act

Acquisitions of Stock or Assets—Private Enforcement of Prohibition Against Acquisitions—Preliminary Injunctive Relief—Consummated Acquisition.—Three directors of a company, engaged in the business of printing and engraving stock certificates and other documents, were denied a preliminary injunction in their action to restrain their company from commingling the assets of a competitor which the company had acquired. There was insufficient positive or affirmative proof that the acquisition violated Section 7 of the Clayton Act, and the directors failed to show irreparable loss or damage. The directors merely alleged the possibility of actions by the government and by private parties for

treble damages as threatened damage. The acquisition had been fully consummated; therefore, there was no basis for granting preventative relief. Furthermore, preliminary injunctions will not be issued if the threatened damage can be adequately compensated for by monetary damages. Also, the directors did not act promptly after learning of the intended acquisition, but stood by while the acquisition was completed.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4208.15; Private Enforcement and Procedure, Vol. 2, ¶ 9026.15.

For the plaintiffs: Stroock & Stroock & Lavan (Morton L. Deitch, Milton N. Scofield, David Lubart, E. Millimet, and Roger S. Kuhn, of counsel), New York, N. Y.

For the defendants: Dwight, Royall, Harris, Koegel & Caskey (John A. Wells, H. Allen Lochner, Justin W. D'Atri, and Herbert C. Earnshaw, of counsel), New York, N. Y.; and Crowell & Leibman (Morris I. Leibman and Donald S. Macleod, of counsel), Chicago, Ill., for Security Banknote Co., James A. Austin, George W. Goldsworthy, Jr., Oswald Maland, Charles H. Sulzberger, William P. Hunt, and Charles R. Koerwer, Jr. Duke and Landis (David B. Landis and Herbert A. Harris, of counsel), New York, N. Y., for Columbian Bank Note Co.

Opinion

[*Preliminary Injunction*]

LEVET, District Judge [*In full text*]: The plaintiffs above named, stated to be suing individually and as directors of Security Banknote Company (hereinafter called Security), seek a preliminary injunction against certain acts of Security with regard to the acquisition of the assets of the Columbian Bank Note Company (hereinafter called Columbian). The plaintiffs predicate jurisdiction in this suit upon Section 16 of the Clayton Act, Title 15 USCA § 26, which in part is as follows:

> "Injunctive relief for private parties; exception
>
> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: * * *"

[*Acquisition of Assets*]

The factual basis upon which plaintiffs predicate their asserted right to the relief requested is as follows:

1. Security is a Delaware corporation qualified to do business in the State of New York; Columbian is an Illinois corporation qualified to do business in the State of New York;

2. Security is said to be subject to the jurisdiction of the Federal Trade Commission;

3. Columbian and Security entered into a contract pursuant to which Security acquired all the assets of Columbian and assumed (with certain exceptions) all the liabilities of Columbian. This contract was *consummated* on October 18, 1957;

4. Prior to October 18, 1957, the principal business of Security and Columbian was the printing and engraving of stock certificates, bonds, debentures, warrants, corporate securities, etc.;

5. The plaintiffs contend that the three major companies engaged in this bank note business were defendants Security and Columbian and the American Banknote Company (hereinafter called American); that the bank note business in the United States prior to October 18, 1957, was the subject of active and intense competition between the three principal companies just mentioned. The plaintiffs assert that American did approximately one-third, Security, one-third, and Columbian, one-fifth of this total business, while the remainder was distributed among other companies; that the acquisition by Security of the assets of Columbian will eliminate competition between these two defendants and that this creates a violation of the antitrust laws of the United States, Title 15 USCA § 18.

[*Antitrust Violation*]

The defendants object to a preliminary injunction (to whatever effect such injunction would now lie) upon various grounds:

1. The burden rests on the plaintiffs to establish reasonable cause to believe that Section 7 of the Clayton Act has been violated. *Lowe v. Consolidated Edison Co.*, D. C. S. D. N. Y., 1941, 67 F. Supp. 287; *Hall Signal Co. v. General Ry. Signal Co.*, 2 Cir., 1907, 153 Fed. 907; *Universal Major Electric App. v. Universal Major Corp.*, D. C. S. D. N. Y., 1956, 138 F. Supp. 745; *Margolis v. Franks*, D. C. S. D. N. Y., 1956, 138 F. Supp. 9. The defendants energetically and extensively dispute the allegations of the control of the bank note business aforesaid. They assert that plaintiffs' proof made upon this motion does not sustain this burden. I have concluded that there is in fact insufficient positive or affirmative proof by the plaintiffs of this allegation of violation of the antitrust acts.

[*Threatened Injury*]

2. The plaintiffs, having conceded by their complaint and affidavits that the exchange of Security stock for Columbian assets has been fully consummated in law and fact, they have no basis for intervention under Title 15 USCA § 26 permitting preventative or injunctive relief by reason of a *threatened* violation of the antitrust act. Obviously, the purpose of a preliminary injunction is to preserve the status quo pendente lite, not to undo completed transactions. See *Warner Bros. Pictures v. Gittone*, 3 Cir., 1940 [1940-1943 TRADE CASES ¶ 56,004], 110 F. 2d 292; *Westor Threatres v. Warner Bros. Pictures*, D. C. D. N. J., 1941, 41 F. Supp. 757, 763.

[*Irreparable Loss or Damage*]

3. The plaintiffs have failed to show the danger of irreparable loss or damage requisite for preliminary injunction, whereas defendants will, it is claimed, be greatly damaged by a preliminary injunction. It is fair to assert that under Section 16 of the Clayton Act, Title 15 USCA § 26, a preliminary injunction will be issued only upon a showing that the danger of irreparable loss or damage is immediate; that the danger must be real, not fancied, actual, not prospective, and threatened, not imagined. *Weeks v. Alpert*, D. C. D. Mass., 1955, 131 F. Supp. 608, 609. The principal, if not the only danger or threatened loss, asserted in the complaint and supporting affidavits is the *possibility* of actions by the government and by private parties for treble damage under the antitrust laws. In *Gomberg v. Midvale Co.*, E. D. Pa., 1955, not officially reported, CCH 1955 TRADE CASES, Par. 68,238, it was held that possible private treble damage actions were not the type of threatened damages contemplated by Section 16 of the Clayton Act. There is also the further well-established principle that preliminary injunctions will not be issued if the threatened damage can be adequately compensated for by monetary damages. *Henis v. Compania Agricola De Guatemala*, D. C. D. Del., 1953, 116 F. Supp. 223, 225, affirmed 3 Cir., 1954, 210 F. 2d 950.

[*American Crystal Sugar Case*]

The case of *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, D. C. S. D. N. Y., 1957 [1957 TRADE CASES ¶ 68,735], 152 F. Supp. 387, does not support plaintiffs' position on this motion for the following reasons:

1. In the *American Crystal Sugar* case a preliminary injunction had been denied and the question before the court was whether on the evidence adduced at the trial plaintiff was entitled to a permanent injunction;

2. In the *American Crystal Sugar* case injunctive relief was granted to prevent a threatened union of plaintiff and defendant. Here, union is already an accomplished fact;

3. The threatened injury to plaintiff in the *American Crystal Sugar* case was not merely the possibility of future antitrust litigation. The court found that the union of plaintiff and defendant would be harmful to plaintiff in impeding its plans for increasing its business in certain districts and in limiting plaintiff's effectiveness in representing the views of the American beet sugar interests.

[*Balancing of Conveniences*]

Obviously, the court must, in the determination of an issuance of a preliminary injunction, weigh the conveniences of the parties and possible injuries to them according as they may be effected by the granting or withholding of the injunction. See *Yakus v. United States*, 321 U. S. 414, 440 (1943). In such a balance, the weight must prevail

in favor of the moving party before an injunction is granted. Nothing in the motion papers or in the complaint supplies any material basis for prospective injury to Security, other than the merely potential danger of suits above mentioned. The possibility of such suits naturally cannot be forecast but the probability of such suits is not shown by the plaintiffs.

["*Unclean Hands*"]

4. The defendants allege that the plaintiffs come into court with "unclean hands" and, hence, are not entitled to equitable relief. The basis of this argument is that the plaintiffs seek to force the defendant Security to settle with plaintiffs Leslie and Fein a certain suit brought by such plaintiffs in a New York State court on October 10, 1957, seeking to obtain valuable stock options from Security. There is no doubt that these two plaintiffs have such a claim pending and there seems to be little doubt that an effectuation of such option will mean a material financial gain if plaintiffs succeed.

[*Delay*]

5. The defendants maintain that the plaintiffs have not acted promptly. The background of events leading to the board meetings of Security and Columbian on October 18, 1957, demonstrates that the plaintiffs knew in advance of the impending transaction which the defendants consummated on that date. They did not act. This consequence meant the neglect of an action necessary to invoke the protective preventative remedies of Section 26 of Title 15 USCA.

Thus, it developes that the plaintiffs have stood by while the long-threatened act was not only planned, but completed. Now they seek to restore a condition existing prior to October 18, 1957, by a method of transaction of business by a maintenance of separate and distinct accounting procedures and by a segregated status of assets of the two corporations. In all likelihood, this will mean additional overhead expense and a probable preclusion of administrative savings which might otherwise occur.

[*Injunction Denied*]

Under the circumstances, plaintiff's motion for a preliminary injunction is denied and the temporary restraining order heretofore granted is vacated.

A supplemental decision will follow on defendants' motion under Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the complaint.

So ordered.

[¶ 68,859] United States v. Imperial Chemical Industries, Ltd.; Imperial Chemical Industries (New York), Ltd.; E. I. du Pont de Nemours and Company, Inc.; Remington Arms Company, Inc.; Lammot du Pont; Walter Samuel Carpenter, Jr.; and Charles Krum Davis.

In the United States District Court for the Southern District of New York. Civ. No. 24-13. Filed November 12, 1957.

Case No. 789 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Modification of Decree—Additional Relief—Extension of Time.—A chemical company had been required by a judgment to license its nylon patents and to make available technical information. The judgment retained jurisdiction in the court for five years for the purpose of enabling the court to modify the relief granted or to grant additional relief. A subsequent motion by the Government to extend, for an additional two years, the period of time within which it could seek further relief was denied. The Government stated that it might seek relief requiring the chemical company (1) to sell intermediates and polymer to its licensees to enable them to manufacture a type of nylon and (2) to provide technical information. The court noted that the case did not involve a monopoly but rather involved an unreasonable restraint of trade. There was no claim or suggestion that the chemical company had not lived up to the letter and spirit of the judgment. The fact that none of the post judgment licensees manufactured the nylon did not indicate the inadequacy of the remedy provided in the judgment, but rather indicated a lack of interest

or unwillingness to make the necessary capital expenditure. Furthermore, none of the post judgment licensees had sought to obtain technical information or had complained to the Government or come into court seeking the relief suggested by the Government. "It is not the purpose of the antitrust laws, nor is it of this Court, to hold a judgment open indefinitely when no good purpose is served thereby. An open end judgment would not aid competition, but rather tends to stifle it and prevent research and development of new or improved products."

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.325.

For prior decisions of the U. S. District Court, Southern District of New York, see 1956 Trade Cases ¶ 68,435, 68,325; 1954 Trade Cases ¶ 67,739; 1952 Trade Cases ¶ 67,282; 1950-1951 Trade Cases ¶ 62,923; and 1948-1949 Trade Cases ¶ 62,350.

Memorandum

[*Modification of Judgment*]

SYLVESTER J. RYAN, District Judge [*In full text*]: The United States of America, as plaintiff, has moved for an order modifying this Court's final judgment of July 30, 1952, solely as to defendant E. I. du Pont de Nemours and Company, Inc. The modification sought is that the Court extend the time for two additional years within which the plaintiff may, if so advised, seek further modification of the judgment for "further and more complete relief." The final judgment, at the behest of the United States, retained jurisdiction in the Court for five years (until July 30, 1957) "for the purpose of enabling the Court . . . to modify the relief granted by this final judgment, or to grant such other or additional relief as appears to be required . . .".

[*Additional Relief*]

The motion, made on the eve of the expiration of the five-year period, seeks additional time to permit plaintiff "to investigate and to await the outcome of certain matters." The matters involved on this motion are the patents and processes for manufacture of nylon 66 yarn, and the intermediates and polymer therefor. The additional relief which plaintiff states it might seek are (a) to require du Pont to sell to its licensees intermediates and polymer to enable them to manufacture nylon 66 yarn; and (b) to require du Pont to provide technology and know-how beyond that required by the final judgment.

[*Restraint of Trade*]

At the outset, it must be noted that the complaint in this case did not charge a monopoly—but rather it was an unreasonable restraint of trade case. The Government argues that none of the post judgment nylon licensees manufacture nylon 66 yarn. On its face, this does not indicate any inadequacy in the remedy provided in the judgment.

[*Adequacy of Judgment*]

The judgment requires du Pont to license others on a reasonable royalty basis to use its nylon patents. It requires du Pont to furnish written manuals describing du Pont's methods and process in commercially manufacturing the products. It requires du Pont to furnish written manuals describing methods found by du Pont prior to June 30, 1950 in a commercial plant, pilot plant or semiworks usable in practicing commercially the inventions claimed in the licensed patents. Furthermore, the judgment provided that if the manuals were inadequate, the Court would make further orders requiring other disclosure of methods or processes as were appropriate.

There is no claim or suggestion that du Pont has not lived up to the letter and spirit of the judgment. It is recognized that the setting up of a commercial plant for the manufacture of nylon polymer and intermediates requires a capital expenditure of many millions of dollars. The fact that none of the post judgment licensees has undertaken to establish a manufacturing plant for nylon 66 suggests not the inadequacy of the remedy in the judgment, but rather a lack

of interest or unwillingness to make the necessary capital expenditure.

Two further facts are important: (1) none of the post judgment licensees of the nylon patents has sought to obtain from du Pont the technical know-how provided for in the judgment in the form of the written manuals or other descriptive material used by du Pont in commercially developing the manufacture of nylon 66 or its intermediates and polymer; and (2) no one of the companies listed by the Government as post judgment licensees has complained to the Government, nor have any come to the Court seeking the relief now suggested by the Government.

[*Motion Denied*]

Considering the papers submitted in support of the motion in the most favorable light, the Court concludes that they are wholly insufficient and form no basis for granting the relief sought. It is not the purpose of the anti-trust laws, nor is it of this Court, to hold a judgment open indefinitely when no good purpose is served thereby. An open end judgment would not aid competition, but rather tends to stifle it and prevent research and development of new or improved products.

Motion denied.

[¶ 68,860] Bertha Building Corporation v. National Theatres Corporation. Gumbiner Theatrical Enterprises, Inc. v. National Theatres Corporation.

In the United States Court of Appeals for the Second Circuit. October Term, 1956, Nos. 329-330. Docket Nos. 24253-4. Petition filed September 24, 1957. Decided November 7, 1957.

On Petition for Rehearing.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Defenses—Statute of Limitations—State Tolling Provisions—Factual Issues—Right to Jury Trial.—A trial court had held that a California three-year statute of limitations was applicable to two treble damage actions brought in a Federal District Court in New York by reason of a New York borrowing provision, and that the running of the California statute of limitations was not tolled by a California statute which prevents the running of a statute of limitations against a plaintiff who is unable to present his cause of action in California because the defendant is not amenable to process of the California courts. The court's dismissal of the actions on the grounds that the California statute of limitations barred the actions and that the California tolling provision was not applicable because the defendant was amenable to suit in California under Section 12 of the Clayton Act was reversed by a Court of Appeals since a jury rather than the trial court should have decided whether or not the defendant was amenable to suit in California.

On a petition for rehearing, the Court of Appeals ruled that, as to one of the actions, it had not considered the impact of the New York statute of limitations (which provided that where a cause of action arises outside of the state, an action cannot be brought to enforce such cause of action after the expiration of the time limited by the laws of the state or the laws of the state where the cause of action arose) and held that the trial court properly dismissed that action without submitting any issue to a jury. The cause of action was barred by the New York statute of limitations, and the running of the New York statute of limitations was not tolled by the alleged absence of the defendant, a foreign corporation, from the state. Under the New York statute, the tolling provision does not apply where a foreign corporation has one or more officers in the state on whom a summons for such corporation may be served. On the record in the case, the defendant did have officers in the state; therefore, the statute of limitations was not tolled.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.210, 9010, 9010.100, 9014.

For the petitioner: Dwight, Royall, Harris, Koegel & Caskey, New York, N. Y. (John F. Caskey, Frederick W. R. Pride, Charles F. Young, and Stanley Godofsky, of counsel), for National Theatres Corporation.

For the plaintiffs: Corcoran, Kostelanetz & Gladstone, New York, N. Y. (Boris Kostelanetz, Arthur Karger, Theodore E. Gladstone, and Francis J. Mulderig, of counsel).

Petition for rehearing of a decision of the U. S. Court of Appeals, Second Circuit, 1957 Trade Cases ¶ 68,818, reversing a decision of the U. S. District Court, Eastern District of New York, 1956 Trade Cases ¶ 68,308; for prior opinions of the Court, see 1954 Trade Cases ¶ 67,897 and 67,793, and 1952 Trade Cases ¶ 67,271.

Before: HAND, CHASE and HINCKS, Circuit Judges.

[*Rehearing*]

PER CURIAM [*In full text*]: By its petition for rehearing the defendant, National, persuades us to amplify and modify our original opinion and decision.

[*Order of Dismissal*]

We are unmoved by the petitioner's contention that we were wrong in asserting that a dismissal based upon a defense of the statute of limitations is an adjudication on the merits. *Warner v. Buffalo Drydock Co.*, 2 Cir., 67 F. 2d 540, which is cited in support of that contention, we think is distinguishable. And moreover, it has been superseded by the clear mandate of Rule 41(b) of the Federal Rules of Civil Procedure which in its last sentence directly contradicts the holding of the *Warner* case. Although under the rule in a proper situation the District Judge may specify that his order be without prejudice, Judge Galston did not so qualify his order of dismissal.

[*Statute of Limitations*]

We think, however, that National is right when it now urges that we failed to consider the impact of the New York statute of limitations on the *Gumbiner* cause of action. The *Bertha* cause of action arose in 1935 which was within six years of the *Paramount* action. Thus as to Bertha the six-year New York statute, C. P. A. § 48(2), could not possibly have run and the crucial question was whether the three-year California statute had run, as we correctly stated in the opening paragraph of our original opinion. However, in the *Gumbiner* case there was another question equally crucial, viz., whether the New York statute of limitations had run. For the *Gumbiner* cause of action accrued on December 8, 1931. Thus if the New York statute was not tolled by National's absence, the *Gumbiner* action was barred here in December, 1937. Section 13 of the New York Civil Practice Act* is alternative in operation: if the statute has run either in California *or* in New York the suit is barred here.

Gumbiner argues that the New York law should determine whether in fact the statute has been tolled. From this premise it asserts that under state law, although National may have been amenable to process in New York, the statute was nevertheless tolled during that period. This argument derives from an analogy to an individual debtor who has hidden out in an obscure part of the state under an assumed name. If a creditor can find him, such a debtor is amenable to process: but while he is thus hiding the statute of limitations is tolled. Gumbiner thus concludes that even if National was amenable to process in New York, its presence was not open and notorious and on that account the statute was tolled during the relevant period.

Even if New York law does determine tolling (a proposition we need not decide in this case), this argument is fallacious. For the tolling statute (C. P. A. § 19)** during the relevant period had a subdivision (2), which declared, "Nor does this section apply while a foreign corporation has had or shall have one or more officers in the state on whom a summons for such corporation may be served." On the record in this case

* Section 13 in pertinent part reads as follows: "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action * * *"

** The main paragraph of § 19 in its present form reads:

"If when the cause of action accrues against a person, he is without the state, the action may be commenced, within the time limited therefor, after his coming into or return to the state. If, after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for the space of four months or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the state under a false name, the time of his absence or of such residence within the state under such false name is not a part of the time limited for the commencement of the action."

that section was applicable: National did have officers in the state. Gumbiner would read in a further requirement of open and notorious conduct. But all of the New York cases cited in support of this proposition are concerned with individual defendants, most of whom have just entered the state or have just returned to it. Not one case applies an "open and notorious" requirement to a foreign corporation otherwise amenable to process throughout the statutory period. Indeed, in *Mack v. Mendels*, 249 N. Y. 356, 164 N. E. 248, Judge Lehman admonishes the courts construing C. P. A. § 19 to read it as the Legislature wrote it and not to imply further requirements.

Gumbiner further urges that National was not amenable to process in New York under either federal or state standards. We disagree. A careful review of the evidence before Judge Galston on the question of whether the New York statute was tolled has convinced us that, if the facts had been heard by a jury, Judge Galston would have been required to set aside a plaintiff's verdict on this issue. Even though the jury might have disbelieved every one of defendant's witnesses, the documentary evidence recited in Judge Galston's findings was overwhelming.* Regardless of which standard is applied it is irrefutable that National was amenable to process in New York during

* The following findings of Judge Galston were based solely on a stipulation and on evidence corroborated by documentary evidence.

"32. National's Board of Directors held all of its meetings in New York and transacted its business there from 1930 to June, 1936. From June, 1936, to January, 1944, the Board met in Jersey City, New Jersey. After January, 1944, corporate meetings were again held in New York. All meetings of National's Executive Committee were held in New York during the existence of such Committee, i.e., from December 5, 1934, to January 3, 1936.

"33. National's agent, Agency, maintained an office from June, 1936, until the date these actions were begun at 444 West 56th Street, N. Y., in space rented from Twentieth Century-Fox. All officers of Agency had their offices at that address from that time until Agency opened an office in Los Angeles in August, 1942. The Board of Directors of Agency met weekly in New York.

"34. From the date of its organization to the date of the institution of these actions, Agency performed substantial and continuous agency services for National and National's subsidiaries in New York. Agency maintained the payroll for its own and National's employees, kept National's books of account and performed in New York extensive supervisory, advisory, operating and managerial activities and services for National and its subsidiaries which it had agreed to perform under its contract of December 2, 1935, with National.

"37. National continuously maintained a bank account or accounts in New York from 1930 throughout the period here involved. Its main account was with The Chase National Bank of the City of New York and that bank was National's principal banker. National also had accounts with the Commercial National Bank and Trust Company, The Marine Midland Trust Company and the Guaranty Trust Company of New York.

"38. National borrowed money from time to time in New York from New York banks. In 1930 National borrowed a total of $19,350,000 from the Chase National Bank in three loans. In 1931 it borrowed $15,000,000 from The Chase National Bank. In 1932 National arranged for substantial loans for its California subsidiaries from The Chase National Bank and unconditionally guaranteed payment of these loans. National hypothecated its assets with the bank in order to borrow money. As a result of those loans The Chase Bank was National's largest creditor until November, 1934, when it acquired 58 per cent of the stock of National in exchange for the indebtedness owed to it by National and National's subsidiaries.

"39. In October, 1934, National, in New York, issued debentures in the amount of $5,270,000 to Fox Film Corporation, dated as of March 4, 1933, to reflect National's indebtedness to Fox Film Corporation. The Empire Trust Company of New York was trustee under the trust indenture. Those debentures were exchanged for stock of National in the reorganization of November 14, 1934.

"40. In 1935 a line of credit in the amount of $750,000 was established with the Commercial National Bank & Trust Company of New York. Loans from that bank were negotiated in 1935 and 1937.

"41. From 1930 throughout the period here involved the dividends which National received from its subsidiaries were received by it in New York and the dividends paid by National were paid in New York. National had substantial assets.

"42. National itself paid no utility charges directly to any utility company. It paid a regular charge, however, to its parent Twentieth Century-Fox Film Corporation for services such as utilities, office space and the like. From and after June, 1936, payments for these facilities were made by Agency.

"43. National itself did not have a telephone listing prior to the summer of 1935. Thereafter it was listed in the Manhattan telephone directory as "National Theatres Corporation, see National Theatres Agency Corporation." Prior to 1935 it had used the telephone facilities of Twentieth Century-Fox without a listing and all calls came in through the Twentieth Century-Fox switchboard. Charges for the use of these telephone facilities were included in the regular amounts paid by National to Twentieth Century-Fox."

In addition, several contracts are in the record which list 444 W. 56 St., New York City, as National's office address and the address to which notices may be sent. In a "Consent of Guarantor" defendant is stated to have an office and place of business in New York City.

the relevant period. *United States v. Scophony Corp.* [1948-1949 TRADE CASES ¶ 62,238], 333 U. S. 795; *Pomeroy v. Hocking Valley R. Co.,* 218 N. Y. 530, 113 N. E. 504; see also *Chaplin v. Selznick,* 293 N. Y. 529, 58 N. E. 2d 719.

[*Rulings*]

We now hold, therefore, that the *Gumbiner* action, since the New York statute was not tolled by National's absence from New York or by its unpublicized activity in New York, is barred and that the District Court's dismissal of that action must be affirmed.

However, the majority of the court adheres to its holding that since the question of tolling in California presents substantial fact questions the *Bertha* case must be reversed and remanded for trial by jury on the limitations question.

Petition granted and our previous decision is modified to provide

As to the *Gumbiner* case, affirmed;

As to the *Bertha* case, reversed and remanded.

Judge HAND again votes to affirm both judgments for the reasons stated in his earlier opinion and without passing on the opinion now rendered in the Gumbiner appeal.

[¶ 68,861] Standard Oil Company of California, Shell Oil Company, The Texas Company, Richfield Oil Corporation, General Petroleum Corporation, Tide Water Associated Oil Company, and Union Oil Company of California v. George F. Moore.

In the United States Court of Appeals for the Ninth Circuit. No. 14,927. Filed November 6, 1957.

Appeal from the United States District Court, Western District of Washington. Northern Division. JOHN C. BOWEN, District Judge.

Sherman Antitrust Act

Combinations and Conspiracies—Concerted Refusal to Deal—Sufficiency of Evidence as to Refusal to Deal and Concerted Action.—Evidence, assuming that it was properly admitted, was held to be legally sufficient to support a jury (1) finding that a retail gasoline dealer was unable to obtain a supply of petroleum products from producers and distributors which would permit him to remain in business, (2) finding of an agreement, a combination, or a conspiracy by the producers and distributors to control price cutting and curb-sign advertising by refusing to sell to dealers whose severe price cutting and persistent curb-sign advertising brought them into controversy with their suppliers, and (3) finding that the plaintiff dealer became such a dealer, and that, pursuant to and in furtherance of the agreement, combination, or conspiracy, the producers and distributors refused to sell to him. However, exhibits received in evidence as proof of an agreement, a combination, or a conspiracy were found to be improperly admitted, and a judgment in favor of the dealer was reversed and the producers and distributors were granted a new trial.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785.

Combinations and Conspiracies—Refusal to Deal—Legality.—The act of an individual person or company in refusing to deal with another usually does not, standing alone, have antitrust significance. However, where an act or practice of refusing to deal is shown to be pursuant to, or in furtherance of, an agreement, combination, or conspiracy, Sherman Act liability is encountered. Concerted restraint of this type is illegal, even if intended to meet or overcome an admittedly invidious trade practice. Evidence tending to show that there was a legitimate business reason for the act of an individual merchant in refusing to deal is always admissible in contradiction of a case built upon circumstantial evidence. But, if there is sufficient evidence to support a finding that a merchant entered into such an agreement, combination, or conspiracy, the fact that his individual refusal to deal may be explainable as a reasonable business decision is not excusatory of liability.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785.

Combinations and Conspiracies—Proof of Unlawful Conspiracy—Declarations of Co-Conspirators—Admissibility.—In a conspiracy action where a considerable part of the evi-

dence concerned the acts of individual companies and of their agents or employees, and the extrajudicial declarations of such agents or employees, a reviewing court noted that, in evaluating evidence of this type, it must be kept in mind that evidence of such acts and extrajudicial declarations are not to be considered as against other alleged members of the conspiracy, unless there is independent evidence establishing, prima facie, that such others were members of the conspiracy. A conspiracy creates an agency relationship; therefore, each member of the conspiracy is authorized by the other members to perform acts in furtherance of the common objective. When evidence of the above kind is received, a cautionary instruction should be given to the jury, to be repeated at the end of the trial, calling attention to the limited effect to be given to such evidence. Among other things, the jury should be instructed that evidence of the acts and extrajudicial declarations of the agents or employees of one of the alleged co-conspirators is not to be considered in determining whether another alleged co-conspirator entered into the alleged conspiracy.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.380.

Combinations and Conspiracies—Proof of Unlawful Conspiracy—Conscious Parallel Business Behavior—Evidence of Conspiracy.—"Consciously parallel business behavior in matters touching prices and competition does not itself constitute a Sherman Act offense. It is, however, admissible circumstantial evidence of an underlying agreement, combination, or conspiracy concerning such matters. The probative value of such evidence is to be determined by the trier of the facts."

See Combinations and Conspiracies, Vol. 1, ¶ 2005.360.

Combinations and Conspiracies—Proof of Unlawful Conspiracy—Necessity of Express Agreement.—No express agreement is necessary to constitute an unlawful combination or conspiracy. It is sufficient if persons, with knowledge that concerted action was contemplated and invited, "give adherence to and then participate in a scheme."

See Combinations and Conspiracies, Vol. 1, ¶ 2005.355.

Private Enforcement and Procedure—Suit for Civil Damages—Damages Recoverable —Admissibility of Evidence Relating to Damages.—In reversing a treble damage judgment in favor of a retail gasoline dealer, who charged that he was driven out of business by reason of a conspiracy among producers and distributors to refuse to sell gasoline to him, and in reviewing evidence relating to damages, the reviewing court (1) held that, on retrial, a hypothetical question as to the value of the dealer's good will should be framed to omit an irrelevant factor, (2) noted that a hypothetical question calling for expert opinion must be based upon facts in evidence and should include any undisputed fact which is clearly material and important, (3) held that the trial court did not abuse its discretion in permitting an individual to express an expert opinion as to the value of the dealer's business, (4) noted that it would have been better practice to have an explanation made of the formula used by an expert witness in testifying as to the value of the dealer's business, (5) held that the dealer and his expert witness should not have been permitted to base, in part, their opinions as to the market value of the dealer's business upon certain events and facts which occurred after the date the business was allegedly destroyed, (6) noted that it is for the trial court to determine, in the exercise of its discretion, whether an expert's sources of information are sufficiently reliable to warrant the reception of the opinion, (7) held that federal income tax returns should not have been received in evidence, and (8) held that the trial court did not err in admitting in evidence certain entries in the dealer's ledger which were not made until several months after the transaction recorded.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.385.

Private Enforcement and Procedure—Suit for Civil Damages—Evidence Admissible to Prove Antitrust Violations—Circumstantial Evidence—Conspiracy.—The fact that evidence is circumstantial does not necessarily affect its sufficiency to support a finding of agreement, combination, or conspiracy. Such arrangements "are seldom capable of proof by direct testimony, and may be inferred from the things actually done." The fact that evidence tending to prove a fact is wholly circumstantial is not ground for setting aside a finding of such fact unless, as a matter of law, reasonable minds, as triers of fact, must be in agreement that some reasonable hypothesis other than the existence of such fact could

be drawn from the evidence. In applying this test, the evidence is to be viewed as a whole and not link by link. Where the circumstantial evidence favorable to a verdict meets this test, an appellate court will not "search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences."

See Private Enforcement and Procedure, Vol. 2, ¶ 9012.130, 9015.

Private Enforcement and Procedure—Suit for Civil Damages—Evidence Admissible to Prove Antitrust Violations—Business Records—Extrajudicial Admissions.—A treble damage judgment in favor of a retail gasoline dealer was reversed and the defendants were granted a new trial, where the trial court had admitted in evidence writings and records of the defendants which were not admissible under Section 1732, United States Code, Title 28, which provides for the admissibility of writings and records made in the regular course of business. The reviewing court found that certain writings and records were not admissible because (1) they did not pertain to a matter in which the business was a direct participant, (2) they contained expressions of opinions or conclusions on matters not calling for professional knowledge or skill, (3) they contained information which the writer attributed to unauthorized persons, or (4) they were not made pursuant to an established procedure of the business. The dealer's contention that, even if the writings and records were not admissible under Section 1732, they were properly admitted as extrajudicial admissions, was rejected.

See Private Enforcement and Procedure, Vol. 2, ¶ 9012.

Private Enforcement and Procedure—Suit for Civil Damages—Appeal and Error—Relief on Appeal—Dismissal of Action or New Trial.—Where a reviewing court reversed a treble damage judgment in favor of a retail gasoline dealer on the ground that certain exhibits were improperly received in evidence, the court held that the attainment of substantial justice required that the action be not dismissed, but that it be remanded for a new trial. If none of the inadmissible exhibits had been received, the evidence would have been insufficient to support a jury finding of an unlawful conspiracy. If it could be said that this evidence would not be admissible on any record which could be made and is irreplaceable, the dismissal of the action would be warranted. On a new trial, however, a proper foundation may be supplied for the admission of some of the exhibits and other admissible evidence may be found in substitution of evidence which had been found to be inadmissible.

See Private Enforcement and Procedure, Vol. 2, ¶ 9015.90.

Private Enforcement and Procedure—Suit for Civil Damages—Appeal and Error—Sufficiency of Evidence to Support Jury Findings.—Evidence is legally sufficient to support a jury finding on any question of fact, if it is of such substance and character that reasonable men might reach that conclusion. In determining whether evidence meets this test, all reasonable inferences therefrom, favorable to the verdict, are to be drawn. Likewise, all conflicts between evidence are to be resolved in favor of the verdict. Where testimony submitted by the losing party, although not directly contradicted, is inconsistent with the verdict, it is to be assumed that the jury disbelieved such testimony. In determining the sufficiency of evidence to support a verdict, an appellate court may disregard evidence which has been improperly admitted.

See Private Enforcement and Procedure, Vol. 2, ¶ 9012.500, 9015.

For the appellants: Marshall P. Madison, Francis R. Kirkham, and William E. Mussman, of Pillsbury, Madison & Sutro, San Francisco, Cal.; and Helsell, Paul, Fetterman, Todd & Hekanson, Seattle, Wash., for Standard Oil Co. of California. George W. Jansen, New York, N. Y.; J. Arthur Tucker, Los Angeles, Cal.; and James O. Sullivan, Los Angeles, Cal., for The Texas Co. Milton Handler, New York, N. Y. (Grosscup, Ambler, Stephan & Miller, Seattle, Wash., of counsel). William J. DeMartini, Los Angeles, Cal. (Graham, Green & Dunn, Seattle, Wash., of counsel), for Richfield Oil Corp. Robert W. Graham, Seattle, Wash.; Howard Painter, Los Angeles, Cal.; and Paul E. Bermingham, Los Angeles, Cal. (Bogle, Bogle & Gates, Seattle, Wash., of counsel), for General Petroleum Corp. DeWitt Williams, Seattle, Wash.; William F. Kiessig, San Francisco, Cal.; and Edmund D. Buckley, San Francisco, Cal. (Eggerman, Rosling & Williams,

Seattle, Wash., of counsel), for Tide Water Associated Oil Co. L. A. Gibbons, Los Angeles, Cal.; Moses Lasky, San Francisco, Cal.; and Herbert S. Little, Seattle, Wash. (Brobeck, Phleger & Harrison, San Francisco, Cal., and Little, LeSourd, Palmer, Scott & Slemmons, Seattle, Wash., of counsel), for Union Oil Co. of Cal. Newman H. Clark, Seattle, Wash.; and S. R. Vandivort, San Francisco, Cal. (Venables, Ballinger & Clark, of counsel), for Shell Oil Co.

For the appellee: Ferguson & Burdell, William H. Ferguson, Charles S. Burdell, William Wesselhoeft, Donald McL. Davidson, and Phil H. DeTurk, Seattle, Wash.

Before: STEPHENS, Chief Judge, and POPE and HAMLEY, Circuit Judges.

[*Nature of Action*]

HAMLEY, Circuit Judge [*In full text*]: This is a treble-damage antitrust suit, brought by George F. Moore, a former Seattle gasoline service station owner and operator, against seven major oil compaines.[1] Charging defendants with the destruction of his business, plaintiff sought treble damages in the amount of $285,000. He also asked for a decree requiring defendants to divest themselves of all interest in, or control of, retail service stations in the competitive area. Attorneys' fees in the sum of $40,000 were requested.

[*Trial Court*]

After a trial which lasted more than three months, the jury returned a verdict of $80,000 trebled, or a total of $240,000. Judgment in this sum, and for attorneys' fees in the amount of $40,000, was entered on June 24, 1955. The prayer for equitable relief was denied.

[*Claimed Errors*]

Defendants appeal. Under five general specifications of error, they question the sufficiency of the evidence to support the verdict, the manner in which the coconspirator rule was applied, the admissibility of some of the evidence, the failure to give certain instructions, the giving of other instructions, and the failure to set aside the verdict because of asserted extraneous influences upon the jury.

I

Background of the Case

[*Defendants' Business*]

Each of the appellants is engaged in the business of producing and refining oil, and in transporting and marketing gasoline, oil and other petroleum products, in Washington and other states. The production and (at the times here in question) refining operations take place in California. Transportation to the state of Washington is generally by ship tanker. The gasoline is received by appellants at their respective marine storage terminals, and from there it is distributed to bulk storage plants located at convenient marketing centers.

Distribution from these terminals and plants falls generally into four categories: Sales to independent service station dealers; retail sales at company-operated stations; sales to secondary wholesale distributors or jobbers; and sales to large commercial, agricultural, and industrial consumers. Except for appellants, only one company transports gasoline into the Puget Sound area of Washington, and then only in relatively small amounts. During the period in question, there was no well production of petroleum products in the state of Wisconsin.

[*Plaintiff's Business*]

In 1939, Moore opened a retail gasoline service station and truck service station at 1961 Fourth Avenue South, in Seattle. Except for eight months in 1944, when he served in the army, Moore operated this station continuously until August, 1952. Thoughout this period, Moore obtained his gasoline and other petroleum products from Tide Water.

Moore was an extremely competitive dealer. While Tide Water required him to post retail gasoline prices on his pumps, it was his practice to give discounts which resulted in a net gasoline price lower than

[1] Standard Oil Company of California (Standard), Shell Oil Company, Incorporated, a Virginia corporation, The Texas Company (Texas), Richfield Oil Corporation (Richfield), General Petroleum Corporation (General), Tide Water Associated Oil Company (Tide Water), and Union Oil Company (Union). Prior to trial, Shell Oil Company (Shell), a Delaware corporation, which, on September 30, 1949, succeeded Shell Oil Company, Incorporated, was made an additional party defendant. At the close of the trial, the court granted a motion for a directed verdict as to Shell Oil Company, Incorporated, and a judgment of dismissal as to this defendant was entered.

the posted price. Generally speaking, this discount, which he gave to all customers, was three cents a gallon.

Moore's business was successful from the beginning. This was due to his pricing policy, the excellence of his location, the efficiency of his operation, his ability as a salesman, and perhaps other factors. His business grew steadily, year by year, until he became the largest Tide Water dealer in the state of Washington. Eight employees were required to operate the station. By 1951, his annual gasoline sales exceeded 1,600,000 gallons.

[*Refusals To Deal*]

Commencing in 1950, however, disagreements developed between Moore and Tide Water. The nature of these disagreements will be discussed at a later point in this opinion. Late in 1951, Moore began looking around for another source of supply. He had conversations with representatives of Standard and General. At that time, however, both of these appellants declined to deal with Moore. Negotiations between Moore and representatives of Union, begun in October or November, 1951, were still in progress in May, 1952.

On May 2, 1952, Moore received a written notice from Tide Water, canceling its contract with him, effective July 30, 1952.[2] He continued his negotiations with representatives of Union during the period from May 2 to July 30, 1952. In June or July, 1952, Moore also had several conversations with representatives of Richfield. Before the end of July, however, Richfield indicated its refusal to deal with Moore on the basis which he proposed.

Tide Water supplied no gasoline or oil to Moore after July 30, 1952. By utilizing the large capacity of his storage tanks and obtaining relatively small quantities of gasoline from independent sources, Moore was able to operate his service station for a few days after that date. During this period, negotiations continued with Union, and were reopened with General. Moore also made a "last-minute" effort to obtain gasoline from each of the other appellants.

As events turned out, Moore did not obtain a continuing supply of gasoline and diesel oil from Union, General, or any other source, following termination of the Tide Water supply on July 30, 1952. When Moore's stored supply became exhausted about the middle of August, 1952, he closed his service station. The complaint in this action was filed on October 4, 1952.

[*Theory of Action*]

The theory of the action is that Moore was refused a supply of gasoline pursuant to, and in furtherance of, an agreement, combination, or conspiracy in restraint of, or to monopolize, interstate trade and commerce, entered into by two or more of the appellants.[3] Jurisdiction to entertain the action and grant the requested relief is asserted under several sections of the Sherman, Clayton, and Robinson-Patman Acts (15 U. S. C. A. §§ 1, 2, 13, 13a, 14, 15, 18, and 26).

In Moore's first amended complaint, the alleged unlawful agreement, combination, or conspiracy is pictured as one to accomplish a dual purpose through multiple lines of action. It is asserted that the general objectives were to control, fix, and regulate gasoline prices, and to monopolize, control, and channelize the distribution of gasoline.[4] The plans and programs adopted in furtherance of these objectives, Moore alleges, relate both to the refining and to the distribution of gasoline.

Concerning the refining of gasoline, these plans and programs, according to the com-

[2] We use the term "contract" to include the entire contractual arrangement between Tide Water and Moore concerning the supply of petroleum products. Actually, there were five written instruments, including two leases, a petroleum products sales agreement, a merchandise agreement, and a delivery allowance letter, all of which were referred to and canceled in Tide Water's notice to Moore.

[3] The term "conspiracy" is not used in the complaint. The facts therein alleged, however, are comprehensive enough to encompass conspiracy as well as unlawful agreement or combination. A conspiracy is a joint undertaking having an unlawful purpose, arising out of agreement, and usually extending over a period of time. *U. S. v. Kissel*, 218 U. S. 601; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 465. See, also, *Piquett v. United States* (7 Cir.), 81 F. (2d) 75, 80. The briefs of all parties deal with the question of "conspiracy" as an issue in the case. Likewise, the trial court instructed fully, and without any objection being interposed, on the meaning of the term "conspiracy," and the application of the law of conspiracy to the facts of this case.

[4] In the complaint, "gasoline" is defined to include diesel fuel.

plaint, called for self-imposed controls and restrictions upon appellants' own activities.[5] With respect to the distribution of gasoline, it is alleged that these plans and programs included not only self-imposed controls and restrictions, but also the imposition of various forms of economic pressure and coercion upon wholesale distributors and retail dealers.[6]

[*Issue*]

As compared to the sweep of these allegations, the averments concerning the way in which the asserted unlawful agreement, combination, or monopoly injured Moore raise a relatively narrow issue. It is not alleged that during the time he was engaged in business Moore's profits or costs were affected in any manner by reason of the production, refining, transportation, storage, marketing, or pricing policies referred to above. The way in which Moore was damaged, according to the complaint, was in being driven out of business at a time when the business was prospering. This was accomplished, it is alleged, by the practice of one of the forms of economic pressure contemplated by the asserted unlawful agreement, combination, or conspiracy—namely, concerted refusal to deal.[7]

[*Answers—Trial*]

Appellants filed separate answers in which they denied the allegations of the complaint concerning the alleged agreement, combination, or conspiracy, concerted refusal to deal, and monetary loss. The cause came to trial on the issues raised by these pleadings. As before noted, the jury verdict was for Moore, and the judgment conforms to the verdict.

II

Sufficiency of the Evidence—In General

Before reaching any question as to the amount of damages sustained by Moore, the jury had to find in his favor on two other questions of fact. One of these is whether Moore was unable to obtain a supply of petroleum products which would permit him to remain in business.[8] The other is whether the inability to obtain such a supply, if this was the case, resulted from an agreement, combination, or conspiracy of the kind alleged.

The verdict represents a jury finding for Moore on both of these questions. Appellants' first specification of error challenges the legal sufficiency of the evidence to support either of these findings.

The evidence is legally sufficient to support a jury finding on any question of fact, if

[5] Self-imposed controls and restrictions pertaining to the refining of gasoline included, according to the complaint, the use of private committees to determine and impose quotas of crude oil to be produced; the purchase of gasoline produced by independent refineries and producers; the use of price-posting systems to fix and maintain uniform and noncompetitive prices to be paid for crude oil purchased from independent companies; the exchanging of crude oil among themselves; and the pooling of transportation facilities.

[6] Self-imposed controls and restrictions pertaining to the distribution of gasoline included, according to the complaint, the use of price leadership and price-posting systems for the purpose of manipulating and stabilizing prices; the exchange of gasoline supplies among appellants; and the sale to retail dealers, for resale under their respective brand names, gasoline actually produced and refined by other appellants. The forms of economic pressure and coercion imposed upon wholesale distributors and retail dealers included, it is alleged, the control and limitation of gasoline supplies, or the cutting off of supplies, of independent wholesale distributors and retail dealers who do not conform to appellants' joint price policies; refusal to permit such distributors and dealers to advertise the type or brand of gasoline sold; utilization of contract forms and other devices which permit appellants to control, adjust, and change retail prices; refusal to sell gasoline to wholesale distributors and retail dealers who will not conform to the joint price policies, or who desire to resell under low cost and cheaper methods of distribution, such as self-service gasoline stations; the artificial decreasing or depressing of gasoline prices, and the creation of so-called "price wars"; at times the prohibition of the use of "price signs" by retail dealers, and at other times the insistence that such signs be displayed; the refusal to sell gasoline to dealers who purchase gasoline from any other appellant; the acquisition, operation, and control of retail service stations; and the practice of discriminating between purchasers as to the price of gasoline.

[7] Specifically, it is alleged that appellants concertedly refused to deal with Moore because he would not adhere to appellants' "artificial price fixing and price maintenance programs." Another reason attributed to appellants for their asserted concerted refusal to deal was appellants' desire to prefer and favor service station outlets which they individually owned or controlled.

[8] This was the only damage asserted to have resulted from the alleged agreement, combination, or conspiracy. If Moore did not prove such resulting damage, he would not be entitled to judgment, even assuming the existence of an unlawful agreement, combination, or conspiracy between two or more of the appellants. *Wolfe v. National Lead Co.* (9 Cir.) [1955 TRADE CASES ¶ 68,094], 225 F. (2d) 427, 432-433, cert. den., 350 U. S. 915.

it is of such substance and character that reasonable men might reach that conclusion. In determining whether the evidence meets this test, all reasonable inferences therefrom, favorable to the verdict, are to be drawn. Likewise, all conflicts between evidence submitted by the prevailing party and the evidence submitted by the losing parties are to be resolved in favor of the verdict. Where testimony submitted by the losing party, although not directly contradicted, is inconsistent with the verdict, it is to be assumed that the jury disbelieved such testimony, as it had the right to do.

In determining the sufficiency of the evidence to support the verdict, there is authority for appellate court disregard of the evidence held to have been improperly admitted. See *Oras v. United States* (9 Cir.), 67 F. (2d) 463, 465. Here, however, the asserted inadmissibility of evidence is based upon claimed lack of foundation testimony—which might be supplied on a new trial. It will therefore be assumed, in discussing the sufficiency of the evidence, that all evidence favorable to the verdict was properly admitted.

III

The Finding that Moore Was Unable To Obtain Gasoline

[*Legal Sufficiency*]

We turn first to the question of whether the evidence was legally sufficient to support a jury finding that Moore was unable to obtain a supply of gasoline which would permit him to remain in business. He sought to prove this by showing that no source of supply was available to him after Tide Water ceased deliveries on July 30, 1952.

[*Nature of Proof*]

There is no dispute between the parties as to the nature of the proof necessary to warrant a finding that any particular source of supply was not available to Moore. As stated in the trial court's instruction No. 35, to which no objection was taken, it could not be found that a particular source of supply was unavailable to Moore unless it were shown that he offered, on a bona fide basis, to purchase gasoline and diesel fuel oil from such source, and that he was ready, willing, and able to pay the current market price of such source applicable to retail gasoline dealers of Moore's classification and category, and that such source refused to sell to him at its current market price applicable to dealers of that classification and category.

[*Contested Findings*]

Appellants do not question the sufficiency of the evidence to support a jury finding that Moore could not then obtain a supply from appellants Standard, Texas, Richfield, Shell, or Tide Water, or from any source other than appellants. They do, however, question the sufficiency of the evidence to support the finding, inherent in the verdict, that Moore could not then obtain a supply from Union or General.

UNION'S ASSERTED REFUSAL TO DEAL.

Viewing the record in the light most favorable to the verdict, we have examined the evidence bearing upon Union's asserted refusal to deal with Moore.

There were extensive negotiations between Moore and Union, beginning in the fall of 1951 and continuing to about August 20, 1952. Early in these negotiations, Moore indicated that he would like the same price arrangement on gasoline as he then had with Tide Water. This was a discount of 6½ cents off the posted retail price of regular gasoline, and 7 cents off the posted retail price of ethyl or premium gasoline. He was told that these discounts were a half cent more than the discount Union then gave to Fleet Service Station No. 1. The latter was a truck service station two blocks away, which did somewhat less business than Moore.

During the initial meetings, however, the Union representatives did not offer to sell to Moore at the Fleet Service figure. Nor did they state that the figure suggested by Moore was out of the question. Quite to the contrary, on three different occasions late in 1951, W. I. Martin, Union's district sales manager in Seattle, informed Moore that he believed he could get the 6½ and 7-cent price for Moore. The price of diesel oil, Moore was told, would be 10 cents a gallon, as compared to the Tide Water price of 9.2 cents. On each occasion, Moore stated that he would enter into a contract with Union on the 6½ and 7-cent discount basis for gasoline, and 10 cents a gallon for diesel. The third time this price plan was discussed, it was left that Martin would take the matter up with Union's California office.

Late in December, 1951, the Los Angeles office advised Martin that the request to

take the account on the suggested basis was denied, but that it was agreeable to take the account "at policy discount." This counter-offer, however, was never communicated to Moore, and he heard nothing more from Union until February, 1952. A company representative, David E. Gray, then went to the station and told Moore that the company was not "taking any accounts like ours right then." There followed some discussion concerning a possible lease of Moore's station to Union. He was later provided with a form of agreement to effectuate such an arrangement. In the middle of March, however, Gray informed Moore that Union was not then leasing any more stations.[9]

Union reopened negotiations with Moore in the late spring of 1952. Martin again told Moore that he believed that a discount of 6½ and 7 cents could be obtained for Moore. At a later meeting, T. G. Wise, Union's territory manager, informed Moore that he had authority from a vice president to take the account on that basis. Moore again agreed to contract on this basis, and Wise had a painting contractor measure the station for painting. Two weeks later, however, Martin told Moore that a Union vice president had ruled that it was not in the company's policy to take the account.

During all of the period referred to above, Moore was being supplied by Tide Water. Hence, Moore's inability to obtain gasoline from the Union during that period bears only indirectly upon the factual question under consideration. As before indicated, that question is whether Moore was unable to obtain a supply after Tide Water terminated deliveries on July 30, 1952. But, as will be seen, Moore's inability to make headway with Union in these earlier negotiations may well have influenced the jury's interpretation of later words and events.

The next contact between Moore and representatives of Union came on the morning of Friday, August 8, 1952, when Martin went to Moore's station. By then, Moore was receiving no gasoline from Tide Water or any other source. Moore's version of this conversation is quoted in the margin.[10]

This, according to Moore, is the first occasion on which a representative of Union proposed to sell gasoline to Moore at its regular truck station discount of 6 and 6½ cents. This is also the first occasion on which a representative of Union had suggested nine cents a gallon as the price for diesel. In all prior negotiations, beginning in the fall of 1951, the price quoted was 10 cents a gallon, the same as it was charging Fleet Service.

The conversation between Moore and Martin just described took place in the morning. About noon of that same day, Martin telephoned Moore. Repeating his previously expressed preference for the 6 and 6½-cent discount proposal involving the "sixty-day paper," Moore asked what Martin was going to do. On direct examination, Moore gave this testimony concerning the conversation which followed:

> "A. . . . He said, "Well, the sixty-day paper, I find out the company doesn't want any accounts like that. They want a five-year account like that.' 'Well,' I said, 'under those circumstances, I will take the other deal that you outlined this morning for the 5½ cents off of the posted retail price and 9 cents for diesel and no paper at all.' And he said, 'I am sorry we can't take that kind of a deal, either.'"

It was thus demonstrated that Martin had been unable to gain company approval of either of the proposals he had advanced earlier in the day. Moore and Martin, continuing with their telephone conversation, then explored other possibilities. Continuing with Moore's testimony:

> "So I said, 'Well, what can you do for me? I need gasoline.' And he said, 'Well,' he says, 'we can give you a five-year contract, and give you 6½ cents a gallon off of the posted price of the regular

[9] Gray testified that he then told Moore that the reason Union could not then take on his account was because the company was then in a condition of "tight supply."

[10] "A Mr. Martin came into the service station and said that he would—wanted to talk business about selling me gasoline and I said I was willing to buy gasoline. He said that—he said that they could take the station with 6 cents off of the posted price on the regular grade of gasoline, and 6½ cents off of the posted price of ethyl gasoline, and nine cents on diesel, and that was a sixty-day contract. Then he said, 'We have another plan.' He said, 'We will give you 5½ cents off of the posted price of retail, posted price on regular gasoline, and 6 cents off of the regular posted price on ethyl gasoline, and nine cents on diesel and no paper at all."

"So I told him that I would take the one with the 6 cents off and the sixty-day paper and wanted that deal, and I said, 'Let me know right away, because I am getting low on gas.' I didn't have any deliveries of gas. So he said he would let me know."

gasoline and 6½ cents a gallon off of the posted price, retail posted price, that is, on ethyl gasoline, and 9 cents for the diesel delivered with a five-year contract.' Q. Would you stop there a moment, Mr. Moore? A. Yes. Q. You said 6½ on both regular and ethyl on this transaction; did you mean that? A. No, I meant 6 cents on the regular and 6½ cents on ethyl. Q. All right. A. And that was to be a five-year contract. I told Mr. Martin I would take the deal, and Mr. Martin said, 'Well,' he said, 'I am sorry, but the price of diesel now is 10 cents'; and I said to Mr. Martin, I says, 'What are you doing, trying to find out how much I can pay for the gasoline and still operate?' I said, 'When you know what you want to sell me the gas and diesel for, come down to the station and let me know, because I want to buy it, but quit horsing around like this, because I am desperate for gasoline.'"

As things then stood, Union had rejected Moore's offer to buy gasoline on a basis of a 6½ and 7-cent discount, with a 10-cent price for diesel. In view of Moore's frustrating experience during the long negotations, the jury could also well find that Martin's concluding price quotation was not an authorized, firm counter-offer, and that Moore was therefore justified in disregarding it. Assuming such a finding, it was then definitely Union's next move if it was to escape the charge of refusing to deal.

Whether Union would have initiated further negotiations with Moore can not be known. Before it had much of an opportunity to do so, Moore had his attorney prepare a letter to Union, dated August 11, 1952, and mailed the next day, offering to purchase from that company all of his supply of gasoline, approximating a specified gallonage a month. He expressed a willingness to purchase at Union's regular prices for similar truck stations in the area. This letter was identical with letters which Moore, on that day, sent to all appellants.

Moore might have established his position more positively by ordering a tank wagon of gasoline at Union's prevailing price. The jury, however, was entitled to find that this letter constituted an offer to buy, the disregarding of which would constitute a refusal to deal. But Union did not disregard Moore's letter. In a reply, dated August 15, 1952, and received by Moore on August 18 or 19, Union said: "We acknowledge and thank you for your letter of August 11, 1952, and advise that our representative will call to see you at an early date."

Since this letter failed to indicate acceptance of Moore's offer, or to present a counteroffer, it was not itself sufficient to avoid the thrust of Moore's offer. But, within the next day or so, Martin went to Moore's station. According to Mrs. Moore, only she and a Frank Wilburn were there at the time. She testified that Martin told her he wanted to talk to her husband about a letter he had received. Mrs. Moore told Martin that her husband had gone out for a moment, and that Martin was welcome to wait. She then excused herself and went out to talk to some former customers. Martin waited not over ten minutes, and then departed, not having seen Moore.

Shortly thereafter, Moore returned to the station. Mrs. Moore told him that Martin had been there. Moore asked her if Martin had said anything about selling gasoline. The testimony does not reveal what reply Mrs. Moore made to this inquiry. Moore then asked his wife whether Martin was going to call back. Mrs. Moore replied that Martin did not say. Moore then observed to his wife, "I guess if he wants to get in touch with me, he will call me." However, neither Martin nor any other representative of Union thereafter made an effort to contact Moore.

Moore testified that his wife had told him that Martin had been to the station and had asked to see Moore. Moore made no effort thereafter to contact Martin or any other representative of Union. When asked why he had not called Martin upon learning of the latter's visit to his station, Moore testified:

> "A. All right. The reason I didn't call Mr. Martin was that if he had been willing to sell me gasoline and get a good account like that, he would have been down there waiting for me and I would have been ready to buy. I was ready to buy."

Arnold Johnson, a laborer who was in the employ of Moore from December, 1947, to August, 1952, testified concerning a conversation with Martin at the station shortly before the 20th or 21st of August, 1952. At that time, according to Johnson, the station was not in operation, and United Truck Lines was using some of the pumps for its own purposes. On this occasion, United Truck Lines, according to Johnson, was unloading a tanker of gasoline. Johnson asked Martin, no one else being present, if

he had come down "to sell us gasoline." It is Johnson's testimony that Martin replied: "No, I come [sic] down to see if United Truck Lines was using this fuel for their own purpose."

This testimony was at variance with Johnson's testimony, in a deposition, that he had not talked to Martin, other than to say "good morning." It is also in conflict with Mrs. Moore's testimony that no person other than Frank Wilburn was present when Martin called.

If Johnson's testimony is to be given full credence, Martin's last call at the station had nothing to do with the sale of petroleum products. Since Union made no other contract with Moore, the finding would justifiably follow that Union had failed to act affirmatively upon Moore's offer to buy at Union's going prices for such a station. This would spell out refusal to deal.

But, in view of the disparity between Johnson's testimony at the trial, on the one hand, and his deposition and Mrs. Moore's testimony, on the other, perhaps the jury could not reasonably have found that Martin's last visit was unconnected with Moore's letter. Proceeding on this assumption, and bearing in mind that it was Union's next move, the question then presented is whether Martin made a reasonable effort to contact Moore. If Martin, on this occasion, did all that was reasonably required of Union to find Moore, for the purpose of consummating a sale of gasoline, there was no refusal to deal.

In our view, the jury could properly find that something more was required of Union at this late date than Martin's ten-minute and somewhat enigmatic call at a time when Moore was not at his station. A little longer wait at the service station, a telephone call, or a letter stating the basis on which Union would sell gasoline, would have been sufficient. Without anything of this kind, the jury was free to infer that, if Martin really went to the station to discuss the letter, it was to say "no." Union finally said "no," the jury could thus conclude, by discontinuing contact while in possession of Moore's written offer.

It is therefore our conclusion that the evidence was legally sufficient to support the jury finding that Moore was unable to obtain a supply of gasoline from Union.

General's Asserted Refusal to Deal

Again viewing the record in the light most favorable to the verdict, we turn to an examination of the evidence bearing upon General's asserted refusal to deal with Moore.

Arguing that the evidence is legally insufficient in this respect, appellants contend that it is uncontroverted that (1) after Tide Water ceased supplying Moore, General offered to supply him with gasoline at General's current tank wagon price; (2) this price was the current market price at which General was then selling or offering to sell gasoline to other service stations of like size and character; and (3) General's offer was refused by Moore.

Before considering what transpired between Moore and General after Tide Water ceased deliveries, it will be well to review the evidence favorable to Moore concerning their prior negotiations. In September or October, 1951, Moore telephoned to a Mr. Elmore, who was a branch manager for General. Elmore went to Moore's station the next day. Moore advised Elmore that the Tide Water contract could be terminated. Elmore indicated great interest in taking the account, stating that General needed representation in that area. "This is a chance that comes to a branch manager once in a lifetime," he told Moore. Elmore told Moore, however, that it was not in General's policy or program to take the account at that time.

In October, November, or December, 1951, a Mr. Falkner, representing General, went to Moore's station. Falkner tried to interest Moore in leasing a station from General on Boren Avenue, in Seattle. Moore looked over the Boren Avenue station and then told Falkner he would take it if he could also get a supply of gasoline for his Fourth Avenue South station. A week later, Falkner told Moore that General would not supply his Fourth Avenue South station. This concluded Moore's negotiations with General at that time.

Moore's supply contract with Tide Water terminated at the end of July, 1952. On the afternoon of August 11, 1952, Moore, in company with one of his employees, called at the Seattle offices of several of the appellants, including General. At General's office, he talked with Mr. Elmore. Moore stated that he was running out of gasoline,

and offered to buy gasoline for cash. He said nothing about prices on that occasion, and did not ask for a supply contract or a commitment for a permanent supply. Elmore told Moore on this occasion that General was short of gasoline and could not sell any to Moore.

Later the same day, Moore sent a letter to General, similar to the letter sent on that day to Union and other appellants, offering to purchase all of this gasoline from General at the latter's "regular" price. General made no written response. Within two or three days, however, Elmore telephoned to Moore. According to Moore, Elmore asked if Moore would pay "tank wagon price" for gasoline.[11] Moore's response was that a station like his could not operate on tank wagon prices, but that he was willing to pay the price which a station similar to his would pay. According to Moore's testimony, Elmore then said that he would see what he could do for Moore about getting gasoline. Moore heard nothing more from Elmore or any other representative of General.

Albert E. Horn, Jr., General's division manager for Washington, testified that, on August 11, 1952, he authorized the supplying of Moore on a temporary basis at tank wagon prices. He further testified that he instructed Elmore to tell Moore that General would sell him gasoline for his service station on a day-to-day basis at General's posted tank wagon price until Moore could arrange for a supply elsewhere. According to Horn, Elmore later reported that these instructions had been carried out. Elmore did not testify.

The jury was entitled to believe Moore's version of what Elmore told him, and to reject the inference arising from Horn's testimony, that Elmore told him something else. If the jury accepted Moore's testimony in this regard, it could have found that General did not accept Moore's offer to buy gasoline, and did not make a counteroffer to sell gasoline to Moore. A seller's inquiry of a prospective buyer as to whether the latter would buy at an indicated price is not necessarily an offer to sell at that price.

Ordinarily, failure to accept, within a reasonable time, an offer to buy, or to make a counteroffer to sell, indicates refusal to deal. This is not always true, however, as the surrounding circumstances may cast such failure in a different light. Thus, if a buyer indicates to the seller in advance that he would not buy at the seller's current prices for similar sales, the seller's failure to offer goods at that price does not evidence a refusal to deal.

Appellants argue, in effect, that the uncontroverted evidence shows that this is what happened here. They produced testimony to the effect that General was in short supply, and was therefore, at the time in question, operating under a sales policy which precluded the taking on of new accounts at less than tank wagon prices.[12] Moore testified that he told Elmore that he could not operate on that price.

Moore testified further, however, that when he told this to Elmore, the latter stated that he would see what he could do. The jury could infer from this that General's price policy was not as inflexible as appellants' testimony would tend to indicate. If such prices were not flexible, then Moore, with his high-gallonage station in a location which Elmore had said was favorable, would be entitled to a discount such as General had previously given other stations, or so the jury could have found.

The jury could also have found that Moore was led to believe, by Elmore's closing remarks during their telephone conversation, that there would be further price negotiations. The jury was warranted in reasoning that, if Moore had been advised that General would, in no event, offer better than tank wagon prices, he might have ac-

[11] Moore gave this version of how the telephone conversation began:

"... He asked me if I was completely out of gasoline. And I told him I was. He asked me if I had gone to all the companies to try to get gasoline, and I told him that I had, and he said that he didn't like that; that it was a black eye to the industry. . . ."

[12] Moore, of course, strenuously disputes General's position concerning its 1952 shortages and resulting restriction upon the taking of new accounts. The sufficiency of the evidence to support a jury finding in Moore's favor on this point is not relevant to our present inquiry, which concerns refusal to deal regardless of reasons. The reasons for refusal, however, do become relevant on the question of the sufficiency of the evidence to support the jury finding of unlawful agreement, combination, or conspiracy. To avoid the necessity of again discussing this factual situation when we come to a discussion of the latter point, we state now that, in our opinion, the matter of General's 1952 gasoline shortages was sufficiently in dispute to present a jury question.

cepted gasoline on such a basis for purposes of a temporary supply. But there were no further price negotiations, and Moore was never told that General would not offer a lower price. Viewed in this light, the jury was warranted in finding that Moore's offer to buy had, in effect, been rejected, and that no bona fide counteroffer had been made. This is enough to support the ultimate finding that General refused to deal with Moore.

We therefore conclude that the evidence was legally sufficient to support the jury finding that Moore was unable to obtain a supply of petroleum products which would permit him to remain in business.

IV

PROOF OF AGREEMENT, COMBINATION, OR CONSPIRACY

This brings us to the question of whether the evidence was legally sufficient to support a jury finding that Moore's inability to obtain gasoline resulted from an agreement, combination, or conspiracy among the appellants in restraint of, or to monopolize, interstate trade or commerce.

[*Interstate Commerce*]

Appellants do not question the sufficiency of the evidence as to the interstate character of the trade or commerce in question.[13] They do, however, contend that the evidence is not legally sufficient to support a jury finding that Moore was refused a supply pursuant to, or in furtherance of, an unlawful agreement, combination, or conspiracy of the kind indicated.

[*Purpose*]

As foreshadowed by the pleadings, the agreement, combination, or conspiracy which Moore sought to prove was broad in scope. Its total objective, according to Moore, was no less than effective control and regulation of gasoline prices, and the monopolization, domination, and channelization of gasoline distribution in the Seattle area.

[*Practices*]

In proof of an arrangement between appellants having this breadth of purpose and complexity of design, evidence was submitted concerning a wide variety of asserted supply, marketing, and pricing practices. Included among these were practices relating to the discontinuance of split-pump accounts,[14] public posting of wholesale, or so-called "tank wagon" prices, granting of discounts from posted prices, withdrawal of discounts and allowances, exchange of price information, exchange of petroleum products between appellants, resale price directives, consignment sales, the so-called "clearance" program,[15] suppression of curb signs, and refusal to sell to price cutters.

[*Evidence Insufficient*]

An examination of the voluminous record of testimony and exhibits [16] brings us to the view that the evidence does not provide substantial support for a jury finding that all or any of the appellants entered into and carried out an agreement, combination, or conspiracy having the magnitude and ramifications pictured in the complaint.

Were this view concerning the sufficiency of the evidence dispositive of the appeal, it would be necessary to here set forth, at least in summary form, a resume of the evidence and our analysis of its deficiencies.

Failure to establish, prima facie, the broadly-alleged agreement, combination, or conspiracy does not, however, compel the conclusion that Moore did not make out a case. Concerted refusal to deal is the particular act or practice which is claimed to have damaged Moore. If there is substantial

[13] In any event, the evidence was sufficient to support a jury finding that interstate trade and commerce was involved. See *Standard Oil Co. v. Federal Trade Commission* [1950-1951 TRADE CASES ¶ 62,746], 340 U. S. 231.

[14] A "split-pump" account is one in which the service station operator is permitted to sell the gasoline of two or more oil companies.

[15] Where a service station operator desired to change from one oil company to the other, the latter company's inquiry of the former as to whether the operator was contractually free to deal with the new company was called a request for "clearance."

[16] The trial lasted over three months. There were 72 witnesses, whose testimony required 20 volumes of printed record comprising 7,701 pages. There are 1,088 exhibits. According to the clerk of the district court, the record is the longest in any civil case ever appealed to this court from the Western District of Washington. It required more trial days than four of the five big antitrust cases brought by the United States in 1949 (13 F. R. D. 64). Including exhibits, the record compares in size with the government's famous Standard Oil case in 1911, which involved every phase of virtually the entire petroleum industry of the United States. *Standard Oil Co. v. United States*, 221 U. S. 1. One and a half days were alloted for oral argument before this court.

evidence to support a finding that for any reason touching the matter of prices or competition appellants agreed, combined, or conspired to deny gasoline to Moore, or to a class of dealers of which he was a member, and that Moore was damaged by a resulting act or practice of that kind, the verdict withstands appellants' factual challenge.

[*Control of Price Cutting*]

The trend of the evidence favorable to Moore suggests the nature of the limited agreement, combination, or conspiracy of this kind which the jury may have found to exist. It would be an agreement, combination, or conspiracy to control price cutting and curb-sign advertising by refusing gasoline to dealers whose severe price cutting and persistent curb-sign advertising bring them into controversy with their present suppliers.

There is substantial evidence that Moore was in this class of dealers. He was not content to hold his price-cutting practices within the limits generally adhered to by other price cutters. During a so-called "price war" in the spring of 1951, the other dealers dropped their prices from 27 cents a gallon for regular gasoline to 24.9 cents. Moore, however, first lowered his price to 24 cents, and later to 22.9 cents, both times over the strenuous objections of his supplier, Tide Water. Nor did he, for a considerable time, heed Tide Water's insistent request that his curb price signs, advertising this low price, be removed.

Moore finally agreed to remove the curb signs, and did so in August, 1951, in consideration of Tide Water agreement to release him from his contract so that he could obtain a supply elsewhere. Moore did not sign the termination papers which were later submitted, however, since Tide Water promised him only a ten-day supply of gasoline. Business relations between Moore and Tide Water deteriorated rapidly from this time on. A half cent of his 2½ cent a gallon discount on gasoline was taken away, and restored only after Moore's attorney negotiated with Tide Water. Moore was put on a C. O. D. basis, and later his Tide Water distributorship on batteries and tires was taken away. In November and December, 1951, according to Moore, Tide Water began delivering poor ethyl gasoline, and continued this for four months.

In resisting Tide Water's asserted pressure on him, Moore stopped payment on certain checks (paying them shortly afterwards), and, on occasion, paid for gasoline with small change. On two occasions, he ordered Tide Water employees off his premises.[17] Finally, on May 2, 1952, Tide Water served upon Moore a notice that his contract was being canceled effective July 30, 1952. As before stated, Tide Water's supply to Moore ended on the latter date.

There is also substantial evidence that the other appellants refused to deal with Moore after this controversy arose between him and Tide Water. This point has been fully discussed in a preceding section of this opinion.

[*Reasons for Refusals To Deal*]

The crucial inquiry, then, is whether there is substantial evidence to support a finding that these other appellants denied service to Moore pursuant to an agreement, combination, or conspiracy of the kind alleged, rather than as a result of a legitimate business decision, independently arrived at, unassociated with any such mutual arrangement or deliberate concert of action.

Each such appellant (except Union and General, which deny that they refused to deal) asserts that its individual refusal to deal with Moore, following the development of his controversy with Tide Water, was the result of a legitimate, independent business decision. The principal reasons advanced by individual appellants as to why they were unable to do business with Moore are that the company had a limited supply, which made it impracticable to take on new accounts, or that the company already had a retail outlet very close to Moore's station.

On the other hand, evidence favorable to Moore, and reasonable inferences which could be drawn therefrom, present a somewhat different picture.

Standard refused to do business with Moore in August, 1952, asserting that its supply position was critical. Considering the record as a whole, however, the jury was not required to accept this explanation.

[17] After 1947, Moore had refused to give Tide Water a financial statement. Moore testified that he refused to give Tide Water such statements because it would jeopardize his bargaining position when it came time to renew his contract if Tide Water knew how well he had been doing.

Moreover, there is evidence to indicate that in the previous year, after Moore's controversy with Tide Water arose, and at a time when Standard had no supply problem, it refused to deal with Moore because "it isn't our policy to take you." This decision was made after a period of negotiation, during which the parties seemed to reach agreement on prices. During the early part of these negotiations, the Standard representative had appeared anxious to take on Moore's account.

Union did not claim lack of gasoline or presence of an adjacent Union station as a reason for not dealing with Moore. Indeed, the position of that appellant is that it was always willing to deal. Yet, the evidence reviewed in a preceding section of this opinion indicates that Union several times rejected Moore's offer, and never quite got around to making a firm counteroffer. This in spite of the fact that representatives of Union who called upon Moore seemed to want his account.

General, like Union, claims that it was willing to deal with Moore after Tide Water discontinued, and asserts that Moore rejected its offer to sell at its prevailing market price. In a preceding section of this opinion, however, we have referred to evidence from which the jury could have concluded that Moore's written offer to buy at General's regular prices, communicated to General on August 12 or 13, 1952, was not acted upon. On August 11, 1952, General had orally refused to deal, asserting, as a reason, short supply of gasoline. Yet, as in the case of Standard, the evidence was such that the jury was not required to credit this assertion.

In the previous September or October, after Moore's controversy with Tide Water arose, his attempt then to obtain gasoline from General was likewise futile. The company representative who then negotiated with Moore had appeared elated to have the opportunity of taking his account, but wound up by telling Moore it was not in General's policy or program to do so. General's policy or program appeared not to stand in the way of leasing a Boren Avenue station to Moore, but only to delivering gasoline to the Fourth Avenue South station where he had had difficulty with Tide Water.

In June or July, 1952, a Richfield representative, answering Moore's request to open negotiations, gave several reasons why it would be to Moore's advantage to deal with Richfield. He was told that, while Moore's contract with Tide Water was a "longer deal" than Richfield was accustomed to, it was believed the Tide Water price could be matched. Moore was also told that it would make no difference that Richfield then had a station across the street. Richfield's Los Angeles office, however, rejected Moore's business for the asserted reasons that he was a price cutter and his discount practices would be "upsetting" to other Richfield accounts. Moore was not given this reason, but was told only that the deal was off.[18]

Moore made no attempt to purchase gasoline from Shell until 2:30 p.m., on August 11, 1952. This was twelve days after his Tide Water source had been terminated. On this occasion, Moore was told that Shell would not sell gasoline to him because there was a service station across the street. The representative who told this to Moore, however, stated that Shell would have solicited Moore's business had not Tide Water told Shell that Tide Water owned the 10,000-gallon tank on Moore's premises. This tank actually belonged to Moore. Replying to Moore's letter of August 11, 1952, offering to buy all of his gasoline from Shell, the company gave two reasons for refusing his business. One of these was that it would be a violation of antitrust laws to enter into an exclusive dealership arrangement. The second reason was that Shell

[18] Richfield, Union, and, to some extent, Tide Water had fair trade clauses in their respective contracts with retail dealers. Under the 1937 Miller-Tydings amendment of the Sherman Act (15 U. S. C. A. § 1), and under chapter 19.88 of the Revised Code of Washington, a manufacturer may fix the minimum resale price of a trade-marked article. The practice is called "fair trading." Except for the period between the decision in *Schwegmann Bros. v. Calvert Distilleries Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384, on May 21, 1951, and the enactment of the McGuire Act on July 14, 1952 (66 Stat. 631, 632; 15 U. S. C. A. § 45), this minimum price is and was binding on dealers whether or not they signed an agreement to observe it. There may be circumstances, however, under which such agreements are illegal because of the existence of competition between the supplier and the retail dealer it supplies, for the business of certain ultimate consumers, (see *Esso Standard Oil Co., v. Secatore's Inc.*, (1 Cir.) [1957 TRADE CASES ¶ 68,695, 68,746] 246 F. (2d) 17, cert. den., — U. S. —, October 14, 1957) or for other reasons. See Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955, 152-153.

products were then being marketed at the nearby Flajole Bros. Shell station.

Moore made no effort to purchase gasoline from Texas until August 11, 1952. On the afternoon of that day, he went to the Texas office in Seattle and offered to buy gasoline for cash. He was denied a supply, on the ground that Texas had a company-owned station two blocks down the street. The company representative told Moore: "The Texas Company has lots of gasoline and is actively soliciting business but you are too close to us and we won't sell you." The same position was taken in that company's reply to Moore's letter of August 11, 1952.

The refusal of all of these appellants to deal with Moore, after the disagreement arose between him and Tide Water, was prophetic fulfillment of statements made to him by Tide Water representatives. While they were trying to bring him into line on prices and use of curb signs, officials of that company told him, "We can break a service station operator like you if you don't do what you are told on these price signs"; "If you don't take the price sign down, when I get through with you no company in town will sell you gas"; "You are being foolish to get the companies mad at you like this for not taking the price sign down." This sort of threat could well lead the jury to infer that Tide Water felt assured that its pressure on Moore would find support from the other appellants.

[*Experiences of Other Dealers*]

Moore was not alone in finding that severe price-cutting practices seemed to close the gates to all sources of supply.[19] Extensive evidence was presented concerning the difficulties experienced by seven aggressive price cutters in obtaining a supply of gasoline. The two instances of this kind most favorable to Moore involved a "Gasoteria" operation by one John Brady, and a General dealer named Victor W. Markov.

All appellants except Shell (but including Shell's predecessor) either rejected in writing Brady's offer to buy gasoline, or failed to respond to his offer. In making this solicitation, Brady had advised each of these companies that he operated a self-service "Gasoteria" station, and that it was his policy to sell gasoline at a discount of three or four cents a gallon off the general retail price. When this solicitation was made, his current source of supply, Clipper Oil Company (which then obtained its gasoline from Texas), had been cut off, due to a controversy which had nothing to do with prices. This quarrel with Clipper was soon settled, and Brady resumed operations. Between 1949 and 1952, Brady endeavored to obtain his gasoline from Texas, General, and Standard, but without success. In 1952, however, he did obtain a substantial amount of gasoline from Signal Oil Company. Signal was then an operating division of Standard.

Markov got into difficulties with his then supplier, General, during the 1951 "price war," when he dropped his prices and thereby substantially increased his sales. General tried to get Markov to raise his prices, but he refused. General then discontinued sales to Markov, but leased his station and continued to deliver gasoline on a consignment basis. This required Markov to sell at prices fixed by General. When Markov demanded permission to lower his prices, General canceled his consignment contract. It then raised his wholesale price to the tank wagon level. Sales continued on this basis to the time of the trial.

In September, 1952, Markov, who then had a reputation as a price cutter, attempted to obtain gasoline from each of the other appellants except Tide Water. Standard turned him down on the ground that it was experiencing a shortage of supply. Shell and Union advised Markov that they were not interested because they were selling to other service stations in the vicinity.[20] Texas told Markov that it was not interested in taking on new business. Richfield declined to sell to Markov because of its "fair trading" policy.

There is in the record other evidence tending to indicate concert of action among appellants in suppressing curb price signs. In the case of General, there was testimony

[19] The evidence favorable to Moore would not support a finding that it was the general practice of appellants to deny petroleum products to all price-cutting service stations. In the Seattle area, there have always been price-cutting service stations supplied by appellants. Moore, who was himself a price cutter for thirteen years, was supplied by Tide Water until July 30, 1952. Tide Water at all times knew of Moore's price-cutting activities.

[20] When Markov first commenced business in November, 1949, however, Shell attempted to obtain his account despite the existence of its adjacent station.

that the action of Markov in displaying price signs was reported by Union, Richfield, and General employees to their respective Los Angeles offices.

A former Richfield employee testified that he was under instructions to report to his office when signs were displayed at the service stations of other dealers. When he reported the presence of such signs displayed by competitive dealers, "the signs usually came down."

Moore, who was a Tide Water dealer, testified that a salesman for Texas, in urging Moore to take down his price sign, stated: "It is in the program to get the price signs down on the Avenue and clean up the Avenue." Moore also testified that, during a 1950 "price war," a representative of his supplier, Tide Water, told him that the company would not sell Moore any more gasoline until he took his price sign down. A Shell station across the street was also displaying such a sign at that time. The Tide Water representative told Moore, "I will have that sign down in five minutes from the time yours is down." Moore took his sign down. The Tide Water man then went to a telephone and made some calls. The Shell sign came down within five minutes.

A retail dealer of Chevron (Standard) products was told by a Standard salesman that if he took his sign down, the signs of other dealers "would be down as soon as possible." This dealer testified that stations in his area representing three or four major oil companies took their signs down about the same time that he did. Some of the exhibits show that Seattle representatives of Tide Water made surveys of the price sign situation in Seattle, determining the name, address, and oil company represented, for use by its San Francisco office.

[*Favorable Evidence—Summary*]

The foregoing resume deals with what we regard as the most significant evidence favorable to Moore bearing directly upon appellants' apparent unanimity of action and possible contact with each other concerning severe price cutters and persistent displayers of curb price signs. There is a great deal of additional evidence, however, tending to show parallel action by appellants, or actual contacts and communications between them, concerning other supply, storage, marketing, and pricing practices. The significance of evidence of this kind lies in its tendency to picture a business setting and relationship which invites inferences favorable to Moore's position.

Among the matters dealt with in the evidence of this character are (1) the apparently concurrent and uniform act of all appellants, in 1936 (excluding Shell but including its predecessor) in discontinuing "split-pump" accounts in the Seattle area, and requiring each retail dealer to obtain his supply exclusively from one oil company;[21] (2) the practice of all appellants in posting their respective tank wagon prices in conspicuous public places, with the resulting tendency towards uniformity as to the wholesale prices of all appellants;[22] (3) the uniform practice of all appellants in allowing unpublished discounts from the posted prices to selected dealers; (4) the practice of all appellants in exchanging petroleum products with each other to meet special supply or storage problems as they developed; and (5) the uniform practice of all appellants whereby they would not undertake to serve a retail dealer already in business without contacting his present supplier and obtaining "clearance."

The summary of the evidence, as set out in this section of the opinion, is necessarily fragmentary, as compared to the bulk of the entire record. Moore will be able to point to items of evidence in his favor which have not been mentioned. Appellants will be able to show that a more complete review of the evidence here adverted to would suggest weaknesses in Moore's case not apparent from a reading of this opinion. Our purpose has been only to indicate, in

[21] In attempting to prove the existence of a combination or conspiracy during a particular span of years, it is permissible to show the relationship existing and practices followed during earlier years. *American Tobacco Co v. United States*, [1946-1947 TRADE CASES ¶ 57,468], 328 U. S. 781, 790.

[22] In achieving this uniformity, an appellant whose prices were high would frequently lower its prices to accord with the posted price schedule of other appellants. But with respect to at least one appellant (Texas), "meeting competition" meant not only lowering prices to parallel a lower price posted by others, but also the raising of prices to produce such uniformity. In the case of Richfield, Texas, and Union, supervising officers sometimes requested local representatives to check the posted price schedule of competition. As to each such company, local representatives were also occasionally advised of information gained by the supervising office as a result of its own check of posted price schedules.

a general way, the lines of evidence which have a tendency to lead in the direction of the jury verdict.

[*Circumstantial Evidence*]

This evidence, of course, is largely circumstantial. The fact that the evidence is circumstantial, however, does not necessarily affect its sufficiency to support a finding of agreement, combination, or conspiracy. Such arrangements, as the Supreme Court has said, "are seldom capable of proof by direct testimony, and may be inferred from the things actually done. . . ." *Eastern States Retail Lumber Dealers' Ass'n v. United States,* 234 U. S. 611, 612.[23]

That the evidence tending to prove a fact is wholly circumstantial is not ground for setting aside a finding of such fact unless, as a matter of law, reasonable minds, as triers of fact, must be in agreement that some reasonable hypothesis other than the existence of such fact could be drawn from the evidence. *Elwert v. United States* (9 Cir.), 231 F. (2d) 928, 935. In applying this test, the evidence is to be viewed as a whole and not link by link. *C-O-Two Fire Equipment Co. v. United States* (9 Cir.) [1952 TRADE CASES ¶ 67,290], 197 F. (2d) 489, 494, cert. den., 344 U. S. 892.

Where the circumstantial evidence favorable to the verdict meets this test, an appellate court will not "search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." *Tennant v. Peoria & P. U. Ry. Co.,* 321 U. S. 29, 35.

[*Extrajudicial Declarations*]

A considerable part of the evidence reviewed above concerned the acts of individual appellants and of their agents or employees, and the extrajudicial declarations of such agents or employees. In evaluating evidence of this kind, it must be kept in mind that evidence of such acts and extrajudicial declarations are not to be considered as against other alleged members, unless there is independent evidence establishing, prima facie, that such others were members of the conspiracy. *Glasser v. United States,* 315 U. S. 60, 74-75.[24]

[*Parallel Business Behavior*]

Part of the evidence, as previously noted, concerned asserted instances of parallel action knowingly taken, rather than actual contracts and communications between appellants. Consciously parallel business behavior in matters touching prices and competition does not itself constitute a Sherman Act offense. It is, however, admissible circumstantial evidence of an underlying agreement, combination, or conspiracy concerning such matters. The probative value of such evidence is to be determined by the trier of the facts. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.* [1954 TRADE CASES ¶ 67,640], 346 U. S. 537, 540-541.[25]

[*Refusal to Deal*]

A merchant is ordinarily entitled to develop business relationships with whom he pleases. *United States v. Colgate Co.,* 250 U. S. 300. Accordingly, the act of an individual person or company in refusing to deal with another usually does not, standing alone, have antitrust significance. There are some exceptions to what has just been said, as noted in the Report of the Attorney General's National Committee, *supra,* 134-136. We need not determine whether the record contains a factual basis for applying any of these exceptions against Tide Water or any other appellant. This is true, because the theory of this action, as set out in the pleadings and unchallenged instructions, and as argued to the jury, does not admit of a verdict based upon individual refusal to deal. The only injury for which Moore sought damages was that said to have resulted from an unlawful agreement, combination, or conspiracy.[26]

[23] See, also, *Interstate Circuit v. United States,* [1932-1939 TRADE CASES ¶ 55,205], 306 U. S. 208, 221; *Flintkote Co. v. Lysfjord* (9 Cir.) [1957 TRADE CASES ¶ 68,674], 246 F. (2d) 368, cert. den. — U. S. —, October 14, 1957.

[24] This rule does not deal with the testimony of members of such an arrangement, or of their agents and employees, but only with independent evidence of facts and extrajudicial declarations. Where such a member, agent, or employee does testify, independent evidence of acts and extrajudicial declarations is admissible for purposes of contradiction. See 2 Restatement, Agency, 642, § 285, comment a.

[25] See, also, Report of the Attorney General's National Committee, *supra,* 36-40.

[26] For the same reasons, the verdict is not sustainable as against Tide Water on the theory (which may or may not have factual support in the record) that Tide Water participated in an agreement, combination, or conspiracy with other service station operators who were in competition with Moore.

Where an act or practice of refusing to deal is shown to be pursuant to, or in furtherance of, an agreement, combination, or conspiracy, Sherman Act liability is encountered. It is now well established, and is not here questioned, that an agreement, combination, or conspiracy between two or more persons engaged in interstate commerce, to withdraw or withhold custom from another, or with a class of others, is violative of the antitrust laws.[27] Concerted restraint of this kind is illegal, even if intended to meet or overcome an admittedly invidious trade practice.[28]

Evidence tending to show that there was a legitimate business reason for the act of an individual merchant in refusing to deal is always admissible in contradiction of a case built upon circumstantial evidence. But, if there is sufficient evidence to support a finding that a merchant entered into such an agreement, combination, or conspiracy, the fact that his individual refusal to deal may be explainable as a reasonable business decision is not excusatory of liability. He will be deemed to have set in motion an illegal undertaking, and will be held accountable for damage caused by the overt act of any member, pursuant to or in furtherance of the plan.

[*Conspiracy*]

This is but an application of the general law of conspiracy. See *Marron v. United States* (9 Cir.), 8 F. (2d) 251, 258. It is based upon the principle that a conspiracy creates an agency relationship, and that therefore each member is authorized by the other members to perform acts in furtherance of the common objective. *Las Vegas Merchant Plumbers' Ass'n v. United States* (9 Cir.) [1954 TRADE CASES ¶ 67,673], 210 F. (2d) 732, cert. denied, 348 U. S. 817.

No express agreement, of course, is necessary to constitute an unlawful combination or conspiracy. *American Tobacco Co. v. United States* [1946-1947 TRADE CASES ¶ 57,468], 328 U. S. 781, 809. It is sufficient if persons, with knowledge that concerted action was contemplated and invited, "give adherence to and then participate in a scheme." *Federal Trade Commission v. Cement Institute* [1948-1949 TRADE CASES ¶ 62,237], 333 U. S. 683, 716.

[*Evidence Sufficient*]

Viewing this evidence, as we are required to, in the light most favorable to Moore, and having in mind the applicable rules and principles to which reference has been made, we hold that the jury finding of agreement, combination, or conspiracy, and resulting overt act, is supportable as against all appellants.

As to all appellants, the evidence is sufficient to support a jury finding of agreement, combination, or conspiracy to control price cutting and curb-sign advertising by refusing gasoline to dealers whose severe price cutting and persistent curb-sign advertising bring them into controversy with their present suppliers. The evidence, is sufficient to support a jury finding, that, in 1951 and 1952, Moore became such a dealer, and that, pursuant to and in furtherance of the agreement, combination, or conspiracy, the appellants withheld their custom.

V

Admissibility of Exhibits Received in Proof of Agreement, Combination, or Conspiracy

[*Nature of Exhibits*]

Hundreds of exhibits were offered and received in evidence in proof of the alleged unlawful agreement, combination, or conspiracy. Most of these consist of photostatic copies of documents found in the Seattle and California files and records of appellants. These documents had been made available in response to orders to produce. They consist largely of the originals or copies of letters, telegrams, memoranda, and reports. Some were handwritten, some were typewritten, and others were mimeographed or printed.

[*Trial Court—Objections*]

It is not questioned on this appeal that the photostatic copies are accurate reproductions of the documents in question, or

[27] *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, [1950-1951 TRADE CASES ¶ 62.737], 340 U. S. 211; *Associated Press v. United States*, [1944-1945 TRADE CASES ¶ 57.384], 326 U. S. 1; *United States v. Frankfort Distilleries, Inc.*, [1944-1945 TRADE CASES ¶ 57,338], 324 U. S. 293; *Millinery Creators' Guild, Inc. v. Federal Trade Commission*, [1940-1943 TRADE CASES ¶ 56.102], 312 U. S. 469; *Fashion Originators' Guild v. Federal Trade Commission*, [1940-1943 TRADE CASES ¶ 56.101], 312 U. S. 457.

[28] *Fashion Originators' Guild v. Federal Trade Commission, supra;* Report of the Attorney General's National Committee, *supra*, 133.

that the documents came from appellants' files and records. Appellants objected to the introduction of most of these exhibits, however, on the ground, among others, that they constitute hearsay, and that no foundation had been laid for their admission under any exception to the hearsay rule.

In nearly every instance where such an objection was made, it was overruled and the exhibit was admitted in evidence. The trial court held that exhibits of this kind which were received in evidence were admissible under the exception to the hearsay rule which applies to business records.[29] In the federal courts, this exception is sanctioned by statute.[30]

Appellants argue that the admission of these exhibits on this ground and over appellants' objection constituted prejudicial error. While several hundred exhibits of this kind are said to have been improperly admitted, our attention is specifically directed to 119 such exhibits. In their specifications of error, appellants provide detailed record references and arguments as to 46 of these exhibits, contending that they exemplify both the impropriety of what was done and the prejudice which resulted. Six exhibits or series of exhibits, selected for illustrative purposes, are dealt with at length in the briefs.

[*Types of Exhibits*]

Most of the memoranda, letters, and telegrams introduced in evidence in this fashion consisted of interoffice communications between officials of the same company. Many of these communications dealt with such matters as the marketing and pricing policies and activities of the company, of other oil companies, or of customer or competing service station operators. Others dealt with problems of supply, plant and service station facilities, or competition. Some of the communications provided factual information. Others contained expressions of opinion, suggestions, instructions, or requests for information.

In addition to these interoffice communications, there were many memoranda from salesmen or other field representatives to their superiors. These memoranda were largely used to report the observations of the writer, or information supplied by others, concerning the marketing and pricing policies and practices of other oil companies and of customer or competing service station operators. These field memoranda were sometimes handwritten on printed memo forms supplied for the purpose.

A number of the exhibits were reproductions of weekly reports or surveys of highest, lowest, and average prices posted at retail outlets in specified areas.

Admissibility as Business Records

[*Statute*]

To be admissible under 28 U. S. C. A. § 1732, the writing must have been made "as a memorandum or record" of some "act, transaction, occurrence, or event." The memorandum or record must have been made in the "regular course" of the business. It must also have been in the regular course of such business to make the memorandum or record "at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter."

The probability of trustworthiness of memoranda and records made and maintained as provided in § 1732 lies in the fact that they are routine reflections of the day-to-day operations of the business in whose files the memoranda and reports are found. *Palmer v. Hoffman, supra,* pages 113-114. The matters which reflect the day-to-day operations of a commercial enterprise are those in which it is directly concerned as a participant. Illustrative of these

[29] As apparently recognized by all concerned, most of these exhibits constituted hearsay, since substantially all of them were offered to prove the truth of the contents, and were not subject to the test of cross-examination. See *Palmer v. Hoffman,* 318 U. S. 109, 112; 5 Wigmore, Evidence (3d ed., 1940) 3, 376, §§ 1367, 1530.

[30] 28 U. S. C. A. § 1732, subd. (a) of which reads as follows:

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

are such matters as bids, offers, purchases, sales, deliveries, price quotations, credit extensions, loans, rentals, salary and wage payments and deductions, inventory changes, and bank deposits.

[*Matters Outside of Business*]

It follows that a writing which does not pertain to a matter in which the business was a direct participant, but to some incident, circumstance, or activity outside that business, is not a memorandum or record of an "act, transaction, occurrence, or event" within the meaning of the statute. In this event, the writing is not admissible under § 1732, notwithstanding it may have been made in keeping with systematic and routine procedures, and concerns a matter of importance to the business. See *Palmer v. Hoffman, supra; Clainos v. United States* (D. C. Cir.), 163 F. (2d) 593.

A great many of the exhibits in question consist of memoranda, letters, and reports dealing with the pricing and marketing policies of oil companies other than the one in whose files the writing was found. Other such exhibits deal with the like policies and practices of service station operators who were not customers of the company in whose files the writing was found. For the reasons just stated, such writings are not business records, and should not have been admitted under § 1732.

[*Opinions or Conclusions*]

The considerations discussed above and the context of § 1732, read as a whole, also indicate that a writing cannot ordinarily be considered a "memorandum or record" of an "act, transaction, occurrence, or event," unless the recitals in such writing are factual in nature. There are special circumstances under which writings containing expressions of opinion or conclusions, as distinguished from factual statements, may be admissible under the statute. This may be done, however, only where the subject matter is such that the expression of an opinion or conclusion calls for professional or scientific knowledge or skill, and where the opinion or conclusion is expressed by one having the required special competence and authorized to do so by the person or company maintaining the memorandum or record.[31]

A good many of the exhibits in question contain expressions of opinion, or conclusions, concerning the reason why another oil company or a noncustomer service station operator took, or failed to take, certain action, or concerning the probable course such companies or persons would follow in the future. Expressions of opinions or conclusions on such matters do not call for professional or scientific knowledge or skill It follows that exhibits containing such recitals were not admissible under § 1732.

[*Information—Unauthorized Persons*]

A memorandum or record cannot be considered as having been made in the "regular course" of business, within the meaning of § 1732, unless it was made by an authorized person, to record information known to him or supplied by another authorized person. The second paragraph of § 1732(a) expressly provides that the entrant or maker need not have personal knowledge of the matters recited in the memorandum or record. *Wheeler v. United States* (D. C. Cir.), 211 F. (2d) 19, 23, cert. denied 347 U. S. 1019. But where the entrant or maker records information supplied by others, it must appear that "it was part of their regular course of business to report to him what the declarants themselves knew, as it was part of his business to record what they said." *United States v. Grayson* (2 Cir.), 106 F. (2d) 863, 869.[32] Where the information comes to the entrant or maker from unauthorized persons, the memorandum or record is therefore inadmissible, not because it contains hearsay, but because it was not made in the regular course of business.

With regard to some, but not all, of these exhibits, there was evidence to indicate that the writing had been prepared in the course of the writer's duties as an employee of the

[31] See, for example, *Medina v. Erickson* (9 Cir.), 226 F. (2d) 475, 482, cert. denied 351 U. S. 912 (doctors' consultation reports, made in accordance with hospital regulations); *Moran v. Pittsburgh-Des Moines Steel Co.* (3 Cir.), 183 F. (2d) 467, 473 (report of U. S. Bureau of Mines concerning explosion); *Pekelis v. Transcontinental & Western Air* (2 Cir.), 187 F. (2d) 122, cert. denied, 341 U. S. 951 (report of company accident investigation board). But see *Chapman v. United States* (5 Cir.), 194 F. (2d) 974, 978, cert. denied, 344 U. S. 821, criticizing the Pekelis and Moran decisions.

[32] See, also, *Gencarella v. Fyfe* (1 Cir.), 171 F. (2d) 419; *Clanios v. United States* (D. C. Cir), 163 F. (2d) 593. *Contra: Pollack v. Metropolitan Life Ins. Co.* (3 Cir.), 138 F. (2d) 123, 129; *United States v. General Motors Corp.* (7 Cir.) [1940-1943 TRADE CASES ¶ 56,120], 121 F. (2d) 376, 409, cert. denied, 314 U. S. 618.

company maintaining the record. In many of these exhibits, however, there is information which the writer attributed to others. This is particularly true with respect to memoranda from the field. In few, if any, of these instances was any showing made that the person supplying such information to the writer had the duty to do so. In most cases, the lack of such authority is self-evident, for the information was attributed to a service station operator or other person having no relationship with the company which could give rise to such a duty.[33] Exhibits falling in this category were not admissible under § 1732.

[*Regular Course of Business*]

A memorandum or record cannot be considered as having been made in the "regular course" of business, within the meaning of § 1732, unless it was made pursuant to established company procedures for the systematic or routine and timely making and preserving of company records.[34]

As before noted, it was established with regard to some, but not all, of these exhibits that the writing had been prepared in the course of the writer's duties as an employee of the company. On a good many of the papers, there were initials or other marks to indicate that the communication, after being transmitted, had come to the notice of one or more of the company's officials. In most instances, however, it was not established that the internal procedures of the company required that such writings be prepared, transmitted, and filed systematically, or as a matter of routine.

Concerning almost all of the items comprising the grist of interoffice memoranda and letters which were introduced, the nonexistence of any such company procedure seems almost self-evident. They were patently intended as communications between employees, and not as records of company activity. Many of them were casual and informal in nature, seeking or providing information of a kind which could be, and no doubt often was, communicated by telephone or in conference. Most of them were apparently written as a result of the exercise of individual judgment and discretion.

If there was any systematic or routine procedure being followed in the preparation and filing of such writings, the burden was upon appellee to prove it. He failed to do so, at least with regard to most such exhibits. Where this foundation was lacking, the exhibit was not admissible under § 1732.[35]

With regard to few, if any, of these exhibits was there testimony indicating that it was a regularly established business procedure to make such memoranda or records at the time of the act, transaction, occurrence, or event therein described, or within a reasonable time thereafter. In numerous instances, the writings themselves reveal that they had not been prepared with any particular or general time limit in mind. Some of the documents contain references to acts which occurred or policies which

[33] Perhaps the most extreme example of this kind is plaintiff's exhibit 6-B. It is a report by an unidentified salesman named "Art" to Union's local manager, about a Tide Water dealer. Received as a business record of Union, it reads in part:

"Mr. Chris Pieren, Associated dealer at 7120 East Marginal Way told me today that Associated has removed off policy discounts from their self-serve dealers and has discontinued selling to them unless they raise their posted price to the regular retail level.

"Bill Scholdt, operator of Bill's Gas Well at 10300 East Marginal Way, said the Harris Petroleum had been approached by two Associated Self-Serve dealers formerly supplied by them for their further supply since Associated was going to take away their discount. . . ."

[34] The existence of a document or its presence in the file of a corporation does not, without more, render it admissible under § 1732. *National Labor Relations Bd. v. Sharples Chemicals, Inc.* (6 Cir.), 209 F. (2d) 645. That the company procedures must provide for systematic or routine entry of such records, see *Palmer v. Hoffman, supra; New York Life Ins. Co. v. Taylor* (D. C. Cir.), 147 F. (2d) 297, 303; *Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co.* (2 Cir.), 18 F. (2d) 934; 5 Wigmore, Evidence (3d ed. 1940) 373, § 1525. The requirement that the procedure call for timely entry of such records is expressly spelled out in § 1732(a) in these words: ". . . and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter."

[35] It is not suggested that the writings were inadmissible because they were in the form of memoranda or letters. It is expressly provided in § 1732 that writings which meet the requirements of that statute are admissible "whether in the form of an entry in a book or otherwise." Thus, informal memoranda, prepared for the purpose of recording company acts, transactions, occurrences, or events, dictated as a regular company practice within a reasonable time afterwards, would be admissible as records made in the regular order of business. See *Smith v. Bear* (2 Cir.), 237 F. (2d) 79.

were established a considerable time before the writing was prepared. Others do not refer to past acts and events at all, but contain predictions as to what would or should occur in the future. Exhibits unsupported by foundation evidence showing adherence to company procedures calling for prompt preparation of the writing were not admissible under § 1732.

[*Decisions*]

In reaching the conclusions stated above, concerning the lack of adequate foundation to warrant the admission of these exhibits under § 1732, we have not overlooked the decisions relied upon by appellee. For the reasons stated below, we believe that they do not support appellee's position.

Southard v. United States (9 Cir.), 218 F. (2d) 943, involves § 1733, not § 1732. In *Sheehan v. Municipal Light & Power Co.* (2 Cir.), 151 F. (2d) 65, it was held that copies of certain letters were admissible under the predecessor statute (28 U. S. C. A. § 695). These copies, however, did not constitute hearsay. They were not admitted to prove the truth of the contents, but only to show that notice of certain action had been given. In *Waters v. Kings County Trust Co.* (2 Cir.), 144 F. (2d) 680, cert. denied, 323 U. S. 769, the question was whether the administration of a trust is a "business," within the meaning of the business records act. It was not questioned that the writings, consisting of a bank's history sheet or diary of events, were otherwise admissible under the act.

Landay v. United States (6 Cir.), 108 F. (2d) 698, 704, cert. denied, 309 U. S. 681, concerned the admissibility of corporate books to prove certain stock transactions between corporations. They were identified by the one who superintended the making of the records, and the entries were, the court said, "prepared in the ordinary routine, which warrants their reliability." In *Stillman v. United States* (9 Cir.), 177 F. (2d) 607, it was held only that a proper foundation had been laid for the introduction of certain business records, where a partner had admitted that they were "the books" of the partnership.

United States v. General Motors Corporation (7 Cir.) [1940-1943 TRADE CASES ¶ 56,120], 121 F. (2d) 376, 409, cert. denied, 314 U. S. 618, comes the closest to supporting appellee's position. It is stated in that opinion that intracompany reports are admissible, under the predecessor business records act, "as recorded acts or transactions made in the regular course of business." The court went on to say, however, that most of the errors assigned in connection with this class of evidence were not argued, and that the appellants admitted that none of such evidence was prejudicial in and of itself, though its cumulative weight might influence the jury. The court expressly stated that the appellants "could not possibly have been prejudiced or injured" by the reception of such evidence, either in isolation or in its entirety.

[*Outline of Factors*]

In discussing the admissibility, under § 1732, of the exhibits introduced in the case before us, it has not been practicable to deal individually with the hundreds of items which were offered and received. It has been our purpose, however, to outline the factors to be considered in ruling upon these or other like exhibits offered on a different record at a new trial.

[*Inadequate Foundation*]

In our view, there was an inadequate foundation for the admission, as business records, of most of these exhibits.

The objections which appellants voiced to the introduction under § 1732, of the exhibits in question were sufficient to present all of the considerations which have been discussed above.

[*Prejudicial Error*]

That the introduction of these exhibits was prejudicial to appellants is not denied. All of the 46 exhibits mentioned in the specifications of error were referred to, and many were quoted, in the argument to the jury made on behalf of appellee. A great many additional exhibits of this kind are referred to in appellee's brief as providing evidence of an unlawful agreement, combination, or conspiracy.

[*New Trial*]

If none of these inadmissible exhibits had been received, the evidence would have been insufficient to support the jury finding that there was such an unlawful agreement, combination, or conspiracy. If we were able to say that this evidence would not be admissible on any record which could be made,

and is irreplaceable, we would be warranted in directing dismissal of the action.

On a new trial, however, a proper foundation may be supplied for the admission of some of these documents, and other admissible evidence may be found in substitution of evidence here found to be inadmissible.[36] The attainment of substantial justice therefore requires that the action be not dismissed, but that it be remanded for a new trial. See 28 U. S. C. A., § 2106; Rule 61, Federal Rules of Civil Procedure, 28 U. S. C. A.

Admissibility as Extrajudicial Admissions of a Party-Opponent.

[*Contentions*]

Appellee, however, argues that, if these exhibits were inadmissible under § 1732, they were, in any event, properly received as extrajudicial admissions of a party-opponent (herein referred to as admissions). To this contention, appellants reply that (1) the course of the trial precludes sustaining the introduction of the documents as admissions; and (2) there was no foundation for introduction of the documents as admissions.

[*Foundation Evidence*]

Turning to the first of these points, it is appellants' position that the challenged exhibits were offered and received only on the ground that they were business records admissible under § 1732. The possible admissibility of these exhibits as admissions having assertedly not been raised and inquired into at the trial, they should not now, appellants argue, be held admissible on the latter ground.

Examination of the record indicates that appellants are correct in stating that these exhibits were admitted as business records, and not as admissions. Counsel for Moore, on two or three occasions, sought to admit documents of this kind as admissions. Each time, the trial court rejected this contention, and made it clear that the writings were receivable, if at all, only as records made in the regular course of business. Conforming to this ruling, the foundation evidence was directed only to the requirements of § 1732 as a ground for admission.[37]

All of the discussion and argument of counsel concerning the admissibility of individual exhibits, with the possible exception noted in the last footnote, were directed to that inquiry. Likewise, the comments of the court regarding the ground of admissibility concerned only that line of inquiry. As a result, the challenged exhibits were received only on the basis that they constituted memoranda or records made in the regular course of business.

In view of what has been said, it would be manifestly unfair for us to now hold these exhibits admissible on a different ground, assuming that the evidence in the record would support such a ruling. Appellants have had no trial court opportunity to inquire into the factual basis for admission of the exhibits on any ground other than that they were business records.[38]

Upon a new trial of this action, Moore may seek introduction of some or all of these documents as admissions. We therefore consider it appropriate to state the principles to be applied in the event this effort is made. We speak here not of the foundation which must be laid to establish the authenticity and genuineness of such writings.[39] Our purpose is to indicate what showing Moore must make to warrant a determination that a properly authenticated

[36] Some of these exhibits which were admitted to establish the truth of the recitals therein contained (and so were hearsay) may also be admissible on a new trial for limited and non-hearsay purposes, such as to show the orders of a superior, pattern of business conduct, contemporary explanations of ambiguous conduct, notice, or motive. In this event, it would not be necessary to qualify them as business records, extrajudicial admissions, or under any other exception to the hearsay rule.

[37] There is one possible exception to what has just been said. This concerns Plaintiff's Exhibits 28-A, 28-C, 29-E, and 32-A. The witness who gave the additional testimony concerning these exhibits testified that they had been prepared in Associated's San Francisco office, and that he had no knowledge of the procedure followed. Conceding that, as to these exhibits, a foundation for their admission as business records had not been established, counsel for appellee reoffered them only as against Associated, and on the theory that they were admissions. We have failed to find, in this voluminous record, where this reoffer of these exhibits was acted upon.

[38] See *Shepard v. United States,* 290 U. S. 96, 103; 1 Wigmore, Evidence (3d ed. 1940), 320, note 14.

[39] Where a document is not admissible as a memorandum or record made in the regular course of business, its authenticity and genuineness must be established in accordance with familiar rules pertaining to the authentication of private writings in general. See the cases cited in 32 C. J. S., Evidence, pages 606 et seq., § 706.

document may be received, as an admission, to prove the truth of the statements therein made.

[*Extrajudicial Admissions*]

Extrajudicial admissions of a party-opponent are receivable as exceptions to the hearsay rule. [40] In our case, the documents consist of the writings of employees and agents of the companies against which, at a new trial, they would be produced. To obtain their reception as admissions, it must therefore be made to appear that the statements in question were made or acted upon under circumstances which require appellant corporations to accept responsibility for them as admissions.

The writings here in question were, for the most part, prepared and transmitted by employees and agents of the appellant company in whose files the documents were found. However, they were not, with a few exceptions, communications to persons outside such company. They were interoffice memoranda, letters, telegrams, reports, and the like. It follows that there is here no room for application of the rule [41] that the statement is the principal's if the agent or employee was authorized to make it to a third person. A report made by an employee or agent to his principal, and not to a third person, is not, as such, the principal's statement or extrajudicial admission.[42]

If, however, a corporation, through its shareholders, board of directors, or authorized management officials, vouches for part or all of an employee's or agent's statement, then the part vouched for is receivable against the corporation as an adoptive admission. It is not necessary, in such case, to show that the statement was expressly vouched for. If authorized management officials direct that business be conducted in reliance upon a particular intramural statement or report, and it is so conducted without reservation, the company has, by implication, adopted the statement or report, and is chargeable with it as an extrajudicial admission.

VI

Cautionary Instructions Concerning Acts or Extrajudicial Declarations of Coconspirators

As stated in a preceding section of this opinion, evidence concerning the acts and extrajudicial declarations of one member of an asserted agreement, combination, or conspiracy are not to be considered as against other alleged members unless there is independent evidence establishing, prima facie, that such others were members of the conspiracy.

When evidence of this kind is received, a cautionary instruction should be given to the jury, to be repeated at the end of the trial, calling attention to the limited effect to be given to such evidence.

Appellants complain of the cautionary instruction here given, asserting that the jury was not clearly told that, in order to impose liability upon any individual appellant, Moore had to connect that appellant with the alleged agreement, combination, or conspiracy, by evidence apart from the acts and declarations of any other appellant. Instead, according to appellants, the court permitted the jury to determine the complicity of one appellant from evidence of the acts and declarations of others.

Appellee argues that appellants are giving the trial court's cautionary instructions a strained construction, and that appellants did not, during the trial, point to the asserted defect they now rely upon.

Since the case must now be returned for a new trial, it is sufficient for us to say that the cautionary instruction dealing with this matter should clearly indicate that evidence of the acts and extrajudicial declarations of the agents and employees of one appellant is not to be considered in determining whether another appellant entered into the asserted agreement, combination, or conspiracy. However, if the jury finds, from substantial evidence independent of the acts and extrajudicial declarations of the agents and employees of other appellants, that a particular appellant entered into such an arrangement, then the evidence of such acts

[40] For a discussion of the distinction between extrajudicial admissions and statements of fact against interest, see 4 Wigmore, Evidence (3d ed. 1940) 6, § 1049; McCormick, Evidence (1954) 502, § 239, 546, § 253.

[41] Restatement, Agency, § 286.

[42] *Lever Bros. Co. v. Atlas Assurance Co.* (7 Cir.), 131 F. (2d) 770; Restatement, Agency, § 287; Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 559; Morgan, The Rationale of Vicarious Admissions, 42 Harv. L. Rev. 461, et seq.; Mechem, Agency (2d ed. 1914) § 1784.

and declarations may be considered on the question of whether an overt act was committed pursuant to, or in furtherance of, the agreement, combination, or conspiracy.[43]

VII

Admissibility of Evidence Relating to Damages

Appellants question, in several particulars, the admissibility of certain evidence adduced by Moore on the question of damages. Since these questions may again arise on a new trial of this action, we here state our views.

The Hypothetical Question as to Good Will Value.

It was Moore's contention that his business had been totally destroyed on August 15, 1952, when he could no longer obtain gasoline. He therefore asked the jury to measure his damages by the market value of the business on that date. Moore owned the land and the other capital assets of the business, and retained them when he went out of business. It follows that the only value which his business had before it was closed that it did not have afterwards was its "going concern" or "good will" value.

As one means of proving going concern or good will value, Moore produced the opinion testimony of an expert witness. The hypothetical question asked of this witness included, as one of its assumptions, that in August, 1952, Moore was forty-one years of age, was in reasonably good health, and wanted to continue the management of the service station. Appellants argue that the question, as so framed, was irrelevant to the issue.

We agree. In measuring the value of the good will of such a business, appropriate factors to be considered are: (1) What profit has the business made over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner? (2) What is the reasonable prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the valuation? See *Kimball Laundry Co. v. United States,* 338 U. S. 1, 16-17. These are the factors which would influence a prospective purchaser. The special value which the business might have to Moore, or the profit potential of the business beyond that which would be transferable to a purchaser, would have no effect on market value of the business.[44] Upon the retrial, the question should be framed to omit this irrelevant factor.

Appellants also contend that the hypothetical question, as asked, omitted the recital of many fundamental facts which were in evidence, and assumed basic facts contrary to the uncontradicted record.

We have no way of knowing what evidence will be in the record upon a retrial, on the basis of which a new hypothetical question may be asked. It will therefore serve no useful purpose to express an opinion as to whether the hypothetical question now before us, measured by the evidence in this record, is subject to the criticism leveled at it by appellants.

In general, it may be said that a hypothetical question should include any undisputed fact which is clearly material and important.[45] The parties, however, are often not in agreement as to what facts are undisputed, material, and important. If it is objected that certain facts should be included, it is for the trial judge, in the exercise of his discretion, to determine whether the question should be reframed to add such facts. *Pasadena Research Laboratories v. United States* (9 Cir.), 169 F. (2d) 375, 384, cert. denied, 335 U. S. 853.

If the trial judge does not require this to be done, it is seldom that prejudicial error can be said to result. This is because the objecting party can, through cross-examination, expose to the jury the asserted deficiencies of the hypothetical question as asked. *Dunagan v. Appalachian Power Co.* (4 Cir.), 33 F. (2d) 876, cert, denied, 280 U. S. 606. It is for this reason that it is

[43] See *Mayola v. United States* (9 Cir.), 71 F. (2d) 65, 67; *Oras v. United States* (9 Cir.), 67 F. (2d) 463, 466. See, also, the general discussion of the order of proof and the so-called "rule of convenience," in *Flintkote Company v. Lysfjord, supra.*

[44] Moore retains his life expectancy and business acumen. Assuming that he is entitled to, and so receives, the market value of the destroyed good will of his business, he can, at least theoretically, do as well with it as he could have done by continuing in business at his Fourth Avenue South location.

[45] *Berndt v. Dept. of Labor & Industries,* 44 Wn. (2d) 138, 148, 265 P. (2d) 1037, 1043; *Starr v. Oriole Cafeterias,* 182 Md. 214, 34 A. (2d) 335. Conversely, such a question need not include every fact in the case. *Rowe v. Pennsylvania Greyhound Lines* (2 Cir.), 231 F. (2d) 922, 925, cert. denied, 351 U. S. 984.

usually held that defects in such a question go not to the competency of the evidence, but merely affect its weight. *Permanente Metals Corp. v. Pista* (9 Cir.), 154 F. (2d) 568, 569.

A hypothetical question calling for expert opinion must be based upon facts in evidence. *Hupp Motor Car Corp. v. Wadsworth* (6 Cir.), 113 F. (2d) 827. There is here less leeway for the exercise of discretion, since the determination of whether certain facts are in evidence is not so dependent upon judgment factors as the determination of whether certain facts are undisputed, material, and important. Even where it is found that facts assumed in the hypothetical question are not in evidence, however, it is not often that prejudice results. This, again, is because the exercise of the right of cross-examination makes it possible to illuminate any false assumptions contained in the hypothetical question.[46]

Qualifications of Expert Witness

The witness from whom Moore's counsel sought an expert opinion as to value of the business was Dr. Henry Burd. Dr. Burd taught marketing at the University of Washington from 1924 to 1954. Since then, and until the trial, he was engaged in business as a consultant in marketing fields. Appellants concede that Dr. Burd was eminently qualified in many phases of marketing, but argue that he was not qualified by study, training, or experience to state an opinion on the salable value of Moore's service station.

In determining whether a particular witness is qualified to express an expert opinion, the trial court is called upon to exercise a sound discretion. *Pollard v. Hawfield* (D. C. Cir.), 170 F. (2d) 170, cert. denied, 336 U. S. 909. Whether the witness has had occupational experience in the particular field embraced by the hypothetical question is a factor to be considered in determining his qualifications. But it is not controlling. The court may find that it is sufficient that such witness is qualified by study, research, and general background, to express an opinion. *Empire Oil & Refining Co. v. Hoyt* (6 Cir.), 112 F. (2d) 356; 2 Wigmore, Evidence (3d ed. 1940) § 556

Our examination of the record convinces us that the trial court did not abuse its discretion in permitting Dr. Burd to express an expert opinion as to the value of Moore's gasoline service station business.

Formula Used to Measure Going-Concern Value

In expressing an opinion as to the going-concern value of Moore's business, Dr. Burd used a formula which allocated average profit to (1) capital investment, (2) value of personal services, and (3) "good will," and which capitalized the latter derived figure at various postulated percentages.

Appellants state that nowhere did Dr. Burd explain why the formula which he used was reasonable under the circumstances. Thus, it is contended, his testimony is subject to the same objection which was upheld in *Emich Motors Corp. v. General Motors Corp.* (7 Cir.) [1950-1951 Trade Cases ¶ 62,577], 181 F. (2d) 70, 83, modified on another ground, [1950-1951 Trade Cases ¶ 62,778] 340 U. S. 558.

Without undertaking to say that the lack of background testimony explaining the formula used by Dr. Burd was a fatal defect, we express the view that it would have been better practice to have such an explanation from the witness. The outline of Dr. Burd's formula seemed to follow rather closely the prime factors mentioned in *Kimball Laundry Co. v. United States, supra.* But the jury should have had his reasons for adopting the particular formula and its component factors and assumptions. This deficiency can be supplied upon the retrial.

Opinion Based upon Developments Subsequent to Valuation Date

The measure of damages which Moore sought to establish was the market value of Moore's good will as of August 15, 1952. In testifying as to such market value, however, Moore and Dr. Burd were permitted to base their respective opinions in part upon certain events, facts, and business developments occurring subsequent to that date. Appellants contend that this should not have been permitted.

[46] It should not be understood, from the foregoing discussion, that it is always necessary to propound a hypothetical question in eliciting the opinion of an expert. The present trend of thinking is that the use of hypothetical questions is not required except in the discretion of the trial judge. See Uniform Rules of Evidence, Rule 58; Uniform Act on Expert Testimony, § 9; McCormick on Evidence (1954) 34, § 16.

We agree. See *Ithaca Trust Co. v. United States*, 279 U. S. 151; *New York v. Sage*, 239 U. S. 57.

Opinion Testimony Based on Facts Not in Evidence

We have discussed above the contention that the hypothetical question asked of Dr. Burd was defective, in that it assumed facts not in evidence. Appellants also argue, quite apart from the asserted improper form of the hypothetical question, that Dr. Burd should not have been permitted to premise his answer upon facts which were not in evidence, and many of which were based on hearsay.

Dr. Burd testified that, in preparing himself to express an opinion as to market value, he made certain studies and gathered background information from a number of sources. He indicated the nature of these studies and the sources drawn upon.[47] The information gained or findings arrived at in the course of this research were not revealed, however, nor were the source materials which Dr. Burd consulted offered in evidence. On at least one occasion, counsel for Moore sought to have Dr. Burd testify as to the information gained in these pretrial studies. Appellants' objection was sustained, the court instructing the witness: "You can state if you considered things as a reason for this, but you cannot say what the things are as a factual basis."

It is common practice for a prospective witness, in preparing himself to express an expert opinion, to pursue pretrial studies and investigations of one kind or another. Frequently, the information so gained is hearsay or double hearsay, in so far as the trier of the facts is concerned. This, however, does not necessarily stand in the way of receiving such expert opinion in evidence. It is for the trial court to determine, in the exercise of its discretion, whether the expert's sources of information are sufficiently reliable to warrant reception of the opinion. If the court so finds, the opinion may be expressed. If the opinion is received, the court may, in its discretion, allow the expert to reveal to the jury the information gained during such investigations and studies. Wide latitude in cross-examination should be allowed.[48]

Admissibility of Income Tax Returns

Copies of Moore's original income tax returns covering the period 1940 to 1952 were admitted in evidence over appellants' objections.

These tax returns, being offered in proof of the facts therein recited, were concededly hearsay. They were not admissible as admissions, because they were offered by the party for whom they were prepared. Nor does the fact that these returns were "public records" under the internal revenue laws render them admissible. *Greenbaum v. United States* (9 Cir.), 80 F. (2d) 113. They are not "business records," within the meaning of 28 U. S. C. A. § 1732, since not made in furtherance of Moore's business, but at the behest of the Director of Internal Revenue, under sanction of a federal statute. *Matthews v. United States* (5 Cir.), 217 F. (2d) 409, 413-414.

Moore, however, asserts that they were admissible as summaries of the details of his loose-leaf ledger which was admitted in evidence as Plaintiff's Exhibit 207.

Summaries of voluminous records may, in the discretion of the trial judge, be received in evidence. *Board of County Commissioners*

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[47] (1) History of Moore's station from 1940 to July, 1952, the information being supplied by Moore; (2) retail gasoline business in Seattle as disclosed in published data for the nation as a whole; (3) general economic and business conditions, as reported in materials available in public library; (4) general business conditions from July, 1952, to 1955, based on Dr. Burd's personal study; (5) flow of traffic on Fourth Avenue South, shown by Seattle traffic surveys; (6) business performance of other gasoline stations in area since Moore went out of business, shown by Dr. Burd's personal observations; (7) data concerning gasoline stations in Seattle, taken from United States Census of Business; (8) gasoline prices from 1952 to 1955, revealed by Dr. Burd's research; (9) competitive conditions in the area of Moore's station from 1952 to 1955, as determined by investigations made by Dr. Burd; (10) service station operating problems learned by Dr. Burd as a result of discussions with a representative of Time Oil Company, and with a Richfield and a Standard dealer; and (11) business conditions in the Fourth Avenue South area, known to Dr. Burd because of his familiarity with the area.

[48] See *District of Columbia Redevelopment Land Agency v. 61 Parcels of Land* (D. C. Cir.), 235 F. (2d) 864; *Gwathmey v. United States* (5 Cir.), 215 F. (2d) 148; *United States v. 5139.5 Acres of Land* (4 Cir.), 200 F. (2d) 659. Some of the sources drawn upon by Dr. Burd, as summarized in the last footnote, are objectionable because they pertain to events occurring since the critical date of August 15, 1952. The witness should have been directed to exclude such considerations in arriving at his opinion.

v. William J. Howard, Inc. (10 Cir.), 230 F. (2d) 561, 564, cert. denied, 351 U. S. 926. No case has been cited, however, in which it has been held that income tax returns are admissible on such a theory. While the returns in question undoubtedly contain information drawn from Moore's ledger, they also contain computations which are not reflections of ledger entries. Moreover, the returns were actually offered as primary proof of the income from Moore's business. No testimony was offered, nor statement made, that these returns were being submitted as summaries of Moore's accounting records. In our view, the income tax returns should not have been received in evidence.

Admissibility of Ledger and Summary Sheets

Certain of the entries in Moore's ledger, introduced as Plaintiff's Exhibit 207, were not made until several months after the transaction recorded. Mrs. Moore, who kept the ledger, was unable to recall the lapse of time involved in making certain other entries. The business records act provides that memoranda or records, to be admissible, must have been made at the time of the act, transaction, occurrence, or event recorded, or within a reasonable time thereafter. 28 U. S. C. A. § 1732. Appellants argue that, in view of this provision, portions of Plaintiff's Exhibit 207 which were not made shortly after the transactions recorded should have been excluded.

The entries were based upon cash register tapes, and, in most cases, were posted shortly after the end of each month. There were occasional time lags of several months in posting these entries. There was no evidence to show that this lag introduced inaccuracies or uncertainty as to the reliability of the ledger. The lapse of time was less than involved in *United States v. Potson* (7 Cir.), 171 F. (2d) 495, 499, where annual summary sheets were held to be admissible as business records. In our view, the trial court did not err in admitting Plaintiff's Exhibit 207.

Certain summary sheets, admitted as separate exhibits, were based upon Moore's income tax returns. Since we have found such returns to be inadmissible, summaries based thereon should not be received at the new trial.

[*Other Claimed Error*]

Appellants remaining specification of error relates to asserted prejudicial extraneous and coercive influences exerted upon the jury. The circumstances upon which this specification of error is based are not likely to recur at the new trial. It is therefore unnecessary to discuss the point in this opinion.

[*Reversed*]

Reversed and remanded with directions to grant appellants a new trial.

[¶ 68,862] C. C. Stanton, trading and doing business as Stanton Oil Company v. The Texas Company.

In the United States Court of Appeals for the Fifth Circuit. No. 16436. Dated November 18, 1957.

Appeal from the United States District Court for the Southern District of Florida. Bryan Simpson, District Judge.

Robinson-Patman Price Discrimination Act

Price Discrimination—Section 2(a) of Clayton Act and Section 3 of Robinson-Patman Act—Sufficiency of Complaint—Punitive Damages.—A trial court ruling striking from a complaint a reference to the Robinson-Patman Act and a claim for punitive damages was affirmed. The reviewing court noted that it was "impossible to read the pleadings and the evidence without reaching the fixed conviction that what was really in controversy below was not whether there had been a violation of the Robinson-Patman Act" but whether a competing distributor of petroleum products had "unlawfully interfered with the contract rights of the plaintiff without justification." The trial court had ruled that Section 2(a) of the Clayton Act, as amended, is a civil statute enforceable exclusively by suits for treble damages and injunctive relief; and that Section 3 of the Robinson-Patman Act does not

prohibit injuries to competing sellers, and that the plaintiff could not recover punitive damages for a claimed violation of this section because such damages, where recoverable at all, are recoverable only by the party against whom the criminal violation is directed.

See Price Discrimination, Vol. 1, ¶ 3505, 3551; Private Enforcement and Procedure, Vol. 2, ¶ 9011.

For the appellant: Rhyden C. Latham, Jacksonville, Fla.

For the appellee: Cyril C. Copp, Jacksonville, Fla.; William S. Clarke, Houston, Tex.; and Amzy B. Steed, New York, N. Y.

For a prior opinion of the U. S. District Court, Southern District of Florida, Jacksonville Division, see 1956 Trade Cases ¶ 68,496.

Before HUTCHESON, Chief Judge, and TUTTLE and WISDOM, Circuit Judges.

[*Inducing Breach of Contract*]

HUTCHESON, Chief Judge [*In full text*]: Brought by plaintiff, a wholesale distributor of Shell Oil products, against defendant, the Texas Company, another marketer of petroleum products, the suit was for allegedly inducing a breach of contract between plaintiff and Horne's of Bayard, Inc., the operator of a gasoline service station and candy store in Bayard, Florida, which plaintiff had previously supplied.

[*Robinson-Patman Act*]

In addition to compensatory damages, plaintiff, alleging that the interference with the contract rights of the plaintiff was without justification and malicious, and in violaion of the Robinson-Patman Act, claimed $1,000,000.00.

[*Pre-Trial Motions*]

Defendant moved to dismiss the complaint, to strike from it the reference to the Robinson-Patman Act, and for summary judgment, arguing in support (1) that plaintiff was not entitled to any relief whatever because no valid contract or lease existed between plaintiff and the Hornes; and (2) that there had been no violation of the Robinson-Patman Act on which to ground a claim for punitive damages.

Granting the motions to the extent of striking the reference to the Robinson-Patman Act and the claim for punitive damages, the district judge denied defendant's motion to dismiss and for summary judgment except as to the claim of punitive damages.

[*Amended Complaint*]

Thereafter plaintiff moving for leave to file an amended complaint which it tendered with the motion and the district judge denying the motion on the ground that the amended complaint presented no essential difference in fact or in law from the original complaint, the cause went to trial before the court without a jury on the issue of compensatory damages.

[*Trial Court Ruling*]

The trial concluded, the district judge made findings of fact and conclusions of law [1] and entered judgment accordingly, and

[1] Findings of Fact:

1. The plaintiff is a citizen and resident of Florida, the defendant is a Delaware corporation, and the amount in controversy exceeds Three Thousand Dollars, exclusive of interest and costs.

2. The plaintiff, C. C. Stanton, trading and doing business as Stanton Oil Co., is, and was at all times material hereto, a contract distributor of petroleum products manufactured and sold by Shell Oil Co., a corporation, with exclusive rights within his contract designated territory to sell such products in bulk to retailers. Such designated territory includes Bayard, Duval County, Florida.

3. Beginning in 1935, plaintiff had continuously as a customer, first Alton I. Horne, then Alton I. Horne and Robert Horne (Alton I. Horne's son) who owned and operated a gasoline filling station at Bayard, Florida. The Hornes handled plaintiff's Shell products exclusively.

4. About Oct. 4, 1948, the Hornes moved their location a short distance (still in Bayard, and in plaintiff's exclusive sales territory). The Hornes needed money to construct a paved driveway at the new establishment, and plaintiff advanced them $2000.00 to use for this purpose. This was paid by check, which had the following language typed upon the reverse side, "In full payment of lease on property at Bayard, Florida, known as (Retail Outlet) Horne's Candy Shoppe, for Gasoline Filling Station Rights for Five Year Period with Five Year Option." The check was payable to "Alton I. and Robert Horne" who indorsed it directly below the above quoted language and negotiated it. Stanton's pumps and underground equipment were installed at the new location.

plaintiff has appealed, assigning four specifications of error.[2]

[*Plaintiff's Contentions*]

Recognizing the controlling effect of the findings of fact of the district court, that on the tendered issue, whether defendant induced the breach of plaintiff's contract with Hornes, plaintiff devotes the larger portion of his brief to the task of overcoming the effect of these findings. Setting out some of the oral testimony and stating, "So we come into a direct conflict in the testimony", appellant goes on to say:

"If we had only this oral testimony, the Court would be faced with the impossible task of determining who's lying. However, you don't have to rely on oral testimony to so decide, to resolve this case. There is in this record documentary evidence in the form of correspondence between officials of Texas on this subject which sets it all out in full and gives us the true picture."

Thus premising, appellant, setting out the correspondence he relies on, argues vigorously that these writings completely refute and thus make clearly erroneous the court's finding of fact No. 9:

5. The Hornes, with their respective wives and themselves as sole stockholders, incorporated the Bayard business as "Horne's of Bayard, Inc., a Florida corporation," on May 7, 1953. The business continued exactly as before with the corporation operating in lieu of the partnership and carrying on the sale of Shell products supplied by Stanton.

6. By letter of May 15, 1953, the defendant, Texas Company, wrote Shell Oil Co. that Mr. Horne had decided to change over to Texas products at this location. This letter was forwarded by Shell to Stanton, Shell advising Texas that the station was serviced by its distributor, Stanton. By letter of May 25, 1953, Stanton advised Texas Company that he held a five year lease with option to renew, and requested that the account be not disturbed by Texas as long as the lease was in force. No further dealings between the Hornes and Texas took place until after the first of the calendar year 1954.

7. Relations between the Hornes and Stanton became more strained. The Hornes were handling Texas products in similar enterprises at various locations in Florida and Georgia, and considered Texas products more saleable than Shell's. Shortly after the first of the calendar year 1954, Stanton began making a 1 cent per gallon rebate from tank wagon prices to the Hornes.

8. By letter of April 2, 1954, after additional negotiations between the Hornes and Texas Co., the Hornes notified the plaintiff Stanton they would no longer handle his Shell products, and gave him until April 10, 1954, to remove his equipment. The Hornes commenced using Texas products at Bayard April 12, 1954, and continued so doing until another company, Gulf Oil Co., commenced supplying the station in Dec., 1955.

9. The plaintiff contends (a) that the change over to Texas products by the Hornes was induced by the solicitation and invitation of Texas Co., and (b) that this occurred at a time when he had either (1) a valid lease with the Hornes, (2) a valid extension thereof, or (3) a satisfied customer who would have continued to deal with him (to Stanton's profit) throughout an implied extension of the lease for the second five years, absent the interference of Texas Company. I am inclined to view the language typed on the reverse of the $2,000 check as an exclusive sales agreement, or marketing agreement for five years, with a right to renew for five years, which right to renew was never exercised. However, I do not consider that this agreement requires legal construction or exact definition. Nor do I consider it material whether the agreement was or was not effectively renewed, so as to be in effect when Texas took over the supplying of the station on April 12, 1954.

I find that nothing was done by Texas to solicit the Horne's business at Bayard at any time material hereto. All the negotiations between the Hornes and Texas were at the Hornes' instigation, and Texas did nothing more than accept the business when it was offered. Hence, regardless of the nature of the legal relation between the Hornes and Stanton, no breach of that relation is shown to have been induced by Texas Company.

10. The parties stipulated that Stanton's recovery for loss of net profits, if allowed by the Court, should be in the amount of $11,071.30. As indicated above, no right to such recovery is established. Additionally, it was agreed that the plaintiff should recover $600 for the use of his underground equipment by Texas Company before its removal. The plaintiff is entitled to judgment in this amount, and for no other amount claimed.

Conclusions of Law:

1. This Court has jurisdiction of this cause, and of the parties.

2. The plaintiff is entitled to judgment against the defendant, The Texas Company, a corporation, in the amount of $600.00, as compensation for the use by defendant of plaintiff's underground tanks and equipment at Horne's of Bayard, Inc., station, Bayard, Florida, from April 12, 1954, to the time such equipment was removed.

3. The plaintiff is denied recovery for every other claim mentioned in his complaint.

[2] (1) The Court erred in striking from the complaint reference to the Robinson-Patman Act and allegations supporting punitive damages.

(2) The Court erred in denying leave to file amended complaint.

(3) The Court erred in finding that the actions of Texas did not constitute unlawful interference with Stanton's rights to service Hornes of Bayard.

(4) The Court erred in refusing to allow plaintiff to recover punitive and compensatory damages.

"I find that nothing was done by Texas to solicit the Hornes' business at Bayard, at any time material hereto. All the negotiations between the Hornes and Texas were at the Hornes' instigation and Texas did nothing more than accept the business when it was offered. Hence, regardless of the nature of the legal relation between the Hornes and Stanton, no breach of that relation is shown to have been induced by Texas Company."

Insisting that the court should have found to the contrary on this issue, appellant then proceeds to a discussion of the other issue which the court declined to decide, whether he had an enforceable contract with the Hornes. Further insisting that even though a contract is unenforceable, because of the statute of frauds or of some other defect which could be raised by the other party to the contract, such defect cannot be availed of by a person in the position of Texas as a defense to a suit for causing the breach of it, he cites and discusses cases which he claims support his view.

Leaving to the last page of his brief, and without citing any authority or putting forward any argument in support, appellant contents himself with the dictum that there can be no doubt that Texas willfully and knowingly violated the Robinson-Patman Act.

Finally, in a single paragraph dealing with the question of damages and completely disregarding the finding that defendant had not committed the acts charged against it, appellant concludes his brief with the didactic assertion that he should be here awarded the compensatory damages which the parties agreed should be awarded as due if there was a breach, and the cause should be remanded for a jury trial on the issue of punitive damages.

[*Defendant's Contentions*]

The appellee squarely meeting the contentions and arguments of appellant on the issue which was decided by the district judge, presents as its counter point one, "The trial court's finding of fact, that Texas did nothing to induce or support any breach of contract, is amply supported by the evidence and is dispositive of the entire appeal," and supports it by full reference to excerpts from and discussions of the record facts.

Proceeding then, as the appellant has done, though the district judge did not decide the question, to argue that there was no valid contract to breach, appellee puts forward and vigorously argues its counter point, "Plaintiff's action for inducing breach of contract will not lie because there was no valid contract to breach". Citing in support *Chipley v. Atkinson,* 1 S. 934; *Pokress v. Southern Hotel Co.,* 42 S. 2d, 166; *Behrman v. Max,* 137 S. 120; *Camichos v. Diana Stores Corp.,* 25 S. 2d 864; *Baker v. Coleman,* 34 S. 2d 538; *Minsky's Follies of Florida v. Sennes,* 206 F. 2d 1, appellee stoutly disputes appellant's contentions both as to the validity of the contract and as to his right to recover for interference with his business relations, even though there was no valid contract. Pointing out that the evidence completely fails to show: (1) that there was an agreement on the essential terms of the option; (2) that the option was exercised; and (3) that the statute of frauds was satisfied; appellee insists that the evidence establishes as a matter of law that the alleged breach sued for did not occur and could not have occurred because plaintiff had no contract to breach.

Finally, meeting appellant's claim, that he pleaded and proved a case entitling him to punitive damages, by pointing out that on the facts of record and under the findings of the court, plaintiff failed to establish that he was entitled to any recovery whatever and his claim for punitive damages inevitably fails,[3] appellee insists that appellant's claim, that this is a case for punitive damages, is hardly to be taken seriously.

[*Findings Supported*]

We find ouselves in complete agreement with appellee's position that the findings of fact and the rulings and judgment of the district court are well supported by the record.

It is impossible to read the pleadings and the evidence without reaching the fixed conviction that what was really in controversy below was not whether there had been a violation of the Robinson-Patman Act or whether Texas had interfered with the general business relations between plaintiff and the Hornes, but whether, as charged by plaintiff, "The Texas Company unlawfully

[3] *Winn & Lovett Gro. Co. v. Archer,* 171 So. 214, 221; and *McLain v. Pensacola Coach Corp.,* 13 So. (2d) 221.

interfered with the contract rights of the plaintiff without justification, as hereinabove shown, and operated to the detriment of the plaintiff, C. C. Stanton and to its own profit and advantage."

When, therefore, the district judge found, as he did in Par. 9:

> "I find nothing was done by Texas to solicit the Hornes' business at Bayard at any time material hereto. All the negotiations between the Hornes and Texas were at the Hornes' instigation and Texas did nothing more than accept the business when it was offered.",

if his finding is supported by the record, he completely and effectively disposed of the case before him. Recognizing that this is so, appellant undertakes by a strong and earnest attack on the finding to set it aside as erroneous, while the appellee, with the same recognition, as vigorously defends it as amply supported by the record.

We are not persuaded by appellant's arguments that the correspondence on which he relies refutes the oral testimony which the court accepted as correct and establishes that the finding was erroneous. On the contrary, after considering the whole record in the light of the finding and the arguments, we agree with appellee that we ought not, indeed may not, interfere with it. Because we do and because this finding is dispositive of the appeal, we find it unnecessary to discuss or consider the other matters so vigorously and interestingly discussed in both briefs.

[*Affirmed*]

The judgment was right. It is affirmed.

[¶ 68,863] Youngs Rubber Corp. v. Sirbel Sales Corp.

In the New York Supreme Court, New York County, Special Term, Part III. 138 N. Y. L. J., No. 102, page 6. Dated November 25, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Temporary Injunction—Necessary Proof—Defenses.—A motion for a temporary fair trade injunction was denied where the claimed offending sales were vigorously denied and not identified except by a statement of a shopper. Also, the defendant claimed to be a wholesaler, and it was entitled to a fair and full investigation into one or more of its proposed defenses.

See Fair Trade, Vol. 1, ¶ 3354.34.

[*Temporary Injunction Denied*]

STREIT, Justice [*In full text*]: Plaintiff moves for a temporary injunction in enforcement of the Feld-Crawford Act. The claimed offending sales are vigorously denied. They are not identified by sales slip, description of the seller or otherwise save the mere statement of the shopper. Defendant claims to be a wholesaler and denies the claimed sales at retail. Plaintiff has failed to make proof of sales in such degree as to warrant temporary injunctive relief. In addition, defendant is entitled prior to injunction to a fair and full investigation into one or more of its proposed defenses. The motion is denied. Order signed.

[¶ 68,864] Oceanus Beverages, Inc. v. Van Munching & Co., Inc., and Harry Boening and Philip Boening, Jr., co-partners doing business as Boening Bros.

In the New York Supreme Court, Appellate Division, Second Judicial Department. Dated November 18, 1957.

New York Antitrust (Donnelly) Act

Combinations and Conspiracies Under State Antitrust Laws—Procedure—Sufficiency of Complaint—Injury.—An order granting motions to dismiss an amended complaint (filed in an action brought under the New York antitrust laws for an injunction and other relief) for failure to state facts sufficient to constitute a cause of action was affirmed.

Discontinuance of business relationships and elimination of competition are not actionable unless the elimination is complete, or unless there is other injury to the public, or ruination of a competitor's business.

See Combinations and Conspiracies, Vol. 1, ¶ 2425.34.

For the appellant: Blum and Levin, Lawrence, N. Y.

For the respondents: Goldstein, Judd and Gurfein, New York, N. Y.; and Salvatore M. Milano, Lynbrook, N. Y.

Present: BELDOCK, Acting P. J., MURPHY, UGHETTA, HALLINAN and KLEINFELD, JJ.

[*Dismissal Affirmed*]

[*In full text*]: In an action pursuant to section 340 of the General Business Law for an injunction and other relief, the appeal is from an order granting respondents' motions to dismiss the amended complaint for failure to state facts sufficient to constitute a cause of action.

Order unanimously affirmed, with $10 costs and disbursements.

Discontinuance of business relationships and elimination of competition are not actionable unless the elimination is complete, or unless there is other injury to the public, or ruination of a competitor's business. (*Locker v. American Tobacco Co.*, 121 App. Div. 443, affd. 195 N. Y. 565; *cf. Peekskill Theatre v. Advance Theat. Co.*, 206 App. Div. 138; *cf. Alexander's Dept. Stores v. Ohrbach's, Inc.* [1940-1943 TRADE CASES ¶ 56,285], 266 App. Div. 535, appeal dismissed, 291 N. Y. 707.)

[¶ 68,865] Paper Mate Manufacturing Company v. R. H. Macy & Company, Incorporated.[*]

In the New York Supreme Court, New York County, Special Term, Part III. 138 N. Y. L. J., No. 94, page 7. Dated November 13, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Defenses—Enforcement Activity.—A fair trader was granted a temporary injunction where the defendant admitted fair trade violations and stated that it intended to continue such violations. The fair trader had adequately showed a vigorous and serious attempt to enforce its fair trade prices, even though initially there was some laxity in enforcement.

See Fair Trade, Vol. 1, ¶ 3440.34.

[*Injunction Granted*]

GREENBERG, Justice [*In full text*]: This motion for an injunction *pendente lite* is granted. The facts not only are not in dispute, but the defendant at the oral argument and in its opposing affidavits admits violation of the Fair Trade Act and sets forth it intends to go on selling plaintiff's products at less than Fair Trade prices. The sole basis of the defendant's opposition to the motion is its contention that plaintiff's program of enforcement is insufficient and that, therefore, in equity plaintiff ought not to receive the protection of the Fair Trade Act. The papers adequately sustain the position of the plaintiff and show a vigorous and serious attempt to enforce the Fair Trade Act even though initially there was some laxity in the enforcement of the act (see *General Electric Co. v. Macy & Co.* [1950-1951 TRADE CASES ¶ 62,764], 199 Misc., 87). There the court said:

> "* * * The precise elements of an adequate enforcement program are not prescribed by law. Enforcement activities may take such form as is called for by the nature of the product, the industry, and the violations by the retailers, providing they add up to a reasonable and diligent effort in the light of all the facts."

[* The case of *Paper Mate Mfg. Co. v. E. J. Korvette, Inc.*, 138 N. Y. L. J., No. 94, page 7, was decided on the authority of the instant case by Justice Greenberg on the same date. CCH.]

Here plaintiff has made out such a case. Defendant, upon its stipulation, may obtain an early trial. Settle order which will provide for the fixation of a bond, and in that connection the court will receive suggestions from the various parties.

[¶ 68,866] Olin Mathieson Chemical Corporation v. World Merchandise Exchange & Trading Company, Incorporated.[*]

In the New York Supreme Court, New York County, Special Term, Part 1. 138 N. Y. L. J., No. 93, page 6. Dated November 12, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Violation of Temporary Injunction—Contempt—Proof of Violation—Failure To Prosecute.—A fair trader's motion to punish a defendant for violating a temporary fair trade injunction was denied. The defendant's answer contained defenses under the antitrust laws which apparently had not been urged on the motion for the temporary injunction. The court commented that it did not appear proper that a temporary injunction should serve the purpose of a permanent injunction, and that contempt would not lie had the action been tried and the defendant prevailed. In any event, the two sales claimed to have been made in violation of the injunction were not so conclusively established as to warrant relief without a hearing. Also, the defendant's motion to dismiss for failure of the fair trader to prosecute was to be granted, unless the fair trader served and filed notice of trial, at which trial the issues of claimed contemptuous violation could be determined.

See Fair Trade, Vol. 1, ¶ 3380.34.

[*Contempt Motion*]

GOLD, Justice [*In full text*]: Plaintiff moves to punish for contempt. This action in enforcement of the Feld-Crawford Act was commenced on May 10, 1956. Defendant is charged with contempt for violation of the temporary injunction order made August 22, 1956. Answer was served on August 21, 1956, containing defenses under the Robinson-Patman and Sherman Acts (15 U. S. C., sec. 13, and sec. 1 *et seq.*) which apparently were not urged on the motion for temporary injunction. It does not appear meet that a temporary injunction should serve the purpose of a permanent injunction and contempt would not lie had the action been tried and defendant prevailed. In any event, the two sales claimed to have been made on May 5, 1957, and June 18, 1957, and denied, are not so conclusively established as to warrant relief without hearing. However, defendant cross-moves for dismissal for failure to prosecute. The cross-motion is granted unless plaintiff serves and files a note of issue for the December, 1957, term and upon the trial of the cause the issues of claimed contemptuous violation may also be heard and determined. In the event the cause is not noticed for trial accordingly the cross-motion is granted and the motion is denied. Settle order.

[¶ 68,867] Dictograph Products, Inc. v. Empire State Hearing Aid Bureau, Inc., and William Barth.

In the New York Supreme Court, Appellate Division, First Department. October, 1957. Nos. 11380 and 11381. Dated November 6, 1957.

Appeal by defendants from order of the Supreme Court at Special Term (BENVENGA, J.) entered May 1, 1956 in the New York County Clerk's office denying defendants' motion to modify decree dated November 6, 1953; plaintiff appeals from order entered October 26, 1956 denying plaintiff's cross-motion to punish defendants for contempt.

[* The following cases were decided on the authority of the instant action by Justice Gold on the same date: *Olin Mathieson Chemical Corp. v. Polovsky*, *Olin Mathieson Chemical Corp. v. Jacobson*, and *Olin Mathieson Chemical Corp. v. Weiss*, 138 N. Y. L. J., No. 93, page 6. CCH.]

Clayton Antitrust Act

Private Enforcement and Procedure—State Court Action—Federal Antitrust Law Violation as a Defense—Exclusive Dealing.—A hearing aid manufacturer and one of its former employees entered into a decree which prohibited the employee from engaging in the hearing aid business. The former employee had admitted that he had in his possession customer lists of the manufacturer. Subsequently, the manufacturer entered into a distributorship agreement with such employee. The agreement suspended the enforcement of the decree. However, the manufacturer cancelled the agreement allegedly because such employee promoted the sale of products competitive to the manufacturer's products. A court, in affirming an order denying the manufacturer's motion to punish the employee for subsequently violating the decree and in granting the employee's motion to modify the decree, noted, among other things, that the practice of the manufacturer in making contracts with exclusive dealing clauses with independent distributors had been condemned by the Federal Trade Commission as in violation of the Clayton Act, and that the Commission's order directing that such clauses be eliminated from its contracts had been sustained in *Dictograph Products, Inc. v. Federal Trade Commission,* 1955 Trade Cases ¶ 67,932.

See Private Enforcement and Procedure, Vol. 2, ¶ 9041.145.

For the plaintiff-appellant-respondent: Theodore F. Tonkonogy, New York, N. Y.

For the defendants-respondents-appellants: George F. Halperin, of counsel (Leonard C. Shalleck with him on the brief; Edwin B. Wolchok, attorney).

[*Motion to Modify Decree*]

Valente, Justice [*In full text*]: Defendants appeal from an order denying their motion to vacate or modify a consent decree entered on November 6, 1953. That decree enjoins defendants from disparaging or interfering with plaintiff's business or good name; restrains them from engaging in, or being employed or interested in, any hearing aid business in the Boroughs of Brooklyn and Manhattan in the City of New York for a period of five years; forbids the use of plaintiff's customers lists by defendants; and restrains the direct or indirect transfer of the ownership of defendants' business to one Ethel Murray (a former employee of plaintiff) or to any third party except on condition that said Ethel Murray be not employed by it. Additionally, the decree directs the surrender of all customers lists to plaintiff, and provides for liquidated damages for violation of the injunctive provisions.

[*Cross-Motion—Contempt*]

Plaintiff appeals from a separate order denying its cross-motion to punish defendants for contempt for violating the decree of November 6, 1953.

[*Background*]

Plaintiff manufactures hearing aids, conducting a nation-wide business mainly through distributor agencies. Defendant Barth, for a long time before December, 1952, was employed by plaintiff, and was in charge of its store on 49th Street, in New York City. Barth resigned in December, 1952. After working for a hearing aid company in Chicago, he returned to New York in 1953, formed the defendant corporation and commenced doing business in Manhattan.

Not long thereafter, plaintiff discovered that defendants were soliciting its customers and were deprecating its products in order to sell their own. Following an investigation, plaintiff concluded that certain missing records, containing the names and addresses of customers, as well as file cards, were in the possession of defendants. Upon execution of a search warrant which plaintiff obtained from the Court of General Sessions, the missing records, as well as certain used hearing aid transmitters, were found in defendants' premises. At a hearing before a judge of that Court on October 1, 1953, defendant Barth admitted that all the property seized under the search warrant belonged to the plaintiff, and consented to its return to plaintiff.

[*Consent Decree*]

On November 4, 1953, Barth and his attorney signed a stipulation consenting to the decree of November 6, 1953. Special Term correctly found that the stipulation was not signed under threats of criminal prosecution. Moreover, it is evident that the decree, entered on consent, was justified by the facts then existing.

[*Equity Powers*]

However, a Court of Equity has inherent power to change its decrees where there has been a "change of circumstances which would make continued enforcement of the injunctive process inequitable, oppressive and unjust or in contravention of the policy of the law." *U. S. v. Swift & Co.*, 286 U. S. 106; *Enterprise Window Cleaning Co. v. Slowuta*, 273 App. Div. 662, affd. 299 N. Y. 286; *Manufacturers Mutual Fire Ins. Co. v. Hopson*, 176 Misc. 220, 227; affd. 262 App. Div. 731; affd. 288 N. Y. 668. In 1 *Freeman-Judgments*, § 253, p. 511, it is said:

> "And where the further enforcement of a final decree of perpetual injunction has, by reason of subsequent events, become inequitable, the court may vacate or modify it, though even here the court's action on the motion is more in the nature of a stay of the process of enforcement than a vacation of the decree."

[*Public Policy*]

We have concluded that although the decree herein was adapted to the needs that existed at the time of its entry, its continuance is no longer warranted, and that its enforcement, in view of the change of circumstances, will effect an injustice and will contravene public policy.

It appears that on December 9, 1953, defendant Barth signed an agreement with plaintiff whereby he was appointed as a non-exclusive agent for plaintiff in New York City, and in connection therewith, a stipulation was executed suspending enforcement of the injunctive provisions of the decree of November 6, 1953 during the existence of the agreement. In February, 1954, the agency agreement was supplanted by a distributor agreement containing the same provision for suspension of the injunction decree. On August 26, 1955, plaintiff cancelled the distributor agreement. The affidavits are in dispute as to the cause for cancellation, defendant Barth averring that it was because of his failure to accede to plaintiff's demand to desist from promoting the sale of any other company's product. It should be noted here that the practice of plaintiff in making contracts with exclusive-dealing clauses with independent distributors was condemned by the Federal Trade Commission as in violation of the Clayton Act. The Commission's order directing that such provisions be eliminated from contracts with independent distributors was sustained in *Dictograph Products v. Federal Trade Commission* [1955 TRADE CASES ¶ 67,932], 217 F. 2d 821 (2 Cir., 1954).

[*Ruling*]

The Court below in disposing of the motion to punish defendants for contempt, aptly said:

> "It goes without saying that a court has a right to assume that its decrees are sought for legitimate purposes, and that they will not be used to effect a contractual relationship, or to police such relationship when brought into existence, or for any ulterior purpose. The parties cannot, by agreement between themselves, modify or suspend a decree of the court (*Encyclopedia Britannica v. Warner*, 172 F. 1012, 1014-16) or permit it to become dormant, and then, without the sanction of the court (30 C. J. S., Equity, Sec. 621), reinstate or revive its provisions."

Agreeing as we do with this statement of the law, we are in accord with the denial of the motion to punish the defendants for contempt; but it also impels us to grant defendant's motion to vacate the decree of injunction. We cannot view with equanimity trafficking in an injunction decree of the court. The drastic remedy it affords must not be perverted by the parties into an adjunct to their commercial affairs. Where the equity power of the court is invoked to prevent a threatened wrong, the recipient of the court's favor will not be permitted to engage in a course of conduct incompatible with his antecedent pleas for relief. When plaintiff herein resumed its business relationship with defendant Barth after it had obtained the decree, that conduct was so inconsistent with the spirit of the decree as to call for its vacatur, notwithstanding the ineffectual agreement to suspend its operation. Therefore, the motion to vacate the decree should have been granted.

The order denying defendants' motion to modify the decree should be reversed and the motion granted, with costs. The order denying plaintiff's motion to punish for contempt should be affirmed.

All concur.

[¶ 68,868] Dale Hilton, Inc. v. Triangle Publications, Inc., et al.

In the United States District Court for the Southern District of New York. Civil 125-17. Filed November 6, 1957.

Clayton and Sherman Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Motion for Production of Documents.—In an action said to raise the issue of the existence of an alleged monopoly on the part of the defendant and an alleged conspiracy between the defendant and others, where the defendant apparently contended that the loss of business by the plaintiff was due to causes other than those alleged in the complaint, the defendant's motion for the production of documents was granted in part and denied in part. The affidavit upon which the production of documents was sought was not adequate in some respects, with the result that good cause had not been shown for the production of all of the items demanded.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.825.

For the plaintiff: Robert C. Weiss, New York, N. Y.

For the defendants: Wm. B. Jaffee, and Proskauer, Rose, Goetz & Mendelsohn, New York, N. Y.

Memoranda

[*Production of Documents*]

LEVET, District Judge [*In full text*]: Defendant Triangle Publications, Inc. (hereinafter called Triangle) has moved for the production of certain documents by plaintiff. The action was brought under the Clayton and Sherman Acts. The complaint is said to raise the issue of the existence of an alleged monopoly on the part of defendant Triangle and an alleged conspiracy between Triangle and others. Apparently, defendant Triangle contends that the loss of business by plaintiff was due to other causes than the acts complained of in the complaint. The affidavit upon which production of documents is sought under Rule 34 of the Federal Rules of Civil Procedure is not adequate in some respects, with the result that good cause has not been shown for the production of all the items demanded.

[*Documents To Be Produced*]

Accordingly, the motion is disposed of as follows:

Plaintiff is directed to produce the following records:

1. Plaintiff's minute books, articles of incorporation, certificates of registration to do business, certificates of dissolution and other records showing termination of business since the year 1951;

2. Records of the receipts and disbursements and records showing plaintiff's profit and losses, profit and loss statements, balance sheets and income tax returns since January 1, 1953;

3. All correspondence and memoranda by and between the plaintiff and the magazine known as "Seventeen" since May, 1954;

4. All contracts, correspondence and memoranda of conversations between plaintiff and its advertising agency since September, 1953;

5. All correspondence to and from purchasers responding to advertisements placed by the plaintiff in "Seventeen" magazine, including but not limited to correspondence relating to the placing of orders, returns of merchandise, complaints and requests for refunds;

6. All correspondence between plaintiff and manufacturers whose merchandise was referred to in advertisements placed by plaintiff in "Seventeen" magazine or other advertising media since September, 1953;

7. Advertisements placed by plaintiff with every advertising medium other than "Seventeen" magazine from September, 1953 to 1957;

8. All correspondence to and from persons responding to advertisements placed by plaintiff in every advertising medium other than "Seventeen" magazine, limited, however, to the complaints and requests for refunds;

9. All documents and correspondence to and from representatives of the United States Post Office relating to plaintiff's mail order activity from September, 1953 to date.

Otherwise the motion is denied since no good cause is shown.

So ordered.

[¶ 68,869] **Orbo Theatre Corporation v. Loew's Incorporated, et al.**

In the United States District Court for the District of Columbia. Civil Action No. 840-56. Dated December 4, 1957.

Sherman Antitrust Act

Combinations and Conspiracies—Section 3 of Sherman Act—Motion Picture Clearances—Conspiracy—Parallel Action.—An operator of a motion picture theatre failed to establish that motion picture producers and distributors conspired in refusing the operator's request that pictures be licensed to him on a 14-day clearance, with preference over a drive-in theatre, and in instituting a system of competitive bidding between the drive-in theatre and the operator's indoor theatre on the basis of a 21-day clearance. There was no evidence from which an inference of even remote cooperation among the producers and distributors could be derived. Also, the operator failed to establish a conspiracy between the producers and distributors and first run exhibitors to impose an unreasonable restraint against neighborhood theatres.

The fact that parallel action is taken by alleged conspirators may, under certain circumstances, justify a court in drawing the conclusion that the parallel action is concerted action. While parallel action may be concerted action, it may also be due to the fact that the persons concerned arrived at the same solution of a common business problem. Under the circumstances in the instant case, the parallel action of the producers and distributors did not constitute concerted action.

See Combinations and Conspiracies, Vol. 1, ¶ 2051.

Combinations and Conspiracies—Section 3 of Sherman Act—Motion Picture Clearances—Legality.—Producers and distributors of motion pictures did not impose illegal restrictions on an operator of a motion picture theatre when they licensed pictures to the operator on a system of competitive bidding between his theatre and a drive-in theatre on the basis of a 21-day clearance. Clearances contained in contracts for the rental of motion pictures, that is, negative covenants not to lease the same picture to potential competitors until the lapse of a certain period of time after the termination of the prior showing, are valid if reasonably limited as to time and area. The court ruled that the restrictions imposed in the instant action were valid, and that it may not substitute its own judgment for the business judgment of the parties in determining the reasonableness of such restrictions. Also, the defendants had a right to refuse to lease any pictures to the operator; therefore, they had a right to refuse to rent to the operator except after the expiration of certain waiting periods. No conspiracy between the producers and distributors had been established.

See Combinations and Conspiracies, Vol. 1, ¶ 2051.

Combinations and Conspiracies—Section 3 of Sherman Act—Transactions Within Section—Commerce.—Motion picture producers and distributors, in licensing their pictures for exhibition, were engaged in commerce in the District of Columbia as well as in commerce between the District of Columbia and a state or states; therefore, their transactions were within the cognizance of Section 3 of the Sherman Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2051.

Combinations and Conspiracies—Section 3 of Sherman Act—Scope of Section.—"The objective of the Sherman Act was, in large part, to enact into a statute the principles of the common law relating to restraints and monopolies; to render them applicable to transactions in interstate and foreign commerce; and to implement them by effective remedies. The common law, however, did not ban all restraints of trade. It proscribed only unreasonable restraints. Consequently, the Sherman Act has been construed as being applicable only to unreasonable restraints of trade, even though the word 'unreasonable' is not found in the statute. In effect, the word 'unreasonable' has been inserted by judicial construction."

See Combinations and Conspiracies, Vol. 1, ¶ 2051.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Evidence Admissible To Prove Violations of Antitrust Laws—Prior Government Actions—Identity of Issues.—Findings of fact, conclusions of law, and decrees entered in a Government antitrust action against producers and distributors of motion pictures were not admissible as prima facie evidence of a conspiracy alleged in a private antitrust action brought against motion picture producers and distributors. The conspiracy alleged in the private action was not the same conspiracy as that found to exist in the Government action. Under Section 5 of the Clayton Act, a Government decree is prima facie evidence only of a conspiracy covering the same area and existing during the same time as that involved in the instant action.

See Private Enforcement and Procedure, Vol. 2, ¶ 9012.410.

For the plaintiff: Joseph G. Dooley and Joseph A. Lynott, Washington, D. C.

For the defendants: John F. Caskey, New York, N. Y.; William R. Glendon, Washington, D. C.; and Joseph Childs, Washington, D. C.

Opinion

[*Trial on Liability Issue*]

ALEXANDER HOLTZOFF, District Judge [*In full text*]: This is the trial of a private civil action for an injunction and triple damages based on an alleged violation of the antitrust laws. Since no jury was demanded, the trial was by the Court alone. Accordingly, at the opening of the trial, the Court directed that the issue of liability be heard first and announced that if the plaintiff prevailed the trial would be resumed for the purpose of ascertaining the amount of damages, if any. The trial on the issue of liability having been concluded, this opinion deals with that subject.

[*Nature of Action*]

This action is brought by the lessee and operator of a motion picture theater in Rockville, Maryland, against a number of motion picture producers and distributors. The plaintiff complains that it is the practice of the defendants to withhold the release of motion pictures to the plaintiff's theater until after the expiration of a waiting period of twenty-one days following the completion of their premiere showing in Washinging, D. C. It is contended that this course is illegal as a violation of the Sherman Act. The complaint prays for an injunction against the continuation of the alleged conspiracy and for triple damages.

[*Sherman Act*]

Section 3 of the Sherman Act, 15 U. S. C. § 3, under which this action was brought, provides as follows:

> "Every contract, . . . or conspiracy, in restraint of trade or commerce in . . . the District of Columbia, or in restraint of trade or commerce between . . . the District of Columbia and any State or States, . . . is declared illegal."

[*Clayton Act*]

Section 4 of the Clayton Act, 15 U. S. C. § 15, which permits a suit to be maintained by any person who has been injured by a violation of the Sherman Act, reads as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[*Distribution of Motion Pictures*]

The following facts appear from the evidence. All of the defendants, with the exception of United Artists Corporation, are producers and distributors of motion picture films. The defendant, United Artists Corporation, is a distributor of pictures originated by various producers. Distributors are engaged in the business of renting motion picture films for public showing on specified dates by exhibitors, who own or operate motion picture theaters. It would be manifestly impracticable, and even tend to create chaos, to throw the product on the market for contemporaneous use in all theaters in the country or even in the same vicinity. The general usage of distributors is, therefore, to begin the circulation of a new

picture by first renting it to a large centrally situated theater in several selected localities, and then after its showing is completed in that theater and after the lapse of a specified waiting period, to rent the film to smaller theaters in the same general area. The practice is not to show a picture simultaneously at two competing theaters. Frequently competing houses are accorded an opportunity to bid for an available picture, which is then awarded to the exhibitor submitting the most favorable proposal.

In the District of Columbia the exhibition of a new motion picture is commenced by renting it to one of the big theaters in a congested spot in the city of Washington. Most of these theaters are located on F Street in the downtown business district. Then after the "first run," as it is colloquially called in the industry, is finished, the picture is rented to exhibitors operating other theaters in the greater Metropolitan area, which includes nearby Maryland and Virginia as well as Washington.

[*Clearance System*]

Ordinarily, a separate contract is drawn for the showing of each individual picture. Contracts with the so-called "first run" theaters commonly contain a negative covenant to the effect that the picture is not to be released for exhibition to any other theater until after the expiration of a specified waiting period subsequent to the close of the first showing. In the jargon of the trade this waiting period is known as a "clearance." In Washington and surrounding areas in Maryland the clearance period generally adopted is three weeks after the end of the first showing. In Alexandria, Virginia, which is close to Washington, on the south bank of the Potomac River, the period commonly used is fourteen days after the close of the first exhibition in Washington. It is contended by the defendants that such negative covenants are indispensable for the protection of the first exhibitors against undue inroads by competition. It is claimed that if a film were released to neighborhood theaters either simultaneously or immediately following its first showing, many potential customers, who would otherwise view the picture at the first run theater, would wait until it reached their neighborhood houses. It is customary for theaters to publicize a picture at least a few days before its exhibition commences and unless there were an interval such as has been described above, neighborhood theaters would be advertising the picture while it was still being shown at a centrally located, large theater and thereby adversely affect the patronage of the latter. By the same token, it is to the best interests of distributors to cooperate with the first run houses in obtaining as large an attendance as possible at the first exhibition. The rental charged for a picture is ordinarily not a flat sum, except for old films, but a percentage of the gross receipts. The percentage exacted is generally higher on the first display than it is on the subsequent neighborhood exhibitions. Moreover, the theaters utilized for premiere showings usually have a greater seating capacity and charge higher admission prices than the others. Consequently, a large proportion of the income of distributors is derived from first run displays, and a relatively smaller percentage from later local exhibitions. These are legitimate business considerations.

[*Commerce Involved*]

Each of the defendants has a head office in New York, and also maintains a regional or branch office in Washington, to serve the District of Columbia, Maryland, Virginia, and parts of West Virginia and Delaware. All contracts for the exhibition of films in this territory are negotiated through the Washington office and the films are shipped from there to the various theaters. Apparently the business is conducted in a highly centralized manner, because all contracts are approved or confirmed in New York, and all clearance periods are ratified by the head office. Unquestionably, therefore, the defendants are engaged in commerce in the District of Columbia, as well as in commerce between the District of Columbia and a State or States, and, therefore, their transactions are within the cognizance of the Sherman Act.

[*Geographic Locations*]

It is desirable to visualize the relative geographic locations and distances of the places involved in this action. Rockville is a small town with a population of between twenty and twenty-five thousand and is the county seat of Montgomery County, Maryland. It is situated about fifteen miles north of F Street, Washington,

D. C., and about nine miles north of the northern boundary line between the District of Columbia and Maryland. The town of Bethesda is situated to the northwest of Washington, immediately adjoining the boundary between the District of Columbia and Maryland. Rockville lies seven miles in a general northerly direction from Bethesda. Immediately northeast of Washington and likewise adjacent to the northern boundary of the city, is Silver Spring. Bethesda and Silver Spring each have two motion picture theaters. North of Silver Spring and about on the same latitude as Rockville, lies the town of Wheaton, on the western outskirts of which is located the Viers Mill Theater. Alexandria, Virginia, lies southeast of Washington on the south bank of the Potomac, about seven or eight miles away. Several theaters are found in Alexandria, which is a city of considerable size. A twenty-one day clearance has been maintained between the first run theaters in Washington and all other theaters in the District of Columbia, as well as those in Bethesda, Silver Spring, Wheaton and Rockville. A fourteen-day clearance has been applied to Alexandria.

[*Plaintiff's Theater*]

Prior to the time involved in this action, there had been established in Rockville a motion picture theater known as the Rockville Drive-In which, as its name indicates, is a theater catering to motorists. There was also a small deteriorated theater in Rockville, known as the Milo Theater. In the fall of 1955, the plaintiff purchased the Milo Theater, and renovated and remodeled it at considerable expense. New seats and new sound and projection apparatus were installed. Its name was changed to the Villa Theater. It opened for operation under the new management on December 1, 1955.

[*Requests for Pictures*]

About a month previously to the opening of the Villa Theater, the plaintiff wrote similar letters to all of the defendants, requesting that pictures be furnished to the Villa on a fourteen-day clearance. It was contended that the new theater was entitled to clearance and "protection" over the Drive-In Theater, since the latter operated only during nine months of the year, while the Villa planned to be open the year round. None of the letters gave any indication that an identical demand was being made on any one else. This request posed a problem for the distributors. The Drive-In Theater is commodious, has a considerable capacity, and was in successful operation. To have yielded to the demand, would have been to discriminate against the Drive-In Theater. Moreover, pressure on the part of theaters in Bethesda, Silver Spring and Wheaton for similar treatment and, therefore, a reduction of the twenty-one day clearance to a fourteen-day clearance could reasonably be anticipated in the event that the request of the Villa were granted. In turn, there was a possibility of repercussion from neighborhood houses in Washington.

Each of the defendants, with the exception of Warner Brothers, in the course of the ensuing two or three weeks replied to the plaintiff pointing out some of the above-mentioned considerations and declining the request. Each of these distributors, however, offered to institute a system of competitive bidding as between the Rockville Drive-In Theater and the Villa Theater during the parts of the year when the Drive-In Theater was in operation, and to supply pictures to the Villa on a twenty-one day clearance during other periods. The defendant Warner Brothers replied by a note offering to discuss the matter orally with the plaintiff's representative at his convenience. A system of competitive bids on the basis of a twenty-one day clearance was actually initiated and put in operation as between the Villa and the Rockville Drive-In Theater on the part of all of the distributors except Universal. The latter had no dealings with the Villa.

[*Complaint—Charges*]

On February 25, 1956, — less than three months after the Villa Theater opened —, this suit was filed. The amended complaint alleges that by concerted action and agreement among themselves, the defendants restricted the release of motion pictures to the plaintiff for unreasonable periods of time, and that this course of action constituted a conspiracy in restraint of trade. It is further averred that the plaintiff suffered a loss of substantial profits, which it otherwise would have gained execpt for the alleged unlawful conduct of the defendants. The amended complaint prays for an injunction against the continuance of the

conspiracy, for judgment directing the defendants to rent motion pictures to the plaintiff simultaneously with the premiere exhibitions in Washington, and for damages in the sum of $660,000, representing actual damages in the sum of $220,000, trebled as provided in the Sherman Act. It will be observed that while the original demand prior to the institution of suit was for a release of pictures fourteen days after the termination of the first showing in Washington, the relief sought in the complaint comprises a judgment that would direct the defendants to furnish pictures to the plaintiff simultaneously with the first run houses in Washington. On March 28, 1956, the defendant Universal Film Exchanges, Inc., wrote a somewhat brusque letter to the plaintiff protesting against the filing of the suit and stating that Universal would not do business with the Villa.

[*No Evidence of Conspiracy*]

We must now revert to a further discussion of the replies received by the plaintiff to its original demand. At the trial the plaintiff called as witnesses the Washington branch managers of all of the defendants. The defendants then called as witnesses those of their officials at their home offices, who participated in the decision to reject the plaintiff's demand. Several of the defendants had consulted their house counsel before responding, and each of these house counsel was also called as a witness by them. All of these witnesses, whether called by the plaintiff or the defendants, testified in reply to appropriate questions that they acted without consultations or communication, direct or indirect, with any of the co-defendants. They were subjected to a searching and skillful interrogation on the part of able counsel for the plaintiff, but their testimony was not weakened and their credibility was not impeached. Their testimony remained uncontradicted. There was no evidence, direct or circumstantial, oral or documentary, from which an inference of even remote cooperation among the defendants in this matter could be derived.

[*Parallel Action*]

The fact that parallel action was taken by alleged conspirators may under certain circumstances justify the Court in drawing the conclusion that the parallel action was concerted action. Such an inference is permissible, but is not compelled.[1] Whether to reach it in any particular case depends on the remainder of the evidence and the surrounding circumstances. Parallel action may indeed be concerted action, but it may also be due to the fact that the persons concerned arrived at the same simple solution of a common business problem. Here the problem was a comparatively simple one, and the solution reached was more or less obvious. If the various officers and employees involved in the decision refrained from testifying on this point, the court might well draw an adverse inference. On the other hand, considering the fact that there was absolutely no evidence of the alleged conspiracy, beyond the taking of parallel action; that each of the participants denied any communication or consultation with any of the co-defendants; and that none of the witnesses was in any way impeached or gave any testimony that was inherently incredible, several of them being members of the bar, the Court is not justified in finding that the actions were jointly planned or concerted. In fact, the Court cannot do so without also reaching the conclusion that some of these witnesses testified falsely. There is, however, no basis

[1] *Theatre Enterprises v. Paramount Film Dist. Corp.* (4 C. A.) [1953 TRADE CASES ¶ 67,413], 201 F. (2d) 306, 314, aff. [1954 TRADE CASES ¶ 67,640], 346 U. S. 537, 541.

Robbinsdale Amusement Corp. v. Warner Bros. P. Dist. Corp. (D. Minn.) [1955 TRADE CASES ¶ 68,233], 141 F. Supp. 134.

G. & P. Amusement Co. v. Regent Theater Co. [1952 TRADE CASES ¶ 67,360], 107 F. Supp. 453, aff. (6 C. A.) [1954 TRADE CASES ¶ 67,888], 216 F. (2d) 749.

Windsor Theatre Co. v. Walbrook Amusement Co. (D. Md.) [1950-1951 TRADE CASES ¶ 62,721], 94 F. Supp. 388.

Fanchon & Marco v. Paramount Pictures, Inc. [1950-1951 TRADE CASES ¶ 62,909], 100 F. Supp. 84, aff. (9 C. A.) [1954 TRADE CASES ¶ 67,843], 215 F. (2d) 167.

The case of *Milgram v. Loew's Inc.* [1950-1951 TRADE CASES ¶ 62,733], 94 F. Supp. 416, aff. (3 C. A.) [1950-1951 TRADE CASES ¶ 62,938], 192 F. (2d) 579, on which the plaintiff relies, is distinguishable. In that case the trial judge, after hearing all of the evidence, reached a conclusion as a matter of fact that there was concerted action. The Court of Appeals in affirming the judgment pointed out, however, that mere parallel business practices of themselves are not necessarily sufficient evidence of concerted action (p. 583). Moreover, in that case the conspiracy charged a refusal to treat Drive-In Theaters on the same basis as other theaters for purely arbitrary reasons.

for ascribing such reprehensible action to any of them. The Court, therefore, concludes that the plaintiff did not establish by a preponderance of the evidence that there had been a conspiracy on the part of the defendants to exercise an undue or illegal restraint against the operations of the Villa Theater.

[*General Conspiracy*]

In its endeavors to sustain its claim, the plaintiff sought first to establish a conspiracy, that is an agreement or concerted action on the part of the defendants. Naturally, a conspiracy need not be proved by direct evidence, but may be shown by circumstantial evidence. As indicated above, however, this Court finds as a matter of fact that a conspiracy has not been proved. In addition it is necessary for the plaintiff to establish that the restraint of which it complains was unreasonable. The findings that there was no concerted action among the defendants does not necessarily dispose of the issues, because it is also essential to consider whether there was a conspiracy between the defendants and the first run exhibitors to impose an unreasonable restraint as against neighborhood houses.

[*Government Suit*]

As part of its proof to establish a conspiracy, the plaintiff offered in evidence and relied on the findings of fact and conclusions of law and a series of final decrees in the case of *United States of America v. Paramount Pictures, Inc.*,[2] pending in the Southern District of New York. In this connection the plaintiff invoked the provisions of Section 5 of the Clayton Act, 15 U. S. C. A. § 16, the pertinent provisions of which read as follows:

> "A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken."

The purpose of this enactment was to enable the plaintiff in a private antitrust suit to rely on a prior judgment in a criminal proceeding, or in a civil suit brought by the Government, as proof of a conspiracy. In that event, the plaintiff is merely required to show that the conspiracy affected him and that he was injured by it. The object of this salutary legislation was not only to save the time of the courts, for proof of conspiracy in antitrust cases is sometimes very lengthy, but also to assist injured parties by freeing them from the burden of proving a conspiracy, since the cost of such proof may be prohibitive.[3] Such a decree, however, is prima facie evidence only as to matters actually determined and does not extend to all issues that might have been adjudicated.[4]

[*Different Conspiracies*]

The defendants in the *Paramount* case, were producers and distributors of motion pictures. The findings of fact, conclusions of law and a series of decrees adjudicated that the defendants had entered into a nationwide conspiracy in restraint of trade effectuated by fixing admission fees of individual theaters, by a practice known as block booking, by pooling agreements, by so-called "formula deals," as well as by clearances. In other words, clearances were only one feature of the conspiracy. The Court found also, however, that in the distribution of motion pictures it was essential to lease them for exhibition on different dates. The decrees in the *Paramount* case were made in 1950. The alleged conspiracy, of which the plaintiff complains, to deprive him of pictures except after an unreasonable period of delay, is said to have originated in the fall of 1955. Consequently, it is not the same conspiracy as that found to exist in the *Paramount* case. It should be emphasized that under the above quoted statute the decree is prima facie evidence only of a conspiracy covering the same area and existing during the same time as that involved in the case on trial.

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[2] [1946-1947 TRADE CASES ¶ 57,470] 66 F. Supp. 323, modified [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131.

[3] *Emich Motors Co. v. General Motors Corp.* [1950-1951 TRADE CASES ¶ 62,778], 340 U. S. 558, 571. *Partmar Corp. v. Paramount Pictures Theatres Corp.* [1954 TRADE CASES ¶ 67,674], 347 U. S. 89, 90, 91, 102-103.

[4] *Theatre Enterprises v. Paramount Film Dist. Corp.* [1954 TRADE CASES ¶ 67,640], 346 U. S. 537, 541.

Thus, it was held in *Theatre Enterprises v. Paramount Film Dist. Corp.* [1954 TRADE CASES ¶ 67,640], 346 U. S. 537, 541, which involved an alleged conspiracy to impose undue clearances on a theater located in Baltimore, Maryland, that the decree in the *Paramount* case did not relate to that particular conspiracy and that, therefore, the decree was not prima facie evidence in support of the plaintiff's case.[5]

[*Restrictions*]

As indicated above, while the Court finds that no conspiracy has been established, it nevertheless must proceed to determine whether the clearance system of which the plaintiff complains constitutes a series of illegal restrictions. We are, therefore, brought to a consideration of the basic principles of the law relating to restraints of trade and specifically to the construction of the Sherman Act.

[*Sherman Act Prohibition*]

The objective of the Sherman Act was, in large part, to enact into a statute the principles of the common law relating to restraints and monopolies; to render them applicable to transactions in interstate and foreign commerce and to implement them by effective remedies. The common law, however, did not ban all restraints of trade. It proscribed only unreasonable restraints. Consequently, the Sherman Act has been construed as being applicable only to unreasonable restraints of trade, even though the word "unreasonable" is not found in the statute. In effect, the word "unreasonable" has been inserted by judicial construction.[6]

Negative covenants, auxiliary to contracts of sale and employment, were well known and were permitted at common law, provided they were partial in their nature and were reasonably limited in time and place. The test of their validity was whether the restraint was any greater than was necessary to afford fair protection to the party in whose favor they were made, and not so extensive as to interfere with the interests of the public. Such covenants could be included in a contract solely to protect one of the parties from the injury that he might suffer from unrestrained competition. The very purpose of the contract and the surrounding circumstances suggest the measure of protection needed and furnished a standard by which the legality of the restraint may be tested. This entire subject is elaborately discussed in the classic opinion of Taft, as Circuit Judge, in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 281, 282, affirmed, 175 U. S. 211.

[*Legality of Clearances*]

These basic principles are applicable to so-called clearances in the distribution of motion pictures. Clearances are nothing more than a modern form of a negative covenant to refrain for a limited period and in a circumscribed territory from selling or leasing to any one else the same property as that sold or leased to the other party to the contract, in order to protect the latter against unrestricted competition. Consequently, clearances contained in contracts for the rental of motion picture films, i.e., negative covenants not to lease the same picture to potential competitors until the lapse of a certain period after the termination of the prior showing, are valid if reasonably limited as to time and area.

Thus, in the leading case of *United States v. Paramount Pictures* [1946-1947 TRADE CASES ¶ 57,470], 66 F. Supp. 323, modified, [1948-1949 TRADE CASES ¶ 62,244] 334 U. S. 131, on which plaintiff relies and which has been discussed above, it was said (p. 341):

> "Such provisions are no more than safeguards against concurrent or subsequent licenses in the same area until the exhibitor whose theatre is involved has had a chance to exhibit the pictures licensed without invasion by a subsequent exhibitor at a lower price. It seems nothing more than an adoption of the common law rule to restrict subsequent exhibitions for a reasonable time within a reasonable area."

This view was approved by the Supreme Court in its opinion, which modified the decree as to some other features. Reasonable clearance or waiting periods in the distribution of motion pictures have been upheld in numerous cases.[7] For example, in

[5] See also *Robbinsdale Amusement Corp. v. Warner Bros. P. Dist. Corp.* (D. Minn.) [1955 TRADE CASES ¶ 68,233], 141 F. Supp. 134.

[6] *Standard Oil Co. v. United States*, 221 U. S. 1. *United States v. American Tobacco Co.*, 221 U. S. 106.

[7] *Theatre Enterprises v. Paramount Film Dist. Corp.* [1953 TRADE CASES ¶ 67,413], 201 F. (2d) 306, 314 (4 C. A.) aff. [1954 TRADE CASES ¶ 67,640], 346 U. S. 537.

Dipson Theatres v. Buffalo Theatres (2 C. A.) [1950-1951 TRADE CASES ¶ 62,896], 190 F. (2d) 951.

Theatre Enterprises v. Paramount Film Dist. Corp., supra, a twenty-one day waiting period in favor of downtown theaters in Baltimore, as against a neighborhood theater in a residential section of the city, was held valid. A similar clearance period used in Los Angeles, was upheld in *Fanchon & Marco v. Paramount Pictures, Inc., supra.*

The case of *Gary Theatre Co. v. Columbia Pictures* [1940-1943 TRADE CASES ¶ 56,135], 120 F. (2d) 891, involved a practice of according the privilege of a first run to Loop Theaters in Chicago, followed by a three-week waiting period as to other theaters in that city, and then releasing the pictures to theaters in Gary, Indiana, only after the second series of exhibitions in Chicago were concluded. These restraints were held reasonable and valid as against theaters located in Gary. Numerous other examples of this kind might be adduced, but it seems an unnecessary multiplication of authorities to do so.

[*Business Judgment*]

It may be argued with some degree of cogency that a fourteen-day waiting period would be sufficient in the case at bar, because that is the limitation invoked as against theaters located in Alexandria, Virginia. The Court may not, however, substitute its own judgment for the business judgment of the parties. All that it may determine is whether the negative covenants actually used are beyond the bounds of reasonable restrictions. It may not decide whether a lesser restraint might possibly be sufficient. The Court may not undertake to dictate to the management of business concerns how to conduct and operate their enterprises, but is confined to deciding whether what they are actually doing transcends the law.

The following apt remarks made on a similar point in *Robbinsdale Amusement Corp. v. Warner Bros. P. Dist. Corp.* [1955 TRADE CASES ¶ 68,233], 141 F. Supp. 134, 141, are applicable to the instant case:

"The distribution and allocation of motion pictures to theaters will always present a difficult and delicate problem. Courts should be hesitant to disrupt an established system of runs and clearances in absence of convincing proof that its genesis is the result of conspiratorial connivance, and that it is unreasonable."

Under the circumstances, the Court concludes that the restraints imposed in the case at bar are valid.

[*Right to Select Customers*]

There is still another approach to the fundamental issues in this case. A person engaged in the manufacture or sale of goods, or in rendering services, is under no obligation to sell to everyone who applies, or to serve everyone who desires to deal with him. The only exception relates to callings coupled with a public interest. Dealers and manufacturers may use their own judgment and discretion and select persons with whom they choose to do business as well as the time when they will enter into transactions with them. Thus, in *United States v. Colgate and Co.,* 250 U. S. 300, it was stated that in the absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. A business concern may sell its product to one customer in preference to others, when acting without ulterior motives and free from compulsion. No person is required to sell to all comers, unless he is engaged in a business coupled with a public interest.[8]

In *Paramount Pictures Theatres Corp. v. Partmar Corp.,* 97 F. Supp. 552, aff. (C. A. 9) 200 F. (2d) 561; affirmed [1954 TRADE CASES ¶ 67,674], 347 U. S. 89, it was said (p. 559):

"We are not of the opinion that any theatre has the right, as a matter of law,

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G. & P. Amusement Co. v. Regent Theater Co. [1952 TRADE CASES ¶ 67,360], 107 F. Supp. 453, 459, aff. (6 C. A.) [1954 TRADE CASES ¶ 67,888], 216 F. (2d) 749.

Windsor Theatre Co. v. Walbrook Amusement Co. (D. Md.) [1950-1951 TRADE CASES ¶ 62,721], 94 F. Supp. 388.

Fanchon & Marco v. Paramount Pictures, Inc. [1950-1951 TRADE CASES ¶ 62,909], 100 F. Supp. 84, aff. (9 C. A.) [1954 TRADE CASES ¶ 67,843], 215 F. (2d) 167.

Westway Theatre v. 20th Century Fox (D. Md.) 30 F. Supp. 830.

Gary Theatre Co. v. Columbia Pictures (C. A. 7) [1940-1943 TRADE CASES ¶ 56,135], 120 F. (2d) 891.

[8] *G. & P. Amusement Co. v. Regent Theater Co.* [1952 TRADE CASES ¶ 67,360], 107 F. Supp. 453, aff. (C. A. 6) [1954 TRADE CASES ¶ 67,888], 216 F. (2d) 749.

to demand from a motion picture producer the right of prior runs, any more than the seller of automobiles has the right to demand of the manufacturer an agency within a restricted territory. If the automobile manufacturer has the right to establish an exclusive agency within a restricted area for the sale of its product and to refuse to license any other agency within that restricted area, it would seem to the Court that the motion picture distributor should have the same right and privilege."

The illustration suggested in this quotation is an apt analogy to the situation presented in the case at bar. No automobile dealer may come forward and demand that any particular manufacturer sell its vehicles to him for resale at retail. The practice of automobile manufacturers to designate specified distributors and agents, in some communities on an exclusive basis and in others in a limited number, and of refusing to sell to any other dealer, is well established and is sanctioned by law.[9]

It follows hence that the defendants had a right to refuse to lease any pictures to the plaintiff at all. *A fortiori* they had a right to refuse to rent to the plaintiff except after the expiration of certain waiting periods. The only limitation on this general principle is that the defendants may not conspire among themselves not to deal with the plaintiff. As previously indicated, the Court finds that no conspiracy has been established in this case.

[*Judgment for Defendants*]

Accordingly, the Court concludes that the plaintiff is not entitled to recover. Judgment will be rendered for the defendants dismissing the complaint on the merits. This opinion will constitute the findings of fact and conclusions of law, but counsel, if they so desire, may submit additional proposed findings and conclusions.

[¶ 68,870] Farmington Dowel Products Co., Inc. v. Forster Manufacturing Co., Inc.

In the Supreme Judicial Court of Maine. Dated November 21, 1957.

Maine Unfair Sales Act

Sales Below Cost—Maine Sales Below Cost Law—Applicability to Manufacturers or Producers.—The Maine Unfair Sales Act is not applicable to manufacturers or producers; it is applicable only to the distributive trades. Wholesalers and retailers are expressly mentioned in the Act, but manufacturers and producers are not mentioned. While, in a limited sense, a manufacturer or a producer is a wholesaler or a retailer, because every manufacturer or producer must sell his product (usually at wholesale and less commonly at retail), a manufacturer or a producer is not a wholesaler or a retailer in the business world. The definitions of "cost" contained in the Act support the conclusion that only distributive trades are subject to the Act. Furthermore, manufacturers and producers do not come within the definitions of "wholesaler" or "retailer" set forth in the Act. While the phrase "which is the product of his or its own manufacture," contained in Section 1, subsection VIII, of the Act, suggests that the Act was intended to apply to manufacturers and producers, the phrase is meaningless when read in context with the entire Act.

See Sales Below Cost, Vol. 2, ¶ 7131, 7145.

Sales Below Cost—Computation of Cost—Good Faith in Determining Cost.—Although the Supreme Judicial Court of Maine ruled that it was not necessary, in a case before it, to decide whether it would or would not adopt the rule that the cost definition contained in a sales below cost law should be interpreted as meaning only the approximate cost arrived at by a reasonable rule (or otherwise stated, the cost arrived at by the dealer in "good faith"), the Court noted that, "Consideration would most certainly have to be given to the possible danger that when two different cost accounting theories are advanced, the preference felt by the fact-finder for one theory may too readily lead to a finding of bad faith on the part of a merchant who adopts the other."

See Sales Below Cost, Vol. 2, ¶ 7141.

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[9] *Packard Motor Car Co. v. Webster Motor Car Co.*, (C. A. D. C.) [1957 TRADE CASES ¶ 68,682], 243 F. (2d) 418. *Schwing Motor Co. v. Hudson Sales Corp.* (C. A. 4) [1956 TRADE CASES ¶ 68,564], 239 F. (2d) 176.

For the plaintiff: Berman, Berman & Wernick, Portland, Me.

For the defendant: Locke, Campbell, Reid & Hebert, Augusta, Me.

[*Unfair Sales Act*]

WEBBER, Justice [*In full text*]: This case involves a construction of the statute entitled "Unfair Sales Act," R. S. 1954, Ch. 184. Plaintiff here has brought an action at law seeking treble damages resulting from alleged advertising, offers to sell, and sales below cost with intent to injure competitors, including the plaintiff, and to destroy competition. The defendant is a manufacturer and producer alleged to be selling its product at wholesale and retail. By special demurrer the defendant raises several legal issues, perhaps the most important of which is the vital question as to whether the statue under consideration has application to manufacturers and producers.

We have had only one previous occasion to examine this statute. In *Wiley v. Sampson-Ripley Co.* [1956 TRADE CASES ¶ 68,254], 151 Me. 400, we held that the provision therein that proof of sales below cost constitutes prima facie evidence of an intent to injure competitors and destroy competition was unconstitutional. By dictum we indicated our acceptance of the legal principle that legislative prohibition of sales below cost made with proven intent to injure competitors or destroy competition was within the police power. That opinion, however, has not of course in any way diminished our obligation to scrutinize each set of facts as presented and determine whether or not the statute is in other respects constitutional as applied to those facts.

[*Statute Strictly Construed*]

This statute, being in derogation of the common law, must be strictly construed. *Wiley v. Sampson-Ripley Co., supra.* In *Loughran Co. v. Lord Baltimore Candy & T Co.* [1940-1943 TRADE CASES ¶ 56,024], (1940) 178 Md. 38, 12 A. 2d 201, 204, the court said: "In other words, we are not to infer that the Legislature intended to change common law principles beyond what is clearly expressed by the statute." Conduct which was lawful at common law is by the statute made wrongful. The statute has newly created what may be termed a business crime. The offending merchant may find himself faced with either criminal prosecution, the threat of injuction, or an action at law for damages. In either case he is entitled to be informed by the statute in explicit and unambiguous language what acts and conduct are prohibited.

[*Unfair Sales—Essential Factors*]

Many states have taken legislative action to prevent so-called "unfair sales." Courts which have construed these enactments have generally agreed that two essential factors must be shown to co-exist, the wrongful intent and the sales below cost. (For the sake of simplicity we refer to sales rather than to advertising or offers to sell). Absent either factor, the prosecution for violation must fail. Since from the earliest days of trade, merchants, whether starting a new enterprise or engaging in an established business, have entertained the not unnatural inclination to attract as many customers as possible away from their competitors, it must be expected that the intent to injure competitors will often be present. So long as the intent is not implemented by the unlawful act, however, the statute may not be invoked. The merchant who seeks by "building the better mousetrap" or by some lawful competitive inducement to corner the market for himself, but without resort to any conduct prohibited by law, may possess the requisite intent to injure or destroy competition and yet not be in violation of the statute. In short, proof of either of the essential factors without proof of the other will not suffice. Thus the public is assured of the lowest prices which can be produced by fair and lawful competition. It becomes apparent, therefore, that it is most important that the language of the statute inform the business man of ordinary intelligence whether his particular business operations are covered by the statute, and if so, what conduct on his part is specifically prohibited. If the statute is so vague and uncertain with respect to these matters as to leave him to guess as to its application, it is unenforceable as to him. This basic rule applies alike to criminal prosecution and injunctive relief. As was stated in *Loughran Co. v. Lord Baltimore C. & T. Co., supra,* at page 205: "The right of injunctive remedy and the application of penal

statutes should not be susceptible of doubt or conjecture."[1]

[*Other State Statutes*]

We note at the outset that the Maine statute contains language unlike that found in the statutes of other states. In a majority of the states, the statutes are made applicable only to those who are engaged in the distributive trades. A relatively small group of states have extended the restrictions against "unfair sales" to producers and manufacturers. Quite significantly, we think, those statutes which are recognized as applying to producers and manufacturers include a definition of production cost. The definition found in the California law (Ann. Cal. Code, Sec. 17026) is reasonably representative. "The term 'cost' as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution 'cost' shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor or vendor." It is apparent that students of the subject have regarded Maine as one of the states regulating only the distributive trades. In 1948 an article in 57 Yale Law Journal 391 at 412 contained the following: "Nine of the statutes,[2] not confining themselves to distributive trades, deal also with producers and define their costs as 'the costs of raw materials, labor and all overhead expenses.' The remainder refer only to costs of wholesalers and retailers, and state the minimum level to be invoice cost plus the 'cost of doing business.'" In a footnote the author includes Maine as one of the states falling into the latter group (page 413). Were these writers justified in assuming as they apparently did that the Maine law is intended to apply only to the distributive trades, and not to producers and manufacturers? What does the statute say?

[*Applicability to Manufacturers*]

Sec. 1, Subsections I and II define "cost to the retailer" and "cost to the wholesaler." It is true of course that every producer and manufacturer must sell his product. This he does usually at wholesale and less commonly at retail. In this limited sense a manufacturer is a wholesaler or a retailer. But in ordinary and accepted business parlance the terms have distinct meaning and do not overlap. In the business world the producer or manufacturer is considered to be one who makes or assembles the merchandise he sells. The wholesaler and reailer are thought of as buying merchandise for resale, the essential distinction between them being ordinarily in the relative quantities purchased and sold. We do not think that the terms "wholesaler" and "retailer," without more, would be understood by busines men of ordinary intelligence and possessed of reasonable familiarity with the common and accepted meaning of the terms as having any application to producers or manufacturers. Moreover, the cost definition only serves to support the assumption that only the distributive trades are affected. The "cost to the retailer" is defined as "the invoice cost of the merchandise to the retailer within 30 days prior to the date of sale, or the replacement cost of the merchandise to the retailer within 30 days prior to the date of sale, in the quantity last purchased, whichever is the lower." (To this is added freight, cartage and the cost of doing business as defined.) For purposes of this discussion, the "cost to the wholesaler" is essentially the same. We note at the outset that these cost definitions are in every material respect similar to those employed in the statutes of other states which seek to regulate *only the distributive trades.* The term "invoice cost" would be understood in the business world to import a purchase of the very merchandise now being sold. It is a term ordinarily employed to designate the cost of merchandise bought in the ordinary channels of trade, It would be inconceivable, we think, that the term would be understood to embrace the cost of raw materials and labor, the two primary costs of manufacturer. Surely there is no "invoice cost" of labor in any recognized sense.

[1] As a result of the *Loughran* case, the Maryland Act relating to "unfair sales" was redrafted in 1941 and all the features noted by Loughran as objectionable, some of which appear in the Maine statute, were removed. In its new form the Maryland law was approved in *Blum v. Engleman* (1948) [1948-1949 TRADE CASES ¶ 62,232], 190 Md. 109, 57 A. 2d 421.

[2] Callmann, Unfair Competition and Trade Marks, 2d Ed. (1950) page 537, lists ten states which define production cost. They are Arkansas, California, Colorado, Kentucky, Montana, Oregon, Utah, Washington, Wyoming and South Carolina.

Our view is further strengthened when we turn to the alternative "replacement cost." For here the phrase is added, "in the quantity last purchased." Here is a clear indication that the Legislature, in defining cost, contemplated a "purchase" of the very goods now being sold. This phrase can in our judgment only relate to the distributive trades.

[*Amendment to Statute*]

We note with interest that in 1953 the Legislature amended the Act by adding to Subsection II of Sec. 1 thereof a new paragraph numbered D which reads:

> "D. Sales made by a cigaret *distributor* to a licensed *wholesale dealer* or to the operator of 15 or more vending machines shall not be subject to a markup of 2% as stated in the provisions of the preceding paragraph, but such sales shall be subject to full trade discount only." (Italics supplied) (P. L. 1953, Ch. 308, Sec. 112)

This new paragraph was incorporated into the section dealing with the "cost to the wholesaler." Rather significantly the word "distributor" was used. We would be reluctant, in the absence of concise and specific language, to conclude that the Legislature intended its definition of "cost to the wholesaler" to apply to producers and manufacturers or all other products if sold by them at wholesale, but only to distributors of cigarettes. We think it more reasonable to conclude that only persons engaged in the distributive trades were contemplated, whether of cigarettes or other merchandise. Moreover, the term "wholesale dealer" appears in the context in such a manner as to exclude the possibility that it was meant to include manufacturers and producers of cigarettes. Rather it is suggested that the term as used has a well understood connotation which does not embrace manufacturers and producers and is synonymous with the word "wholesaler" used elsewhere in the statute.

[*Retailer Defined*]

Subsection VI defines "retailer" as follows:

> "The term 'retailer' shall mean and include every person, co-partnership, corporation or association engaged in the business of making sales at retail within this state; provided that in the case of a retailer engaged in the business of making sales both at retail and at wholesale, such term shall be applied only to the retail portion of such business."

Is a producer or a manufacturer engaged *in the business of* making sales at retail within the meaning of the statute? We think not. His busines is manufacturing and his sales are in aid of and incidental to that operation. On the contrary, one who buys at wholesale and sells in smaller quantity at retail is obviously in the business, the primary business if you will, of making retail sales. A similar distinction was noted in *J. H. Allison & Co. v. Killough et al.*, (1927) (Tenn.) 300 S. W. 5. The result is the same when we consider the definition of "wholesaler" found in Subsection VII.

[*Meaningless Phrase*]

There is but one phrase in the entire Act which suggests that it was intended to apply to producers and manufacturers as well as to the distributive trades. In Sec. 1, Subsec. VIII we find the following:

> "VIII. Where a retailer sells at retail any merchandise *which is the product of his or its own manufacture* or which has been purchased by him or it at the purchase price or prices available to wholesalers, in the absence of proof of a lesser cost, both the wholesale markup of 2% and the retail markup of 6% to cover in part the cost of doing business, as provided in subsections I and II, shall be added in determining the 'cost to the retailer' of such merchandise." (Emphasis supplied)

Plaintiff sees in the italicized phrase a clear indication that the Act as a whole is intended to regulate producers and manufacturers. We are not persuaded that this is necessarily so. So construed, the statute remains obscure. The markups referred to are to be added, but to what? If to the "cost to the wholesaler" defined in Subsec. II, that "cost" is meaningless as we have already indicated when applied to a producer or manufacturer. If we were compelled to hold that the Act applies to producers and manufacturers, we would feel equally compelled to hold that the cost definition is too vague, uncertain and conjectural when so applied to satisfy the constitutional requirements of due process of law. We prefer to give to the statute that meaning which we think from a reading of the whole Act it was intended to have, and which will obviate the necessity of passing on the constitutional question. In so saying, we follow a well recognized rule of construction. *State v. Intoxicating Liquors,* 80 Me.

57, 62; *Hamilton v. District,* 120 Me. 15, 20. In *Rust v. Griggs,* (1938) (Tenn.) 113 S. W. 2d 733, an "unfair sales" case, the court supplied the word "not" omitted by inadvertence from the statute to save it from being "senseless and ineffective" and "to carry out the plain legislative intent." We conclude that the phrase in Subsec. VIII which we have italicized is meaningless when read in context with the entire Act. We assume the phrase crept into the law by some inadvertence when it was originally drafted. This is more readily understandable when we consider the history of "unfair sales" legislation here and elsewhere. These statutes had their origin during the economic depression which beset our nation during the thirties. No doubt it was hoped that the imposition of a minimum price base might serve to alleviate some of the economic ills of the moment. State after state enacted "unfair sales" acts in one form or another. Maine followed suit in 1939 (P. L. 1939, Ch. 240). No uniform law has ever been adopted and it is not surprising that in the framing of legislation in a new field, a phrase was inserted which was inconsistent with the manifest intent, purpose and scope of the new law. The Legislative Record indicates that the Act was passed without debate. The issue as to whether the Act was ever intended to apply to producers and manufacturers seems not to have arisen heretofore. The answer must be found within the four corners of the Act itself.

[*State Court Decisions*]

We are not greatly aided by the decisions of other courts. The precise question which confronts us does not appear to have been raised or decided elsewhere. The voluminous and painstaking research of learned counsel has brought to our attention practically every decided case on the subject and we have examined these authorities with interest and attention. We note that in not one of these cases was a manufacturer or a producer involved. All have been concerned with wholesalers and retailers (giving these terms their ordinary and accepted meaning) engaged in the distributive trades.

[*Cost Definition*]

A line of cases following the lead of *State v. Langley,* (1938) 53 Wyo. 332, 84 P. 2d 767, has determined (1) that legislative control is justifiable where there is present an intent to injure or destroy competition coupled with sales below cost, and (2) that the cost definition spelled out by the statute should be interpreted as meaning only "the approximate cost arrived at by a reasonable rule," or stated otherwise, the cost arrived at by the dealer "in good faith." *Assoc. Merchants of Montana v. Ormesher,* (1939) 107 Mont. 530, 86 P. 2d 1031; *State v. Sears* [1940-1943 TRADE CASES ¶ 56,043], (1940) 4 Wash. 2d 200, 103 P. 2d 337; *Dikeou v. Food Distributors Ass'n* [1940-1943 TRADE CASES ¶ 56,069], (1940) 107 Colo. 38, 108 P. 2d 529; *McIntire v. Borofsky* [1948-1949 TRADE CASES ¶ 62,266], (1948) 95 N. H. 174, 59 A. 2d 471. On our view of the case before us, it is not necessary here to decide whether in an appropriate case we would or would not adopt the "good faith" cost rule. Consideration would most certainly have to be given to the possible danger that when two different cost accounting theories are advanced, the preference felt by the fact-finder for one theory may too readily lead to a finding of bad faith on the part of a merchant who adopts the other. Although a violation was perhaps clearly shown in *Dikeou v. Food Distributors Ass'n. supra,* the facts would only need to be altered slightly to present the precise issue as to choice of conflicting cost accounting theories. When applied to the problems of manufacture, especially in the allocation of overhead to unit costs, the difficulties would be complex, if not insurmountable.[3] Suffice it to say in disposition of the case at bar that when a statute uses a cost definition which is manifestly applicable only to distributors, that is a sufficient indication that the Act was not designed to apply to manufacturers.

[*Other Issues*]

We neither intimate nor suggest what our holding would be as to the constitutionality of certain portions of this Act when applied to a distributor. That would depend upon the particular facts presented.

There are other reasons why the declaration here is vulnerable to demurrer, but in view of our holding that this action against a producer and manufacturer has no foundation either at common law or by statute, it is unnecessary to consider them here.

The entry will be *Exceptions sustained.*

[3] 57 Yale Law Journal 391, 394. "For the theory to operate successfully, there must be agreement on what constitutes 'cost'. 'Accounting principles' do not answer this problem; accountants themselves differ widely as to proper methods of valuing assets, of assigning general expenses to particular products and periods, and of computing other elements of cost."

[¶ 68,871] United States v. Safeway Stores, Incorporated.

In the United States District Court for the Northern District of Texas, Fort Worth Division. Civil No. 3173. Filed December 7, 1957.

Case No. 1264 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Monopolies—Consent Decree—Practices Enjoined—Establishment of Arbitrary Sales Quotas by Grocery Chain—Food Products.—A retail grocery chain was prohibited by a consent decree from setting or establishing arbitrary quotas of the total available business in retailing food products for any city, county, or other area of its operations to be attained in any such area, or requiring its personnel to meet any such quota.

See Monopolies, Vol. 1, ¶ 2610.

Monopolies—Consent Decree—Practices Enjoined—Sales at Unreasonably Low Prices and Sales Below Cost.—A retail grocery chain was prohibited by a consent decree from selling any item in any of its retail stores at an unreasonably low price or at a price that is below cost for the purpose of monopolizing the sale of food products at retail in any part of the United States, or for the purpose or with the natural and probable effect of destroying competition or eliminating a competitor engaged in the sale of food products at retail.

See Monopolies, Vol. 1, ¶ 2610.680.

Monopolies—Consent Decree—Practices Enjoined—Operation of Stores Below Cost of Doing Business.—A retail grocery chain was prohibited by a consent decree from (1) operating any store or department thereof below the cost of doing business for the purpose of monopolizing the sale of food products at retail in any part of the United States, or for the purpose or with the natural or probable effect of destroying competition or eliminating a competitor engaged in the sale of food products at retail, or (2) setting or maintaining a low gross profit rate for any of its retail stores or any department thereof or establishing or maintaining low retail prices in such retail store or department knowing that such gross profit rate or retail prices, with reasonably anticipated volume, will cause such store or department to operate below the cost of doing business.

See Monopolies, Vol. 1, ¶ 2610, 2610.620.

Monopolies—Consent Decree—Practices Enjoined—Price Variations.—A retail grocery chain was prohibited by a consent decree from selling at retail any food products in any store at lower prices than the prices at which identical products are then sold in any other retail store of the chain for the purpose or with the intent of monopolizing the sale of food products at retail in any part of the United States, or for the purpose of destroying competition or eliminating a competitor engaged in the sale of food products at retail.

See Monopolies, Vol. 1, ¶ 2610.620.

Department of Justice Enforcement and Procedure—Consent Decrees—Enforcement —Proof of Violation of Decree.—A consent decree entered against a retail grocery chain set forth the acts of the chain which, if established by the Government, would constitute a violation of certain provisions of the decree by the chain. The decree provided that the establishment of such acts would constitute a violation of the decree, unless the chain established to the satisfaction of the court that the acts alleged were not done for the purpose prohibited in the decree.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8401, 8421.

Department of Justice Enforcement and Procedure—Consent Decrees—Enforcement —Retention of Business Records.—For the purpose of securing compliance with a consent decree, a retail grocery chain was required to retain for a period of at least three years sufficient business records to reflect the cost of food products to it, the prices at which its retail stores were directed to sell and did sell such products, and the accounting records that show the details of the profit and loss results of the retail operations of individual stores or sales districts or divisions.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8401.20.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Sale of Store or Cessation of Operations.—A consent decree entered against a retail grocery chain provided that in the event the chain is found to have violated any provision of the decree, the court may, in an appropriate case, direct the chain to sell or close for a reasonable period the store or stores in which the practices complained of took place and to cease doing business, for a reasonable period, in the trading areas of such stores.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.50, 8401.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Notice of Decree.—A retail grocery chain was required by a consent decree entered against it to notify its personnel, engaged in pricing or selling food products, of the terms of the decree insofar as they relate to the retail sale of such products.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.60.

For the plaintiff: Victor R. Hansen, Assistant Attorney General, and William D. Kilgore, Jr., Charles F. B. McAleer, George D. Reycraft, Jr., Margaret H. Brass, and Paul A. Owens, Attorneys, Department of Justice.

For the defendant: Robert L. Clark, Elton L. Marshall, and Carl E. Enggas.

Final Judgment

Joe E. Estes, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on November 1, 1955; the defendant having appeared and filed its answer to such complaint denying the substantive allegations thereof; and the plaintiff and the defendant having severally consented to the entry of this Final Judgment without trial or adjudication of any issues of fact or law herein;

Now, Therefore, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon the consent of all parties hereto, it is hereby:

Ordered, Adjudged and Decreed as follows:

I

[*Sherman Act*]

This Court has jurisdiction of the subject matter herein and of all parties hereto. The complaint states a claim against the defendant under Section 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Person" shall mean any individual, partnership, firm, association, corporation or other legal entity;

(B) "Defendant" shall mean Safeway Stores, Incorporated, a Maryland corporation;

(C) "Food or food products" means any manufactured or processed food, fresh fruits, fresh vegetables, dairy products, poultry or meat and other commodities customarily stocked in retail grocery stores;

(D) "Item" means any product or brand of a product, sold in defendant's retail stores (except fresh meat, fish and poultry, and any other products for which the defendant in the future is unable to determine the unit cost of the product sold, and which, when offered for sale or sold by the defendant, are in forms, shapes or sizes materially different from those in which they were when first acquired by the defendant); each different size, brand or pack of a product shall be considered a separate item;

(E) "Safeway District" shall mean a number of retail stores operated as a group by the defendant as a District under the supervision of a District Manager. The defendant presently operates one hundred seventeen (117) Districts in the United States;

(F) "Safeway Division" means a number of Safeway Districts operated as a group by the defendant from a Division Office. The defendant presently operates nineteen (19) Retail Divisions in the United States;

(G) "Cost" shall mean invoice cost or replacement cost, whichever is lower, or the cost of production and processing of items produced or processed by defendant or a subsidiary;

(1) "Invoice cost" means the price at which an item is invoiced by a seller to the defendant or one of its subsidiaries, less all trade discounts, customary discounts for cash, and all other price reductions recognized in the trade, to which shall be added freight charges and cartage to the retail store not otherwise included in the invoice price. When cartage is to be added, it may be computed by the defendant on a mileage zone, ton-mile, pro rata or actual basis;

(2) "Replacement cost" means the price at which an item could be obtained by the defendant or one of its subsidiaries at the time it is offered for sale or sold at retail, less all trade discounts, customary discounts for cash, and all other price reductions recognized in the trade, to which shall be added freight charges and cartage to the retail store not otherwise included in the invoice cost. When cartage is to be added, it may be computed by the defendant on a mileage zone, ton-mile, pro rata or actual basis;

(3) "Cost of production and processing" means the cost (or replacement cost), whichever is lower, of all raw materials and ingredients plus all costs incurred by the defendant or any of its subsidiaries or supply divisions in producing, manufacturing or processing any item produced, manufactured or processed by the defendant or any of its subsidiaries for subsequent sale in the defendant's retail stores. The cost of production and processing shall include overhead and indirect expenses as well as the handling and transportation costs of such items to the defendant's retail stores.

(H) "Cost of doing business," as to a retail store, means (1) all direct costs and expenses incurred in the operation of the store, and (2) such store's proper share of the indirect, overhead and administrative expenses of Safeway, as determined by generally accepted cost accounting practices.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to the defendant shall also apply to its officers, agents, servants, employees, subsidiaries, successors and assigns, and to all other persons in active concert or participation with the defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

[*Establishment of Quotas*]

Defendant is enjoined and restrained from setting or otherwise establishing arbitrary quotas, either in dollar sales volume or percentages, of the total available business in retailing food or food products for any city, county, Safeway District, Division or other area of the defendant's operations to be attained by the defendant in any such area, or requiring the personnel of the defendant to meet any such quota or percentage.

V

[*Unreasonably Low Prices*]

Defendant is enjoined and restrained from offering to sell or selling any items in any of its retail stores at an unreasonably low price or at a price that is below cost for the purpose of attempting to monopolize or monopolizing the sale of food or food products at retail in any part of the United States, or for the purpose or with the natural and probable effect of destroying competition or eliminating a competitor engaged in the sale of food or food products at retail.

VI

[*Price Variations*]

Defendant is enjoined and restrained from offering to sell or selling at retail any food or food products in any store at lower prices than the prices at which identical products are then offered for sale or sold in any other retail store of the defendant for the purpose or with the intent of attempting to monopolize or monopolizing the sale of food or food products at retail in any part of the United States, or for the purpose of destroying competition or eliminating a competitor engaged in the sale of food or food products at retail.

VII

Defendant is enjoined and restrained from:

[*Operations—Below Cost*]

(A) Operating any store or department thereof below the cost of doing business for the purpose of attempting to monopolize or monopolizing the sale of food or food products at retail in any part of the United States or for the purpose of or with the natural and probable effect of destroying

competition or eliminating a competitor engaged in the sale of food or food products at retail.

(B) Setting, assigning or maintaining a low gross profit rate for any of its retail stores or any department thereof or establishing or maintaining low retail prices in such retail store or department knowing that such gross profit rate or retail prices, with reasonably anticipated volume, will cause such store or department to operate below the cost of doing business.

VIII

[*Violation of Provisions—Proof*]

In any proceeding brought to enforce Section V or VII of this Final Judgment, wherein it is charged that the defendant has done any of the following for the purpose of attempting to monopolize or monopolizing, or destroying competition or eliminating a competitor, and upon the plaintiff establishing that the defendant:

(A) Has offered to sell or sold continuously or for a substantially continuous period of 60 days or more a daily total of 50 or more items below cost or at unreasonably low prices in any retail store; or

(B) Has sold in any store any number of items below cost whose total dollar sales volume in any four-week period constitutes more than 10% of total dollar volume of sale in that store during the same period; or

(C) Has operated any store or department thereof continuously or for a substantially continuous period of 16 weeks (consisting of four accounting periods of four weeks each) or any group of accounting periods constituting more than 25% of any one-year period (1) below the cost of doing business and (2) with a realized gross profit rate (based on landed store cost) for such store or department which is below the average realized gross profit rate for the Safeway stores or departments in the same Safeway District (or in adjacent Districts within the same Safeway Division) which are not operating below the cost of doing business;

the same shall constitute a violation of this Final Judgment unless the defendant establishes to the satisfaction of this Court that the acts alleged were not done for the prohibited purpose charged.

For purposes of subsection (A) hereof only, "item" shall not include different sizes of the same brand of a particular product.

In any proceeding under this Final Judgment wherein the plaintiff seeks to invoke the provisions of subsection (B) hereof, it shall be a defense for the defendant to show that such sales were not made for the purpose charged but to prevent spoilage of perishable food or food products.

For purposes of subsection (C) hereof, in determining whether a store or department is operating below the cost of doing business, indirect, overhead, and administrative expenses incurred outside the store may be allocated to the stores and departments thereof on a sales ratio basis.

IX

[*Sale of Store—Relief*]

In the event that the defendant is found to have violated any of the provisions of this Final Judgment, the Court may, in an appropriate case, direct the defendant, upon such conditions which the Court may impose, with due regard to rights of innocent third parties, to sell, or close for a reasonable period, the store or stores in which the practices complained of took place and to cease doing business, for a reasonable period, in the trading areas of such stores.

X

[*Business Records*]

For the purpose of securing compliance with this Final Judgment the defendant shall retain for a period of at least three years sufficient business records to reflect the cost of food or food products to defendant, the prices at which its retail stores were directed to sell and did sell food or food products, and the accounting records that show the details of the profit and loss results (including the realized gross profit rate based on landed store cost) of the retail operations of individual stores, Districts and Divisions.

XI

[*Notice of Judgment*]

Defendant shall, within ninety (90) days from the date of the entry of this Final Judgment, send written notice of the terms of this Final Judgment insofar as they relate to the retail sale of food or food products by the defendant to its personnel engaged in pricing or selling food or food products (except retail store employees below the level of store managers).

XII

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant made to its principal office, be permitted, subject to any legally recognized privilege, (a) reasonable access, during the office hours of the defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the defendant, relating to any of the matters contained in this Final Judgment, and (b) subject to the reasonable convenience of the defendant, and without restraint or interference from it, to interview officers and employees of the defendant, who may have counsel present, regarding such matters. For the purpose of securing compliance with this Final Judgment, the defendants, upon the written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment. No information obtained by the means permitted in this Section XII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department, except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

XIII

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, or the modification or termination of any of the provisions thereof, or for the enforcement of compliance therewith or for the punishment of violations thereof.

[*Effective Date*]

This Final Judgment shall go into effect thirty (30) days after the date of entry hereof.

[¶ 68,872] United States v. El Paso Natural Gas Company and Pacific Northwest Pipeline Corporation.

In the United States District Court for the District of Utah, Central Division. Civil No. 143-57. Dated October 21, 1957.

Case No. 1354 in the Antitrust Division of the Department of Justice.

Clayton Antitrust Act

Department of Justice Enforcement and Procedure—Jurisdiction of United States District Court and Federal Power Commission—Stock Acquisition of Pipeline Company—Primary Jurisdiction.—In an action charging that a pipeline company violated Section 7 of the Clayton Act when it acquired stock of a competing pipeline company, a motion to dismiss the action for lack of jurisdiction or, in the alternative, to stay the court proceedings until the Federal Power Commission's final determination of applications by the pipeline companies for authority to merge the companies' pipeline assets was denied. The applications were filed with the Federal Power Commission after the Government had instituted the instant proceeding against the stock acquisition. The Federal Power Commission does not have jurisdiction to pass upon the stock acquisition; therefore, the doctrine of primary jurisdiction was not applicable. The court will not abdicate its jurisdiction in favor of that of an administrative agency in relation to a question which cannot and will not be decided by the administrative agency. The filing of the above applications with the Commission did not divest the court of its jurisdiction to hear the Clayton Act proceeding.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4208.25; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8221.125.

For the plaintiff: A. Pratt Kesler, United States Attorney, Salt Lake City, Utah; and Ephraim Jacobs, Department of Justice, Washington, D. C.

For the defendants: Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for El Paso Natural Gas Co.; and Ray, Quinney & Nebeker, Salt Lake City, Utah, for Pacific Northwest Pipeline Corp.

[*Jurisdiction of Court*]

The Court [WILLIS W. RITTER, Chief Judge, *In full text*]: Is there anything further?

For this Court to abdicate his jurisdiction in favor of that of the F. P. C. I think I should wish to have some authority more compelling than any authorities that have been submitted to me.

[*Defendants' Authorities*]

Mr. Dean: Would your Honor give us a certain period of time in which to file a further memorandum with you.

The Court: No, I am prepared to decide this motion this afternoon. I think we have had a good deal of time. I am sure if there had been any cases any more nearly in point than those you have cited me, you would have had them here.

Mr. Dean: Well, it seems to us, your Honor, the cases we have cited, the *Cunard* case and the *Far Eastern Conference* case, are controlling in this matter. The Supreme Court, I think, has made it very clear that it is not necessary for the administrative agency to be able to grant the relief requested. I think that was clear in the *El Dorado-General American Tank Car Corporation* case. And I think the *City of Pittsburgh* case makes it clear the Federal Power Commission can consider the antitrust questions, as well as the questions of public interest, under the Natural Gas Act.

As I read the cases, your Honor, it does seem to me that the Supreme Court has said that under this doctrine of primary jurisdiction that the courts must, in the first instance, allow the administrative agencies appointed by the Congress to pass upon these matters.

[*Stock Acquisition*]

The Court: Well, you folks saw to it in the beginning of this transaction that they couldn't pass on it. You chose, as the initial move, to accomplish your ends by a stock acquisition.

The F. P. C. hasn't any jurisdiction to deal with that at all and never will have unless Congress changes the law.

El Paso and Pacific Northwest had a choice when they moved into this transaction. They had a choice, then and there, to apply to the F. P. C. for a certificate to acquire the assets. Well, they didn't choose to do it.

Now, if the F. P. C. had granted your application, you would have had antitrust immunity.

Mr. Dean: Not according to Mr. Jacobs.

The Court: Well, according to you.

Mr. Dean: Yes, sir.

[*Primary Jurisdiction—FPC*]

The Court: Now, you didn't choose to proceed that way. You knew, when you made that stock acquisition, that there was a risk and you took, as Mr. Jacobs said this morning, a calculated risk about that.

Now, the solution would have been a happy one if the Government had not moved under the Clayton Act, but the Government has moved under the Clayton Act. Now you want to go back and do what you might have done in the beginning, and you are asking this Court to abdicate its jurisdiction to decide the very point under Section 7 of the Clayton Act which you have made it necessary for us to decide here, really, by your choice.

I think the narrow question before us is whether your stock acquisition is in violation of Section 7 of the Clayton Act, and I do not believe, under any view of the matter, that you can urge that that question is a question which Congress has given for decision to that administrative agency. We are all in agreement about that.

Now, you undertook to say in your brief that the stock acquisition and the asset acquisition are one and the same thing. I do not think they are. As a matter of fact, you are a bit inconsistent, I think—with deference to you, too, sir—in saying in your

brief that the stock and asset acquisitions are one and the same thing, have a unity, and then saying, as you did a few minutes ago, that the determination of that issue under the Clayton Act by this Court is not going to be binding upon the F. P. C. because it is a different thing now to apply to them for an asset combination.

If it is true, as you say in your brief, that the asset and the stock acquisitions are one and the same thing, have a fundamental unity, and we are talking about one issue, and it is the same issue, how can you say this afternoon that, having decided that issue here, that won't have some binding effect upon the F. P. C. in a later proceeding in which you ask a certification for an asset merger?

But be that as it may, you folks chose a route that gave you no immunity under the Clayton Act, and the Antitrust Division of the Department of Justice has now seen fit to move against you for an antitrust violation.

The issues before this Court are the ordinary, usual issue in Clayton Act proceedings, nothing more, nothing less. Those issues cannot be presented to the F. P. C. in any view of the matter, never will be presented to the F. P. C. Different issues may be presented to them. You are now seeking to present different issues to them and you are seeking, with your application to the F. P. C., to divest this Court of jurisdiction to hear a Clayton Act proceeding.

Now, I do not think your authorities go that far. I have looked at those authorities, and they do not seem to me to go that far. There is some broad language. The broadest, I think, is in the quotation from Frankfurter on the first two or three pages of your brief.

If you look at the broad principles of primary jurisdiction and do not put your eye too carefully on the facts in the case in which they are announced, why, there is considerable support for what you say; but when you relate what the court says to the factual issues before it, I do not believe you have handed me a case that is in point.

Now, whichever way this case is decided there is going to be some prejudice to the future proceedings. If I decide, as I am about to do, that the motion should be denied and that the Clayton Act proceeding should go forward, I suppose there may be some prejudice in the result, whether it is res judicata or not, in the F. P. C. On the other hand, if I decide those motions in your favor and you go first to the F. P. C. and the F. P. C. agress with you, I suppose there will be some prejudice to the Government's position in the Clayton Act proceedings. Either way I think there is going to be some prejudice to the proceedings, either here or in the F. P. C.

At this juncture all this Court is confronted with is a Clayton Act proceeding, and the Government urges us to get to the trial of it, which the Government is entitled to do. And the trial of it, it doesn't seem to me, is going to involve anything at all that is properly before the F. P. C. or that can be brought before the F. P. C. And because of that fact, I believe this case is distinguishable from your cases that you have referred to.

There isn't any question at all, under the Acts of Congress, that this Court has jurisdiction of Clayton Act proceedings, and I do not see anything in the Acts of Congress, and nothing has been mentioned here, that takes away that jurisdiction in this kind of a situation or in any other.

I would be abdicating my jurisdiction in favor of that of an administrative agency in relation to a question which, admittedly, on all hands, cannot and will not be decided by that administrative agency; and that I will not do.

[*Motions Denied*]

The motions are denied.

Order

Defendants having filed on September 30, 1957, a Motion to Dismiss these proceedings or in the alternative to stay all proceedings pending determination in the Federal Power Commission of certain applications there filed on August 7, 1957, and the Court having duly considered the Motion, affidavits in support thereof and affidavits in opposition thereto filed by the Government, and having heard argument on the Motion;

It is Ordered that the Motion to Dismiss or in the alternative to stay these proceedings is hereby denied.

[¶ 68,873] Brian Pharmacy, Inc. v. Master's Lake Success, Inc.

In the New York Supreme Court, Nassau County. 138 N. Y. L. J., No. 110, page 13. Dated December 6, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Who May Maintain Suit—Retailer. —A pharmacy's motion for a temporary injunction restraining a retailer from selling fair-traded toiletries at less than the retail prices fixed by the manufacturers of the toiletries was granted. The court noted that it has no power to disregard Section 369-a of the New York Fair Trade Act, and that, if the retailer is violating the Act, the pharmacy "is doubtless within the range of inevitable injury."

See Fair Trade, Vol. 1, ¶ 3330.34.

[*Temporary Injunction*]

C. A. JOHNSON, Justice [*In full text*]: This is a motion for a temporary injunction to restrain the defendant from selling numerous price-fixed toiletries at retail at less than the price fixed by the manufacturers. It is not denied that merchandise of the character described is being sold at prices below those fixed by the manufacturers. Defendant seems to suggest that General Business Law, section 369A, should be disregarded. The court feels it has no such power; if, as seems evident, the defendant is violating the statute, the plaintiff is doubtless within the range of inevitable injury. An injunction will accordingly issue against sales at less than prices fixed by Fair Trade contracts of the price-fixed articles of the manufacturers enumerated in the papers. Bond $5,000. Proceed on notice.

[¶ 68,874] H. & A. Selmer, Inc., Plaintiff v. Musical Instrument Exchange, Inc., Defendant; and Musical Instrument Exchange, Inc., Supplemental Plaintiff v. Sam Ash, Supplemental Defendant 1, et al.

In the United States District Court for the Southern District of New York. Civil 119-63. Filed December 3, 1957.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Counterclaim for Civil Damages and Injunctive Relief—Pretrial Procedures—Supplemental Defendants—Necessary Parties.—An order permitting the bringing in of supplemental defendants to a defendant's counterclaim charging that the plaintiff violated the antitrust laws was vacated on the ground that the presence of the supplemental defendants was not necessary and indispensable for the granting of complete relief in the determination of the counterclaim. In effect, the defendant, a retailer, charged that the plaintiff, a manufacturer, would not sell its products unless the defendant adhered to a resale price agreement, and that the supplemental defendants, other retailers, insisted upon the plaintiff taking action against the defendant by reason of the defendant's breaches of such an agreement with the plaintiff. In an antitrust action, it must be shown that injury and damage to the pleader was proximately caused by the alleged wrongful conduct of those charged (the supplemental defendants). No conspiracy among the supplemental defendants and the plaintiff was alleged. The supplemental defendants had no connection with each other and dealt independently with the plaintiff. The presence of the supplemental defendants was not required to enable the defendant to recover on its counterclaim.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.525, 9046.60.

For the plaintiff: Harper & Matthews, New York, N. Y.

For the defendants: Friedland, Jobrack & Zurkow (Louis G. Greenfield and Sidney W. Rothstein, of counsel), New York, N. Y., for Musical Instrument Exchange, Inc.; and O'Brien, Driscoll & Raftery (George A. Raftery and William D. Friedmann, of counsel), New York, N. Y., for supplemental defendants.

For prior opinions of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,800, and ¶ 68,780.

Opinion

[*Motion*]

LEVET, District Judge [*In full text*]: A number of the so-called supplemental defendants herein have moved to vacate the ex parte order dated July 5, 1957, which brought them into this action, or, in the alternative, for other relief. The plaintiff has joined in this motion at the time of argument.

[*Plaintiff*]

Plaintiff, H. & A. Selmer, Inc. (hereinafter called Selmer), is an Indiana corporation with its principal office for doing business in Elkhart, Indiana. Selmer manufactures and sells musical instruments, accessories and parts.

[*Defendant*]

The defendant, Musical Instrument Exchange, Inc. (hereinafter called Musical), is a New York corporation, doing business at 112 West 48 Street, New York City, selling musical instruments at retail.

[*Antitrust Counterclaim*]

The original action of plaintiff Selmer against defendant Musical was based upon a claim for goods sold and delivered in the sum of $9,728.00. The defendant caused the original action to be removed to the federal court on or about April 1, 1957. Defendant answered plaintiff's complaint by setting up affirmative defenses and a counterclaim containing an alleged antitrust charge against the plaintiff. (The plaintiff replied to defendant's counterclaim and the defendant moved to strike the defense of *pari delicto* contained in defendant's [plaintiff's] reply, which motion was denied by this court.)

[*Supplemental Defendants*]

On July 5, 1957, defendant Musical secured an ex parte order of this court bringing in the supplemental defendants.

Rule 13(h) of the Federal Rules of Civil Procedure is as follows:

> "*Additional Parties May Be Brought In.* When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action."

[*Issue*]

In the affidavit of Louis G. Greenfield, sworn to on July 3, 1957, upon the basis of which the ex parte order was made joining these supplemental defendants, he asserts that these supplemental defendants are necessary and proper parties and that their inclusion will prevent a multiplicity of suits; that if Musical prevails in establishing this countercliam, these supplemental defendants will be subject to the injunctive mandate of this court. No assertion was made that the presence of these parties was required for the granting of complete relief in the determination of the counterclaim. This is the issue upon this motion.

If the person to be added is an indispensable party he must be added or the court cannot proceed to an adjudication of the counterclaim. 3 *Moore's Federal Practice*, p. 102.

[*Indispensable Parties*]

The provision in Rule 13(h) of the Federal Rules of Civil Procedure providing for the bringing in of additional parties whose presence "is required for the granting of complete relief in the determination of a counterclaim or cross-claim" has been interpreted by the courts to mean "parties" who are "indispensable" and/or "necessary." *Edwards v. Rogers,* D. C. E. D. So. Car., 1954, 120 F. Supp. 499; *Kuhn v. Yellow Transit Freight Lines, Inc.,* D. C. E. D. Mo., 1952, 12 FRD 252. See also *Shefsky v. Mansew Corp.* [1948-1949 TRADE CASES ¶ 62,513], 2 Cir., 1949, 177 F. 2d 946.

Since the order permitting the bringing in of additional defendants was made ex parte, it may be vacated upon notice. *Shefsky v. Mansew Corp., supra; Invest-Import v. Seaboard Surety Co.,* D. C. S. D. N. Y., 1955, 18 FRD 499.

[*Antitrust Charges*]

Defendant Musical's prolix "supplemental complaint" is in substance as follows:

1. That defendant Musical and the supplemental defendants, among others, were and are retail dealers in musical instruments, etc., and are retail customers of plaintiff Selmer;

2. That defendant Musical seeks damages from plaintiff sustained as a result of acts of plaintiff and its retailers violative of the antitrust acts;

3. That plaintiff Selmer and the retailers named herein, as well as others whose identities are "presently unknown to the supplemental plaintiff" have "combined and conspired" by certain resale agreements to sell only at fixed prices, etc.;

4. That during the year 1953, the supplemental plaintiff Musical introduced and promoted a consumer discount purchasing program known as the "mix" plan;

5. That in January 1953, Selmer adopted a franchise retailing dealers agreement and adopted a new resale plan at fixed terms and prices, in accordance with which dealers who breached such agreement were to cease receiving goods from Selmer;

6. That in January 1953, plaintiff Selmer and others acting in concert with it—that is, the so-called franchised dealers—demanded that defendant Musical adhere to these restrictive terms and that it delete Selmer's name from advertisements and that Musical, so coerced, agreed;

7. That between January 1953 and December 1956, Selmer received complaints from numerous of its franchised retailers that Musical was failing to comply with resale agreements; that Musical refused to abide by such agreements, and that as a result of Musical so refusing, plaintiff Selmer cancelled Musical's franchise agreement;

8. That to secure resumption of sales by plaintiff Selmer to Musical, Musical was compelled to and on or about March 21, 1955, did sign a restrictive agreement;

9. That Selmer and a majority of its retailers adhered to the written agreement of January 28, 1955, and that thereby Musical was affected in its sales of Selmer's products and was disfranchised *by Selmer* and suffered loss, etc.

[*Necessary Proof*]

It must affirmatively appear from the pleadings in an action brought under the antitrust laws that injury and damage to the pleader was proximately caused by the alleged wrongful conduct of those charged, here the supplemental defendants. *Schwartz v. General Electric Co.,* D. C. S. D. N. Y., 1952 [1952 Trade Cases ¶ 67,298], 107 F. Supp. 58; *Dublin Distributors, Inc. v. Edward and John Burke, Limited,* D. C. S. D. N. Y., 1952 [1952 Trade Cases ¶ 67,398], 109 F. Supp. 125.

However, Musical has not shown, even to the extent of pleading, that the presence of these supplemental defendants is required for the granting of complete relief in the determination of the defendant's counterclaim against the plaintiff. There is no allegation of the formation of an overall conspiracy or combination among the plaintiff and the supplemental defendants against the defendant Musical. In effect, Musical claims that each of the supplemental defendants in his own business relationship with plaintiff engaged in a course of conduct motivated by similar considerations. The twelve separate and independent supplemental defendants had no connection with each other and dealt independently with Selmer. See *Canella v. United States,* 9 Cir., 1946, 157 F. 2d 470, 476; *Feddersen Motors Inc. v. Ward,* 10 Cir., 1950 [1950-1951 Trade Cases ¶ 62,579], 180 F. 2d 519; *Alexander Milburn Co. v. Union Carbide & Carbon Corp.,* 4 Cir., 1926, 15 F. 2d 678.

Consequently, it develops that the complaint of Musical is that Selmer would not sell unless Musical adhered to the resale agreement, and the complaint of Musical against the supplemental defendants is that they in turn insisted upon Selmer taking action against Musical by reason of Musical's breaches of its agreement with Selmer. Just what else the supplemental defendants had to do with this problem does not appear. For Musical to recover on such an alleged cause of action by way of counterclaim does not require the presence of the supplemental defendants in this action. If Selmer is eventually enjoined, Musical may secure complete relief in the determination of its counterclaim against Selmer without the presence of these supplemental defendants or any other of such retail dealers who are in a similar position with respect to Selmer. What Musical seeks against Selmer is (1) damages for failure to sell and (2) injunctive relief to prevent its repetition. Thus, Musical is not primarily concerned with what the supplemental defendants do, but only with what Selmer does.

Hence, the supplemental defendants are not required under Rule 13(h) of the Federal Rules of Civil Procedure for the granting of complete relief in the determination of this counterclaim.

[*Order Vacated*]

Therefore, the motion to vacate the order of July 5, 1957, permitting the bringing in of the supplemental defendants, is granted.

So ordered.

[¶ 68,875] Sunbeam Corporation v. Gem Jewelry Company, Inc.; Gem Housewares Co., Inc.; and Government Employees Mutual of Honolulu, Inc.

In the United States District Court for the District of Hawaii. Civil No. 1589. Dated November 19, 1957; filed December 5, 1957.

Hawaiian Fair Trade Act and McGuire Act

Fair Trade—Constitutionality of Hawaiian Fair Trade Act—Violation of Hawaiian Organic Act—Inconsistency with Section 3 of Sherman Act.—"The Hawaiian Fair Trade Act is in violation of Section 55 of the Hawaiian Organic Act (48 U. S. C. Section 562) in that it is and always has been inconsistent with Section 3 of the Sherman Act and hence invalid." The McGuire Act, although it contains the phrase "or in any of the Antitrust Acts," does not amend Section 3 of the Sherman Act, which declares unlawful, in any territory, contracts, combinations, and conspiracies in restraint of trade. The McGuire Act is premised on a recognition of states' rights. Repeals "by implication are not favored, especially when the implication is a strained and dubious one, and one which would have the result of jarring anew the Sherman Act, especially its application in areas that are peculiarly the sole and exclusive property of the Federal Government, namely, the District of Columbia and incorporated territories." When "Congress has in mind amending the Sherman Act, it does so directly, expeditiously and with clarity." Also, the McGuire Act, as it is written, does not make sense as applied to territorial commerce. There are no "intrastate" transactions in a territory. Furthermore, while the Miller-Tydings Act amended Section 1 of the Sherman Act, it did not amend Section 3 of the Act. The McGuire Act is not an expression of Federal "policy" for Federal areas.

See Fair Trade, Vol. 1, ¶ 3035, 3040, 3085.13, 3258.

Fair Trade—Enforcement of Fair Trade Prices—Federal Court Action—Jurisdictional Amount.—In an action to enjoin violations of the Hawaiian Fair Trade Act, a Federal District Court noted that it was dubious as to whether or not the fair trader satisfied the requirement of making out a preliminary, satisfactory showing of jurisdiction. If the test for jurisdictional amount is based on the value of the fair trader's good will or trade-mark, jurisdiction would exist; however, if the test for jurisdictional amount is based on potential damage to good will or the trade-mark, jurisdiction would not exist. The court, assuming jurisdiction, held the Act invalid.

See Fair Trade, Vol. 1, ¶ 3410.

Fair Trade—Enforcement of Fair Trade Prices—Defenses—Validity of Contract—Lack of Mutuality.—In a fair trade enforcement action against a nonsigner under the Hawaiian Fair Trade Act, the court rejected the contention that the action should be dismissed because the fair trade contract lacked mutuality. The enforcement suit was not based on the contract; it was a tort action founded on the Act. The court, however, held that the Act was invalid.

See Fair Trade, Vol. 1, ¶ 3130, 3420.

For the plaintiff: Pratt, Tavares & Cassidy, by Roy A. Vitousek, Jr., Honolulu, Hawaii.

For the defendants: Heen, Kai, Dodge & Lum, by Robert G. Dodge, Honolulu, Hawaii.

Ruling upon Motion to Dismiss

[*Fair Trade Enforcement Action*]

J. FRANK MCLAUGHLIN, District Judge [*In full text*]: I have before me a motion to dismiss a complaint setting forth two alleged causes of action under the Hawaiian Fair Trade Act (Revised Laws of Hawaii 1955, Chapter 205), one for injunction and one for damages. Plaintiff has alleged diversity of citizenship and the $3,000 jurisdictional amount. Under the Hawaiian Fair Trade law Sunbeam products manufactured by the plaintiff corporation are fair-traded in this District. Despite that law, defendants who have not signed a fair trade agreement with Sunbeam but who have been given notice of such agreements after they

have acquired Sunbeam products are selling these products at prices below those fixed under the fair trade contracts by the manufacturer. Plaintiff alleges that it has suffered damage and will continue to suffer damage unless these non-signer defendants are enjoined. It seeks not only a temporary injunction to enjoin violations of its fair trade contract rights under the statute, but also to recover exemplary and punitive damages for defendants' alleged wilful violations.

[*Defenses to Action*]

To support their contention that not only should no temporary injunctive relief be granted but that no permanent injunction should issue or recovery in damages be ordered, defendants have claimed that the complaint is defective in many particulars. The extensive motion to dismiss ranges from charges that the Court is without jurisdiction to various assertions that no equitable relief should be granted for reasons either of defect in the Fair Trade contract, or because of lack of mutuality of remedy or the lack of availability of specific performance due to the clause countenancing revocation. The motion contains two strong contentions that regardless of the alleged defects heretofore mentioned, no relief can be granted and that the complaint should be dismissed because the Hawaiian Fair Trade Act is inconsistent with Federal law, or if valid as to signers, is certainly invalid as to non-signers such as these defendants.

[*Jurisdiction of Court*]

Challenging the jurisdictional allegations of defendants' motion to dismiss, plaintiff has produced testimony and affidavits of corporate officers and deems itself to have satisfied the Court that there is jurisdiction at least for preliminary purposes.

No dispute exists as to the parties' diversity of citizenship or of the Court's well settled power to entertain a diversity suit. There is issue as to whether or not the jurisdictional $3,000 amount is here made to appear with sufficient clarity to warrant the Court going forward. In these fair trade cases there is much talk to the effect that the matter in controversy is the good will of the plaintiff or the value of the plaintiff's trade mark distinguished from any prospective damage which might result from the defendant's actions. Indeed, the bulk of the cases use that type of language, and if it happens to be a plaintiff corporation that is nationally well-known simply say that obviously the good will of the corporation is in excess of $3,000 and go merrily on from that point. There are apparently no cases involving unpopular corporations or corporations that have unpopular products and hence no good will of the value of $3,000. Nor are there cases where the intangible good will is seriously questioned as to whether or not it has any value at all. Here the Court can judicially notice, for it does seem to be a matter of common knowledge, that the Sunbeam Corporation has attached to its name and its products much good will, indeed of a value far in excess of $3,000. If that be the test, certainly jurisdiction here exists. If, however, the Seventh Circuit's test be applied (*Seagram-Distillers Corp. v. New Cut Rate Liquors* [1957 TRADE CASES ¶ 68,719], 245 F. 2d 453, 7 Cir. 1957, *cert. denied,* No. 353, Oct. 14, 1957, 26 Law Week 3118) proof of jurisdiction here must be said to be lacking. It does not appear from the evidence when this test is applied that the potential damage in the offing, if defendants' acts are allowed to continue, would volume wise amount to $3,000. I am dubious as to whether or not plaintiff has here upon the challenging of the defendants satisfied the requirements of making out a preliminary, satisfactory showing of jurisdiction when tested by the law of *KVOS, Inc. v. Associated Press,* 299 U. S. 269 (1936).

[*Contract—Lack of Mutuality*]

Assuming that jurisdiction does exist, I nevertheless do not believe that there is any merit to the contentions advanced by the defendants that this case should be dismissed for reasons sounding in the equity area of lack of mutuality because the contract could not be specifically enforced. These contentions are lacking in merit for the reason that this is not a suit on a contract but is a tort action against a non-signer founded on a statute. Granting that this fair trade contract is very one-sided and lacking in several of the requirements of equity, still I agree with plaintiff that what it is trying to enforce is a set of statutory rights. Therefore, the language of privity, mutuality, or specific performance is not pertinent.

[*Decision of Territorial Court*]

This brings me to the consideration of what I deem to be the central contention upon the motion, to wit, whether or not the Hawaiian Fair Trade Act is valid either as to signers or non-signers. We are met at the threshold of the problem with the question of whether or not I am foreclosed from deciding it because some years ago the Supreme Court of the Territory of Hawaii in *Auto Rental Co. v. Lee,* 35 Haw. 77 (1939), held unanimously that the Hawaiian Fair Trade Act was not inconsistent with any Federal law and hence valid. I do not believe that the *Auto Rental Co.* case forecloses this Court from examining for itself the Federal question. The opinions of the Territorial Supreme Court like those of State supreme courts are binding on us in matters of local law. Whether or not the Hawaiian Fair Trade Act is in conflict with Federal law obviously is not a local question. Thus it is that this Court is not barred from deciding this issue.

To be sure the language of the *Auto Rental Co.* case went beyond the requirement of the case. The issues of *Auto Rental* did not involve non-signers but were between parties who had signed a fair trade contract. It is also significant to remember that the opinion of he court was announced subsequent to the Miller-Tydings Act but before the McGuire Act. It should be pointed out, though, that from time to time successive legislatures of the Territory have passed and re-passed an Hawaiian Fair Trade Act so that to this day the Hawaiian Fair Trade Law is in step with the most recent action of the Congress of the United States and the Supreme Court.

[*Issue—McGuire Act*]

The question to be determined is whether or not by reason of the McGuire Act amending Section 45 of Title 15, United States Code, it can be said that Section 3 of the Sherman Act (15 U. S. C. 3) has or has not been amended. If upon analysis and interpretation it can be said that the McGuire Act had the effect of amending Section 3 of the Sherman Act, then certainly the Hawaiian Fair Trade Act is valid at least as to signers. If the McGuire Act had no effect on Section 3, then the Hawaiian Fair Trade Act has never been valid. Reaching that conclusion there would be no need to distinguish between signers and non-signers.

[*Sherman Act*]

I have examined the legislative history of this Fair Trade legislation, and I am, of course, conversant with the Federal policy first expressed by Congress in 1890 in passing the Sherman Act. I well know that it has been the Federal policy since 1890 to regard every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, or commerce among the several states, or with foreign nations, to be illegal. This policy also regards as illegal every contract, combination or form of trust, conspiracy in restraint of trade or commerce in any territory of the United States or the District of Columbia. This would include restraint of trade or commerce between any such territory and another, between any territory and territories and any state or states and the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations. Indeed, this language of Section 1 and Section 3 of the Sherman Act might well be said to be one of the cornerstones of our competitive free economy.

[*Miller-Tydings Act*]

I know also from this legislative history that there came a time in 1937 when lobbyists and economic soothsayers sold the Congress what is regarded by many today as a bill of goods to the effect that a decent respect for states' rights and the economy of the states required that certain state legislation be rendered immune from the effect of the Sherman Act despite its adverse bearing on interstate and foreign commerce. And thus it was that we had the original exception to the Sherman Act carved out by the Miller-Tydings Act. This exception is a grant of immunity from Federal action and is solidly promised on a recognition of and respect for states' rights.

[*Scope of McGuire Act*]

The original statute, 50 Stat. 693, passed August 17, 1937, says the Miller-Tydings Act amends Section 1 of Title 15. Error, however, crept into the unofficial text. Thus we find the United States Code and the United States Code Annotated stating to this day that the Miller-Tydings Act amended

not only Section 1 but Sections 1 through 7 inclusive. It did *not*. But the question we have is, did the McGuire Act amend Section 3? As stated, the Miller-Tydings Act did not because the actual statute controls over the unofficial text whenever there is a variance. There is no such problem of error with regard to the McGuire Act. It is perfectly clear in the original statute, the United States Code, and in the unofficial text. On its face it appears to endeavor by indirection to amend Section 3 It uses the same language as the Miller-Tydings Act, plus, for the Supreme Court's benefit, the emphatic insertion: "* * * or in any of the Antitrust Acts." See *Schwegmann Bros. v. Calvert Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384 (1951).

The McGuire Act reads:

> "Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements * * * when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale." (Emphasis supplied)

Our inquiry is, does the phrase "or in any of the Antitrust Acts" of the McGuire Act amend Section 3?

[*Sherman Act, Sec. 3, Not Amended*]

I do not believe that it does. The McGuire Act, too, is premised on a recognition of states' rights; witness the preamble to the Act. Further, repeals by implication are not favored, especially when the implication is a strained and dubious one, and one which would have the result of jarring anew the Sherman Act, especially its application in areas that are peculiarly the sole and exclusive property of the Federal Government, namely, the District of Columbia and incorporated territories.

There are two further reasons why I do not believe that the McGuire Act amended Section 3. I have in mind what might be called "congressional know-how." Judge Felix pointed out in *Johnson & Johnson v. Gem Sundries Co., Inc.*, Case No. 3204, decided Oct. 18, 1957, First Circuit of Hawaii, that when Congress has in mind amending the Sherman Act it does so directly, expeditiously and with clarity. Observe the fact that when in 1955 it sought to increase the penal provision from $5,000 to $50,000 it did so by not only amending Section 1 but by also expressly amending Section 3 (15 U. S. C. Sections 1 and 3; 69 Stat. 282).

The final reason why I believe that the McGuire Act does not amend Section 3 by indirection or implication is that as it is written the McGuire Act does not make sense as applied to Territorial commerce. Throughout the Sherman and Clayton Acts there is a well-defined, respected understanding of the meaning of the words "interstate," "intrastate" and "Territorial commerce." Section 45-A as amended by the McGuire Act talks about *intrastate* transactions in a territory or the District of Columbia. You simply do not have intrastate transactions in a territory or in the District of Columbia. You can only have those inside of a state. It looks to me as if, without thinking, the draftsman included the phrase "State, Territory or District of Columbia" as a stock phrase customarily used to assure application throughout the entire country. Perhaps inadvertently the draftsman did not notice this defect to which I have called attention, deemed it harmless or by some process of reasoning hoped that once Congress passed the bill some court would liberally interpret "intrastate" to include territorial commerce and the District of Columbia. Such would be without warrant under the Sherman Act, which so carefully distinguishes interstate and foreign commerce, commerce in the territories and the District of Columbia, and intrastate commerce.

[*Hawaiian Act Invalid*]

It is well-settled by the opinion of the Second Circuit in *General Electric Co. v. Masters Mail Order Co.* [1957 TRADE CASES ¶ 68,715], 244 F. 2d 681, (1957) cert. denied — U. S. — (Oct. 14, 1957, 24 Law Week 3117, No. 224), that fair trade laws are not lawful in the District of Columbia. Thus it would seem that the argument that the McGuire Act is an expression of Federal "policy" for Federal areas falls by the wayside. Congress has never thought so much of fair trade laws as to enact a Federal fair trade law applicable to territories or the District of Columbia or to interstate commerce. Indeed, the whole

structure of these exceptions to the Sherman Act are poised and balanced on the theory of respect for states' rights. Such exceptions could not apply to a territory which has no sovereignty. I am satisfied that the complaint is one which does not state a claim or claims upon which relief can be granted. The Hawaiian Fair Trade Act is in violation of Section 55 of the Hawaiian Organic Act (48 U. S. C. Section 562) in that it is and always has been inconsistent with Section 3 of the Sherman Act and hence invalid.

The motion to dismiss is granted.

[¶ 68,876] Banana Distributors, Incorporated; Percival B. Elbaum; Edith Elbaum; Joan S. Elbaum and Jerome D. Elbaum, minors, by Percival B. Elbaum, their guardian *ad litem*; and The Inland Corporation v. United Fruit Company, Fruit Dispatch Company, and John A. Werner.

In the United States District Court for the Southern District of New York. Civil 87-361. Filed December 6, 1957.

Clayton and Sherman Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Defenses—Statute of Limitations—Applicable Statute—Interpretation of State Tolling Provision.—Connecticut statutes of limitations were held applicable to a private antitrust suit brought in a Federal District Court in New York, where the causes of action asserted in the suit arose in Connecticut and the statute of limitations of the forum, New York, contained a "borrowing" provision. The Federal four-year statute of limitations was enacted after the filing of the instant suit; therefore, it was not applicable.

The Connecticut statutes of limitations provided, in effect, that the running of the statutes of limitations shall be suspended during the period of time that the defendant is absent from the state. In the instant suit, it had to be determined whether or not the defendants were absent from the state during a certain period of time. As a general rule, a Federal court must determine such a question under the laws of the state as interpreted by the courts of the state. The instant court rejected the defendants' contention that, in determining the principles applicable to the question, a Connecticut court would, and, therefore, the Federal court must, utilize the so-called Federal approach and apply the test of amenability to service under the "transacting business" test of Section 12 of the Clayton Act. The court noted that Connecticut courts do not have jurisdiction over Federal antitrust causes of action, and that there is persuasive authority for distinctions between "venue" and "process." The court ruled that a charge embodying the process provision of Section 12 of the Clayton Act was not required.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.100, 9010.200.

For the plaintiffs: Smith, Mathews, Bell & Solomon (Blackwell Smith and Ernest Leff, New York, N. Y., and Arnold, Fortas & Porter, by Thurman Arnold, Washington, D. C., of counsel), New York, N. Y.

For the defendants: Davis, Polk, Wardwell, Sunderland & Kiendl (Theodore Kiendl, Ralph M. Carson, Porter R. Chandler, Edwin J. Jacob, David G. Gill, and David L. Farley, of counsel), New York, N. Y.

For prior opinions of the U. S. District Court, Southern District of New York, see 1956 Trade Cases ¶ 68,532, 68,446, 68,445, and 68,343, and 1955 Trade Cases ¶ 68,232.

Opinion

[*Statute of Limitations*]

LEVET, District Judge [*In full text*]: This is an action for treble damages and injunctive relief under the antitrust laws. The application of the pertinent statute of limitations is immediately involved. The complaint was filed on September 3, 1953. It alleges a combination and conspiracy in violation of the federal antitrust laws commencing sometime in 1946; the complaint also alleges various overt acts constituting an illegal use of defendants' monopoly power

committed in 1947 and 1949 and continuously thereafter up to the date of suit.

[*Federal Statute*]

When the complaint was filed on September 3, 1953, there was no federal statute of limitations governing treble damage actions under the antitrust laws. The uniform four-year statute of limitations now incorporated under the Clayton Act (15 USCA § 15(b)) was not enacted until 1955.

[*New York Borrowing Statute*]

Counsel for plaintiffs and counsel for defendants agree that the causes of action herein, if any, arose in Connecticut. Furthermore, under these conditions, the parties agree that this court in determining the appropriate period of limitations must first look to the law of the forum, to wit, New York.

However, Section 13 of the New York Civil Practice Act (sometimes called the "borrowing provision") provides:

> "*Limitation where cause of action arises outside of the state.* Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, * * *"

The "borrowing statute" (Section 13 of the New York Civil Practice Act) has been consistently applied when the cause of action arose in another jurisdiction. *Seaboard Terminals Corporation v. Standard Oil Co. of New Jersey,* D. C. S. D. N. Y., 1938 [1932-1939 TRADE CASES ¶ 55,188], 24 F. Supp. 1018, affirmed, 2 Cir., 1939 [1932-1939 TRADE CASES ¶ 55,225], 104 F. 2d 659; *Electric Theater Co. v. Twentieth Century-Fox Film Corp.,* D. C. W. D. Mo., 1953, [1953 TRADE CASES ¶ 67,560], 113 F. Supp. 937; *cf. Cope v. Anderson,* 331 U. S. 461 (1947). There is no claim that any of the plaintiffs come within the saving clause in favor of New York residents.

[*Connecticut Laws*]

Hence, we are forced to consider the relevant provisions of the State of Connecticut. These (Title 63, Chapter 414, General Statutes of Connecticut, 1949 Revision) are as follows:

> "§ 8316. *Action founded upon a tort.* No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."
>
> "§ 8325. *Suit for forfeiture on penal statute limited to one year.* No suit for any forfeiture upon any penal statute shall be brought but within one year next after the commission of the offense."
>
> "§ 8330. *Defendant's absence from the state to be excluded, when.* In computing the time limited in the several cases aforesaid, the time during which the party, against whom there may be any such cause of action, shall be without the state, shall be excluded from the computation."

[*Absence from State*]

The matter at issue in this preliminary trial is whether the defendants Fruit Dispatch Company and United Fruit Company were "without the state" during the years 1947-1953.

The basic rule has been stated as follows:

> "It is well established that in determining the period of limitations applicable to actions at law, the federal courts are governed by local statutes as interpreted by the highest courts of the respective States. *Bell v. Morrison,* 1 Pet. (26 U. S.) 351, 359, 360, 363, 7 L. Ed. 174; *Graham v. Englemann,* (D. C.) 263 F. 166, 168. See, also, *Palmer v. Texas,* 212 U. S. 118, 131, 29 S. Ct. 230, 53 L. Ed. 435." *Van Dyke v. Parker,* 9 Cir., 1936, 83 F. 2d 35, 37. See *Campbell v. Haverhill,* 155 U. S. 610.

The same court (9th Circuit) approved of the same rule with respect to any exceptions raising a bar to the statute notwithstanding the fact that the legislation or judicial construction thereof is different from that prevailing in other jurisdictions (83 F. 2d at page 38). See also *Wood & Selick, Inc. v. Compagnie Generale Transatlantique,* 2 Cir., 1930, 43 F. 2d 941, 942.

Consequently, the question of whether defendants were "without the state" must be determined by the laws of Connecticut and by reference to Connecticut decisions. We are bound by the decisions of the State of Connecticut on the construction and interpretation to be given those statutes. *Leonia Amusement Corp. v. Loew's Inc.,* D. C. S. D. N. Y., 1953 [1953 TRADE CASES ¶ 67,592], 117 F. Supp. 747, 751-752; *Dibble v. Bellingham Bay Land Co.,* 163 U. S. 63, 73 (1896); *Bauserman v. Blunt,* 147 U. S. 647, 652 (1893).

In the absence of a decision by the highest court of the state, the federal court must follow the decisions of the intermediate

state courts, even though the rule may appear to be unsound or undesirable, unless it is convinced by other persuasive data that the highest court of the state would do otherwise, but it is not free to apply a different rule merely because it may think that the highest court of the state might announce a different rule in the future. 35 C. J. S. 1257.

The Connecticut statute as to tolling—that is, Section 8330—apparently was first used in 1821, although theretofore such words had been used in a statute concerning book debts enacted in 1785. The early statute provided that "in computing the time limited in the several cases aforesaid, the time during which the party, against whom there may be any such cause of action, shall be without this state, shall be excluded from the computation." Stat. p. 406, § 8 (Ed. 1838). See *Sage v. Hawley,* 16 Conn. 106, 114 (1844).

If analogous decisions clearly show the law of the state, the federal court must determine the case in accord with those decisions. *March v. Buck,* 313 U. S. 406 (1940). If the law cannot be ascertained from state decisions, only then should the federal court examine the decisions of other states on the subject or it may follow the rule established by federal decisions. *But the federal court need not engage in mere speculation as to how the state court would decide the question. New England Mut. Life Ins. Co. v. Mitchell,* 4 Cir., 1941, 118 F. 2d 414, 420, cert. denied 314 U. S. 629.

[*Amenability to Service*]

Defendants assert, however, that in determining the principles applicable to this question, the Connecticut court would, and, therefore, this court must, utilize the so-called federal approach and apply the *test of amenability to service under the "transacting business" test of the Clayton Act.* Here the defendants point to:

(1) *Bertha Building Corporation v. National Theatres Corporation,* 2 Cir., decided September 10, 1957 [1957 Trade Cases ¶ 68,818]. In this case the Second Circuit stated:

> "* * * decisions as to whether these suits are barred by the statute depends upon whether National could have been sued by these plaintiffs in California before the California statute of limitations had run, and so comes down to a question of *venue* in respect to each of such supposititious suits." (Italics supplied.)

This language from the *Bertha* case would not appear to be pertinent since we are not concerned with a question of venue but, rather, with a question of amenability to process. Furthermore, on petition for rehearing (*Bertha Building Corporation v. National Theatres Corporation,* 2 Cir., decided November 7, 1957 [1957 Trade Cases ¶ 68,860]) the Court of Appeals in a per curiam opinion expressly noted that it was not passing upon the question of whether New York law determined tolling under the New York statute (New York Civil Practice Act, § 19).

(2) *Seaboard Terminals Corporation v. Standard Oil Co. of New Jersey,* D. C. S. D. N. Y., 1938 [1932-1939 Trade Cases ¶ 55,188], 24 F. Supp. 1018, affirmed, 2 Cir., 1939 [1932-1939 Trade Cases ¶ 55,225], 104 F. 2d 659:

In the *Seaboard* case, one of the questions before Judge Patterson was whether the Maryland statute of limitations had run against the defendant, Socony-Vacuum Oil Company, or whether the Maryland statute had been tolled due to its absence from the state. The defendant Socony argued that while it was not subject to suit generally in Maryland, it was subject to an action there for treble damages under the Clayton Act. Judge Patterson in rejecting this contention stated:

> "* * * The only activity of this defendant in Maryland shown on these papers, however, is the statement in the amended complaint that it has bought, sold, transported and caused to be transported gasoline and other petroleum products from and to Maryland, Pennsylvania and other states. In my opinion this falls short of alleging that it 'transacted business' in Maryland to a sufficient extent to be subject to civil action there under the Clayton Act." (p. 1020)

Neither the lower court nor the Court of Appeals in the *Seaboard* case was squarely faced with the problem of determining whether to read the "transacting business" text of the Clayton Act into the Maryland tolling provision since even under Section 12 of the Clayton Act, defendant Socony had not "transacted business" in Maryland.

The *Seaboard* case, therefore, would not appear to support defendants' position which would in effect require this court to incor-

porate or absorb federal decisions dealing with venue under Section 12 of the Clayton Act into an interpretation of the Connecticut tolling provision.

[*Clayton Act*]

The statute concerned is Title 15 U S C A § 22, which is as follows:

"§ 22. District in which to sue corporation

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or where it may be found."

The legislative history of the "transacting business" amendment to the Clayton Act was discussed by the Supreme Court in *United States v. National City Lines, Inc.* [1948-1949 TRADE CASES ¶ 62,259], 334 U. S. 573, 581-587. At page 583, the court said:

"The basic aim of the advocates of change was to give the plaintiff the right to bring suit and have it tried in the district where the defendant had committed violations of the Act and inflicted the forbidden injuries. At first they were not much concerned with the exact formulation of the language to accomplish this, several formulas being proposed from time to time. But they were convinced that restricting the choice of *venue* to districts in which the defendant 'resides or is found' was not adequate to assure that the suit could be brought where the cause of action arose, and therefore insisted on change in order to assure that result." (Italics supplied.)

In the legislative history of this section there is evidence indicating that its purpose related to venue and not to service. In discussing the purposes of the amendment Senator Chilton stated:

"* * * That provides where the suit may be brought. It does not give any further jurisdiction or right. If, as a matter of fact, the suit could not be brought before that section was passed, it would not allow the suit to be brought afterwards. It only speaks of the service of the process and where the suit may be brought. It does not refer to the jurisdiction of the court. The other language of the section provides that process may be served in another district. That is already the law. If the bill be passed, if the court has jurisdiction of the case, suits may be brought in one district and the other defendants may be served in another district." (See 51 Congressional Record, 63rd Congress, 2nd Session, 1914, p. 16,049.)

[*Issue Restated*]

The problem restated, however, is whether in this instance, the Connecticut courts (1) would be presumed to consider the federal statute and (2) to follow the interpretation of such statute as decided in the federal decisions.

The difficulty here is that unless a state court is given jurisdiction over antitrust cases, no Connecticut courts would have occasion to determine a specific question of application of Section 8330 to such an action. Thus, we are asked by the defendants to suppose that this court is the Connecticut Court of Errors passing on the application of the Connecticut tolling statute to a cause of action on which the Connecticut courts have no jurisdictional basis to entertain. "In essence, the question is whether the federal courts should or should not be required to make and document that kind of hypothetical estimate; it can never be more than that for the obvious reason that state courts do not have jurisdiction to hear antitrust complaints." See "The Statute of Limitations in Antitrust Litigation." Carl H. Fulda and Howard C. Klemme, 16 Ohio State Law Journal, 233, 238. Also see Disparities in Time Limitations on Federal Causes of Action, 49 Yale Law Journal, 738; Limitations and the Federal Courts, William Wirt Blume and B. J. George, Jr., 49 Michigan Law Review, 937.

The first clause of Section 22 deals with *venue* in which a corporation may be served; the second clause deals with service of process on the corporation. The two are not identical. *Venue* may be (a) in the district wherein the corporation is an "inhabitant;" (b) wherein it may be found; or (c) wherein it transacts business. *Process* may be served upon the corporation (a) "in the district of which it is an inhabitant" or (b) "wherever it may be found."

By the same token, the decisions interpreting Section 22 in reference to "transacting business" relate primarily to *venue*, not *process*.

Jeffrey-Nichols Motor Co. v. Hupp Motor Car Corporation, 1 Cir., 1931, 46 F. 2d 623:

Here plaintiff sued defendant, a Virginia corporation, in Massachusetts following service in Massachusetts. The court wrote:

"The defendant appeared by counsel for the sole purpose of objecting to the jurisdiction, and filed a motion to dismiss the action on the ground that the defendant was not a resident nor did it transact business in Massachusetts. * * * " (p. 624)

The court further stated:

"Prior to the enactment of October 16, 1914, c. 323, § 12, 38 Stat. 736 (15 USCA § 22), a person or corporation violating the anti-trust laws could only be sued in the district where resident, or where found. The provision of section 12 of the Clayton Act relieved 'the injured person from the necessity of resorting for the redress of wrongs committed by a nonresident corporation, to a district, however distant, in which it resides or may be "found"—often an insuperable obstacle —and enabling him to institute the suit in a district, frequently that of his own residence, in which the corporation in fact transacts business, and bring it before the court by the service of process in a district in which it resides or may be "found."' *Eastman Co. v. Southern Photo Co.*, 273 U. S. 359, 373, 374, 47 S. Ct. 400, 403, 71 L. Ed. 684; *Gen. Inv. Co. v. Lake Shore Rwy.*, 260 U. S. 261, 279, 43 S. Ct. 106, 67 L. Ed. 244." (p. 624)

Katz Drug Co. v. W. A. Sheaffer Pen Co., D. C. W. D. No., 1932, 6 F. Supp. 210:

Here Judge Reeves, apparently speaking of the above distinction, said:

"It does not follow that because it was transacting business in the district it could be regarded as present in the district or that 'it may be found' there. * * *" (p. 212)

Adolph Meyer, Inc. v. Florists' Telegraph Delivery Ass'n, Inc., D. C. S. D. N. Y., 1936 [1932-1939 Trade Cases ¶ 55,124], 16 F. Supp. 783:

In this case Judge Knox wrote:

"The opinion of the Supreme Court in *Eastman Kodak Company v. Southern Photo Company*, 273 U. S. 359, at page 373, 47 S. Ct. 400, 403, 71 L. Ed. 684, very definitely points out that the 'transaction of business' by a foreign corporation within the confines of a particular judicial district is of wider significance than the 'doing of business' within such district so as to subject the corporation to the valid service of process therein. The quotation from 273 U. S. 359, at page 371, 47 S. Ct. 400, 402, 71 L. Ed. 684, of the aforementioned opinion, and contained on page 13 of defendant's brief, has to do with the service of process within a district in which a defendant 'does business' and is not an interpretation of what constitutes the transaction of business under the venue provisions of the Clayton Act (38 Stat. 730)." (p. 783)

Lechler Laboratories, Inc. v. Duart Mfg. Co., Inc., D. C. S. D. N. Y., 1940, 35 F. Supp. 839:

Judge Mandelbaum said in this case:

"It is settled that the quantum of business which must be transacted by a corporation in a district to place the venue of an action under the anti-trust acts is less than the 'doing business' which is necessary to sustain the service of process. *Eastman Kodak Co. v. Southern Co.*, 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684; *Hansen Packing Co. v. Armour & Co.*, D. C., 16 F. Supp. 784; *Meyer, Inc. v. Florists' Telegraph Delivery Association, Inc.*, D. C., 16 F. Supp. 783; *Haskell v. Aluminum Co. of America*, D. C., 14 F. 2d 864; *United States v. Aluminum Co. of America*, D. C., 20 F. Supp. 13; *Sure-Fit Products Co. v. Fry Products Co.*, D. C., 23 F. Supp. 610; *Deutsch v. Times Pub. Corporation*, D. C., 33 F. Supp. 957. * * *" (p. 840)

Abrams v. Bendix Home Appliances, Inc., D. C. S. D. N. Y., 1951 [1950-1951 Trade Cases ¶ 62,792], 96 F. Supp. 3:

Judge Weinfeld very properly wrote:

"Section 12 of the Clayton Act is an enlargement of jurisdiction granted under Section 7 of the Sherman Anti-Trust Act, 15 U. S. C. A. § 15, which restricted suits to the district in which the defendant 'resides or is found' and so controlled both the place of service of process and venue. *United States v. Scophony Corporation of America*, 333 U. S. 795, 804, 68 S. Ct. 855, 92 L. Ed. 1091. * * *

"As indicated in the *Eastman* [273 U. S. 359] and *Scophony* cases, venue may be proper in a district, although the corporation may not be subject to service of process there. It follows that the standard to be applied in determining whether a corporation 'transacts business' for the purposes of venue under Section 12 is more liberal than that used in deciding the validity of service. * * *" (p. 5)

Similiter see:

Windsor Theatre Co. v. Loew's Inc., D. C. Distict of Columbia, 1948 [1948-1949 Trade Cases ¶ 62,277], 79 F. Supp. 871; *United States v. E. I. du Pont de Nemours & Co.*,

D. C. N. D. Ill., 1950 [1950-1951 TRADE CASES ¶ 62,557], 87 F. Supp. 962; *Austad v. United States Steel Corp.*, D. C. N. D. Cal., 1956, 141 F. Supp. 437.

[*Ruling*]

There is, therefore, persuasive authority for the above distinctions between "venue" and "process." Consequently, application of the so-called "liberal federal approach" (which in essence deals with nothing more than venue) to this problem of Connecticut interpretation of Section 8330 of the laws of that state is, in my opinion, erroneous.

It would be equally erroneous, in my opinion, to submit to the jury the question of whether defendants can be "found" in Connecticut within the meaning of Section 12 of the Clayton Act since there would appear to be no justification for incorporating or absorbing the federal statutory language into the Connecticut tolling provision. In any event, there seems to be no substantial distinction between the process test set forth in Section 12 of the Clayton Act, and the process test applied by the Connecticut courts. Thus, in *Eastman Kodak Company of New York v. Southern Photo Materials Company*, 273 U. S. 359 (1927) the Supreme Court in discussing the original provision in Section 7 of the antitrust act which authorized suit "in the district in which the defendant resides or is found" stated:

"* * * In *Peoples Tobacco Co. v. Am. Tobacco Co.*, 246 U. S. 79, 84, 86—decided in 1918—it was held that this provision, as applied to a corporation sued in a district in which it did not reside, required that it 'be present in the district by its officers and agents carrying on the business of the corporation,' this being the only way in which it could be said to be 'found' within the district; that to make it amenable to service of process in the district, the business must be of such nature and character as to warrant the inference that it had subjected itself to the local jurisdiction, and was by its duly authorized officers or agents present therein; and that advertising its goods in a State and sending its soliciting agents therein, did not amount to 'that doing of business' which subjected it to the local jurisdiction for the purpose of serving process upon it." (p. 371)

Therefore, a charge embodying the process provision of Section 12 of the Clayton Act is not required.

[¶ 68,877] Paper Mate Manufacturing Co. v. A. Rosenblum, Inc.

In the New York Supreme Court, New York County, Special Term, Part III. 138 N. Y. L. J., No. 111, page 6. Dated December 9, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Temporary Injunction—Availability of Defenses.—A fair trader was granted a temporary fair trade injunction where the claimed offending sales were not denied. A number of defenses were unavailable to the defendant, as an offending seller, to defeat the application.

See Fair Trade, Vol. 1, ¶ 3420.

[*Temporary Injunction*]

McGIVERN, Justice [*In full text*]: Plaintiff moves for temporary injunction in enforcement of the Feld-Crawford Act. The claimed offending sales are not denied. Defendant attempts to assert a number of defenses, but as an offending seller they are unavailable to him to defeat this application. The motion is granted with bond in the sum of $1,000. Settle order.

[¶ 68,878] Julius Kayser & Co. v. E. J. Korvette, Inc.

In the New York Supreme Court, New York County, Special Term, Part III. 138 N. Y. L. J., No. 112, page 6. Dated December 10, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Temporary Injunction—Triable Issue—Purchase of Merchandise Prior to Fair Trade Contract.—A fair trader was denied a temporary injunction where there was a triable issue as to whether or not the defendant purchased the fair trader's merchandise prior to the date of the fair trader's first fair trade contract.

See Fair Trade, Vol. 1, ¶ 3268.34.

[*Temporary Injunction*]

McGivern, Justice [*In full text*]: Plaintiff moves for a temporary injunction in enforcement of the Feld-Crawford Act. Whether plaintiff is entitled to such drastic relief depends here solely upon the pertinent facts and circumstances surrounding the one claimed offending sale. Notice of plaintiff's fair trade program was given to the defendant by letter dated October 10, 1957. The program is evidenced by contracts dated September 25, September 30 and Octber 1, 1957. Whether defendant made its purchase of stock of plaintiff's merchandise prior to September 25, 1957, as claimed, must remain for trial and cannot be determined on this application to support the requested drastic relief (*E-Z Mills, Inc., v. E. J. Korvette, Inc.*, Spector, J., N. Y. L. J., May 1, 1957; *Cluett, Peabody & Son Co., Inc., v. J. W. Mays, Inc.*, Hofstadter, J., N. Y. L. J., May 22, 1957). The motion is denied. Order signed.

[¶ 68,879] Whitaker Pharmacy, Inc. v. Pinkiert Supply Store, Inc.

In the New York Supreme Court, Westchester County. 138 N. Y. L. J., No. 111, page 14. Dated December 9, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Suit by Retailer—Temporary Injunction—Defenses—Enforcement Activity or Policy of Fair Traders.—A retailer was granted a temporary injunction restraining a competing retailer from selling fair traded products at less than their established prices. The defendant did not deny its price cutting, and its affidavit that other retailers and discount houses were selling the products below fair trade prices and that the manufacturers and distributors were not diligently and in good faith enforcing their fair trade contracts was held insufficient to defeat the application.

See Fair Trade, Vol. 1, ¶ 3440.34.

[*Temporary Injunction*]

Eager, Justice [*In full text*]: This is a motion for a temporary injunction in action by retailer to restrain a competing retailer from selling trade marked and branded products at less than the minimum prices established pursuant to the Fair Trade Law. The moving affidavits clearly show repeated and continual unlawful price cutting by defendant, and the defendant, advertising as a "discount center," does not deny its price cutting. The plaintiff has made a clear case for a temporary injunction which is not to be defeated by the general and rather inconclusive averments in defendant's affidavit that other retailers and discount houses in the county and in the metropolitan area are selling the products at less than the fair trade prices and that the manufacturers and distributors are not diligently and in good faith enforcing their Fair Trade Law contracts (see, particularly, *General Electric Co. v. Masters, Inc.*, [1952 Trade Cases ¶ 67,382], 122 N. Y. S., 2d, 14, aff'd 281 App. Div., 827, 118 N. Y. S., 2d, 927; *Fisher v. Rothberg*, Mr. Justice Olliffe, N. Y. L. J., March 4, 1955 [1955 Trade Cases ¶ 68,029]; *Librandi v. Berners Pharmacy, Inc.*, Mr. Justice Dineen, N. Y. L. J., January 25, 1955) [1955 Trade Cases ¶ 67,966]. Motion granted. Plaintiff shall give an undertaking in the sum of $5,000. Settle order on notice.

[¶ 68,880] Parmelee Transportation Company v. John L. Keeshin, et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 56 C 323. Dated November 13, 1957.

Clayton and Sherman Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Pretrial Procedures—Interrogatories.—In a private antitrust action, the court sustained the plaintiff's objection to the defendants' interrogatories requesting financial information which would tend to show whether or not the plaintiff was making (or should have made) a profit in various years on the ground that interrogatories relating to damages will not be allowed until liability is established, and sustained the defendants' objection to the plaintiff's interrogatories requesting the defendants to list every pending Interstate Commerce Commission proceeding (for a period of several months) to which they were parties on the ground that such information is of public record.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.875.

For the plaintiff: Lee A. Freeman, Chicago, Ill.

For the defendants: Noah Walker, M. A. Garvey, D. J. Parker, and Charles F. Hough, Chicago, Ill.

For a prior opinion of the U. S. District Court, Northern District of Illinois, Eastern Division, see 1956 Trade Cases ¶ 68,484.

[*Objections to Interrogatories*]

Memorandum

PHILIP L. SULLIVAN, District Judge [*In full text*]: In this civil anti-trust action pre-trial discovery proceedings in one form or another have been under way for some months. In connection with them, three motions are now before the court.

I

Defendants' Objections to Plaintiff's Interrogatories of July 1, 1957 (Objections Filed August 7, 1957).

Plaintiff has served each of defendant railroads with three interrogatories, to which all defendants object. (For the purpose of this motion the interrogatories may be treated as identical; the slight variation in one instance is immaterial.)

Interrogatory No. 1 asks each railroad to list the docket number and title of every proceeding pending before the Interstate Commerce Commission for a period of several months, to which the railroad or any of its subsidiaries were parties; No. 2 asks for further information relating to each case so listed; and No. 3 inquires whether any officer of the railroad conferred informally with Cross about any of the proceedings listed in response to Interrogatories Numbers 1 and 2.

It is not necessary to consider now all of the arguments advanced by counsel. The objections to Interrogatories Numbers 1 and 2 will be sustained on the ground that the matters requested are of record in the files of the Interstate Commerce Commission and therefore available to the plaintiff. Plaintiff's objection that the names of parties are not spelled out in the titles to Interstate Commerce Commission cases has some merit. Nevertheless, while this may make the task more difficult, it does not make it impossible. (In its answering brief of September 21, 1957, on another motion, plaintiff describes this information as "more readily accessible" to the defendants than to plaintiff). No doubt it is true, as plaintiff insists, that defendants could compile the list much more easily than plaintiff; but it does not follow that the court can compel them to do so.

Even if the matters here requested are regarded as not available to the plaintiff because of the equivocal nature of the titles to the cases, it would be necessary to find that Interrogatories Numbers 1 and 2 are improper. It is apparent that the answers to them would consist of a list of thousands of cases. This is simply too unwieldy to make sense; court and counsel would soon be lost in a morass of lists.

As for Interrogatory No. 3, it must fail in its present form, since by its wording it depends upon Numbers 1 and 2. Therefore, no consideration is given at this time to the various arguments of counsel as to its relevancy.

The objections of each of the defendant railroads to the interrogatories propounded by plaintiff on July 1, 1957, are sustained.

II

Objections of Plaintiff to Interrogatories Propounded by Certain Defendants on May 31, 1957 (Objections of July 1, 1957).

The challenged interrogatories request plaintiff to furnish financial information which would tend to show whether or not the plaintiff was making (or should have made) a profit in various years. The case made by defendants for the relevancy of these questions is weak, and they appear to relate principally to statements assumed in the briefs. Defendants state that these interrogatories might in any event show that plaintiff's damages were not as extensive as claimed by the complaint. Although there is a conflict of authority on the subject, the better view is that interrogatories relating to damages will not be allowed until liability is established. (*Ball v. Paramount Pictures*) [1944-1945 Trade Cases ¶ 57,311], 4 F. R. D. 194, 196 (W. D. Pa. 1944); *Lyophile-Cryochem Corp. v. Chas. Pfizer Corp.*, 7 F. R. D. 352, 364 (E. D. N. Y. 1947); *Zenith Radio Corp. v. Dictograph Products, Inc.*, 6 F. R. D. 597, 599 (D. Del. 1947).

Plaintiff's objections to defendants' interrogatories of May 31, 1957, are sustained.

III

Motion (Sept. 6, 1957) of Defendants to Compel Further Answer to Certain of the Interrogatories of May 31, 1957.

Although, as noted above, plaintiff objected to some of the interrogatories of May 31, 1957, it answered others. Defendants now request that plaintiff be required to elucidate several of these answers.

(A) *Objections to answer to Interrogatory No. 2.*

This interrogatory asks about plaintiff's contracts with various railroads. The answer states that the "terms of these agreements were matters of practice and usage." This is not sufficiently definite, and the objection will be sustained.

(B) *Objection to answer to Interrogatory No. 8(c)(1).*

Since it is apparent from the briefs that the parties are in substantial agreement as to the form and content of a proper answer, the objection will be sustained.

(C) *Objections to answer to Interrogatory No. 12.*

In answer to an inquiry as to alleged agreements between Keeshin and Cross, plaintiff has stated "Plaintiff believes that promises * * * were oral but written memoranda of and documents based upon such promise may have been prepared and may still exist."

Plaintiff should state definitely whether or not it knows of any written memoranda; to that extent the objection is sustained. If it does not know of any, no further consideration of the objections will be necessary. If it does know of some but refuses to reveal them, the objections may be reconsidered.

(D) *Objection to answer to Interrogatory No. 13.*

The answer is sufficient and the objection be overruled.

(E) *Objection to answer to Interrogatory No. 14.*

Plaintiff has in effect answered by saying it does not know. This is all it can do, and the objection is overruled.

(F) *Objection to answer to Interrogatory No. 15.*

Since it appears from the briefs that the parties are in agreement, the objection will be sustained.

Summary

I

Defendants' objections (of August 7, 1957) to plaintiff's interrogatories of July 1, 1957: Sustained.

II

Plaintiff's objections (of July 1, 1957) to defendants' interrogatories of May 31, 1957: Sustained.

III

Defendants' motion (of Sept. 6, 1957) to compel further answers by plaintiff to interrogatories of May 31, 1957: Defendants'

objections to the answers are sustained, and its motion granted, as to Interrogatories Numbers 2, 8(c)(1) and 15; the motion is granted to the extent indicated above for Interrogatory No. 12; the motion is denied as to Interrogatories 13 and 14.

[¶ 68,881] Banana Distributors, Incorporated; Percival B. Elbaum; Edith Elbaum; Joan S. Elbaum and Jerome D. Elbaum, minors, by Percival B. Elbaum, their guardian *ad litem;* and The Inland Corporation v. United Fruit Company, Fruit Dispatch Company, and John A. Werner.

In the United States District Court for the Southern District of New York. Civil 87-361. Filed December 12, 1957.

Clayton and Sherman Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Defenses—Statute of Limitations—Applicable State Statute—Nature of Treble Damage Action.—A New York three-year statute of limitations, covering any action upon a statute for a penalty or forfeiture, rather than a New York six-year statute of limitations, covering any action to recover upon a liability created by statute (except a penalty or forfeiture), was held to be applicable to a private antitrust action brought in a Federal District Court in New York.

In determining the applicable statute of limitations, the court first looked to the law of the forum, that is, New York. The New York statutes provided that where a cause of action arises outside of the state, an action cannot be brought in a state court to enforce such cause of action after the expiration of the time limited by the laws either of the state or of the state where the cause of action arose. The cause of action in the instant action arose in Connecticut, and the Connecticut statutes of limitations provided, in effect, that the running of the Connecticut statutes of limitations shall be suspended during the period of time that the defendant is absent from the state. A jury rendered a verdict finding that the defendants were absent from Connecticut during a six-year period immediately prior to suit. Consequently, since the statute of limitations of Connecticut was tolled by reason of the absence of the defendants from Connecticut, the New York statutes of limitations were applicable to the action.

In determining the applicable New York statute of limitations, the court ruled that the question of whether the cause of action is a cause of action upon a statute for a penalty or forfeiture must be determined by the decisions of the courts of New York, and that the New York courts may decide to be guided by federal court decisions as to the nature of the cause of action. The court found that there were no authoritative New York decisions which were determinative of the issue, that there was evidence that certain New York courts in decisions dealing with federal statutes had resorted to federal determinations for guidance purposes, and that the weight of authorities in federal decisions and in federal expressions of characterization of a federal treble damage action required the choice of the statute of limitations applicable to an action upon a statute for a penalty or forfeiture.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.100, 9010.200.

For the plaintiffs: Smith, Mathews, Bell & Solomon (Blackwell Smith and Ernest Leff, New York, N. Y., and Arnold, Fortas & Porter, by Thurman Arnold, Washington, D. C., of counsel), New York, N. Y.

For the defendants: Davis, Polk, Wardwell, Sunderland & Kiendl (Theodore Kiendl, Ralph M. Carson, Porter R. Chandler, Edwin J. Jacob, David G. Gill, and David L. Farley, of counsel), New York, N. Y.

For prior opinions of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,876; 1956 Trade Cases ¶ 68,532, 68,446, 68,445, and 68,343; and 1955 Trade Cases ¶ 68,232.

Opinion Re New York Statute of Limitations

[*Issue*]

RICHARD H. LEVET, District Judge [*In full text*]: The question immediately involved in this action at this juncture is, what statute of limitations of the State of New York is available to the defense herein. It is concededly either a three-year period under Section 49, subdivision 3, or a six-year term under Section 48, subdivision 2 of the New York Civil Practice Act.

[*Nature of Action*]

The action is for treble damages and injunctive relief under the antitrust laws. The complaint was filed on September 3, 1953. It alleges a combination and conspiracy in violation of the federal antitrust laws commencing sometime in 1946; the complaint also alleges various overt acts constituting an illegal use of defendants' monopoly power committed in 1947 and 1949 and continuously thereafter up to the date of suit.

[*Federal Statute*]

When the complaint was filed on September 3, 1953, there was no federal statute of limitations governing treble damage actions under the antitrust laws. The uniform four-year statute of limitations now incorporated under the Clayton Act (15 USCA § 15(b)) was not enacted until 1955.

[*New York "Borrowing" Provision*]

Counsel for plaintiffs and counsel for defendants have agreed that the causes of action herein, if any, arose in Connecticut. Furthermore, under these conditions, the parties conceded that in determining the appropriate period of limitations this court must first look to the law of the forum, to wit, New York.

However, Section 13 of the New York Civil Practice Act (sometimes called the "borrowing provision") provides:

> "*Limitation where cause of action arises outside of the state.* Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, * * *"

This "borrowing statute" (Section 13 of the New York Civil Practice Act) has been consistently applied when the cause of action arose in another jurisdiction. *Seaboard Terminals Corporation v. Standard Oil Co. of New Jersey,* D. C. S. D. N. Y., 1938 [1932-1939 TRADE CASES ¶ 55,188], 24 F. Supp. 1018, affirmed 2 Cir., 1939 [1932-1939 TRADE CASES ¶ 55,225], 104 F. 2d 659; *Bertha Building Corporation v. National Theatres Corporation,* 2 Cir., decided September 10, 1957, Docket Nos. 24253-4 [1957 TRADE CASES ¶ 68,818]; *cf. Cope v. Anderson,* 331 U. S. 461 (1947). There was no claim that any of the plaintiffs come within the saving clause in favor of New York residents.

[*Connecticut Statutes*]

Hence, we were forced to consider the relevant provisions of Section 8330 of the Statutes of the State of Connecticut, which is as follows:

> "§ 8330. *Defendant's absence from the state to be excluded, when.* In computing the time limited in the several cases aforesaid, the time during which the party, against whom there may be any such cause of action, shall be without the state, shall be excluded from the computation."

A preliminary trial with a jury was held to determine whether the defendants Fruit Dispatch Company and United Fruit Company under said Section 8330 were "without the State" of Connecticut during the years 1947-1953 (see opinion of this court with respect to certain phases thereof, dated December 5, 1957).

At the conclusion of this preliminary trial on December 5, 1957, the jury rendered a special verdict by which it was held that both of these corporate defendants, to wit, Fruit Dispatch Company and United Fruit Company, were "without the State" of Connecticut during the entire six-year period immediately prior to suit, that is, from September 3, 1947 through September 3, 1953. At this trial the defendants stipulated in effect that the defendant John A. Werner was not within the state in the appropriate period. The motion of defendants to set aside this verdict was denied.

[*New York Statutes Control*]

Consequently, since the statute of limitations of Connecticut, in which the cause of action arose, is thus tolled by reason of all three defendants being out of the State

of Connecticut, the New York Statutes of Limitations control. See *American Surety Company of New York v. Gainfort*, 2 Cir., 1955, 219 F. 2d 111.

[*Applicable Statute*]

Section 48, subdivision 2 of the New York Civil Practice Act provides:

"§ 48. *Actions to be commenced within six years.* The following actions must be commenced within six years after the cause of action has accrued:

* * *

"2. An action to recover upon a liability created by statute, except a penalty or forfeiture."

Section 49, subdivision 3 of the New York Civil Practice Act provides:

"§ 49. *Actions to be commenced within three years.* The following actions must be commenced within three years after the cause of action has accrued:

* * *

"3. An action upon a statute for a penalty or forfeiture where the action is given to the person aggrieved or to that person and the people of the state, except where the statute imposing it prescribes a different limitation."

This, then, is the issue for our decision: Is the period six years under Section 48, subdivision 2, or three years under Section 49, subdivision 3?

The general rule is that this court in interpretation of the New York State rules of limitation must look to the constructions of such rules as determined by the highest court of this state. *Bauserman v. Blunt*, 147 U. S. 647, 652 (1893); *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 73 (1896).

Therefore, the question of whether the cause of action involved is a cause of action upon a statute for a penalty or forfeiture must be determined by the decisions of the courts of New York. *Hoskins Coal & Dock Corp. v. Truax Traer Coal Co.*, 7 Cir., 1951 [1950-1951 TRADE CASES ¶ 62,925], 191 F. 2d 912, cert. denied 342 U. S. 947 (1952); *Schiffman Bros., Inc. v. Texas Co.*, 7 Cir., 1952 [1952 TRADE CASES ¶ 67,270], 196 F. 2d 695; *Gordon v. Loew's Incorporated*, 3 Cir., 1957 [1957 TRADE CASES ¶ 68,783, 68,820], 247 F. 2d 451.

The New York state courts may, of course, if they so elect, decide to be *guided* by federal court decisions as to the nature of a cause, especially if based upon federal statutes. See *DiBitetto v. Sussman*, 279 App. Div. 1033 (2nd Dept. 1952); *Corcoran v. Nelson Towers Realty Corporation*, 42 N. Y. S. 2d 265 (Sup. Ct. N. Y. Co. 1942); *Drenne v. Mutual Life Ins. Co. of New York*, 42 N. Y. S. 2d 259 (Sup. Ct. N. Y. Co. 1943).

[*Penal Character of Action*]

Title 15 U. S. C. A. § 15 is as follows:

"*15. Suits by persons injured; amount of recovery*

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

An analysis of the statutory provisions upon which the plaintiffs sue, clearly indicates that the actual loss sustained by plaintiffs is only a base upon which the sanction of treble damages is superimposed. Thus, the fundamentally penal character of the right of action is evident.

At the time of the passage of the Sherman Act, Senator Hoar of Massachusetts, an eminent member of the Bar, one of the sponsors of the bill in the Senate, said of Section 7 of the Sherman Act:

"* * * This section, which is proposed to be amended, is a section establishing a penalty, threefold damages. Now, you cannot clothe a state court with the authority to enforce a penalty. * * *

"* * * we cannot say that a state court shall be clothed with jurisdiction to enforce a claim for threefold damages suffered, which is purely penal and punitive." See 21st Cong. Rec., 3146-3147 (51 Cong., 1st Sess., April 8, 1890).

In the Ninth Circuit in 1955 in *Karseal Corporation v. Richfield Oil Corporation* [1955 TRADE CASES ¶ 68,020], 221 F. 2d 358, the opinion expounded the purposes of the antitrust acts:

"Free enterprise is a basic concept of our economy but contained therein is the corollary of free and fair competition. The broad scope of the antitrust laws, was part of the legislative scheme 'intended in the most comprehensive way to provide against combinations or conspiracies in restraint of trade or com-

merce * * *', *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 1915, 236 U. S. 165, 173, 35 S. Ct. 398, 401, 59 L. Ed. 520, and thus gave substance to those basic concepts and corollaries. The Clayton Act was part of the overall plan and the 'right of the injured party to recover damages was intended to provoke greater respect to the Act * * *', *Maltz v. Sax*, 7 Cir., 1943, 134 F. 2d 2, 5, certiorari denied 319 U. S. 772, 63 S. Ct. 1437, 87 L. Ed. 1720. 'The treble-damage action was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute.' *Fanchon & Marco v. Paramount Pictures*, D. C. S. D. Cal. 1951, 100 F. Supp. 84, 88, affirmed *Fanchon & Marco, Inc., v. Paramount Pictures Inc.*, 9 Cir., 1954, 215 F. 2d 167, certiorari denied 348 U. S. 912, 75 S. Ct. 293. The object of the three main statutes, Sherman, Clayton and Robinson-Patman Acts, 15 U. S. C. A. § 1 *et seq.*, comprising the antitrust laws, 'is to protect "the interstate market"', *Balian Ice Cream Co. v. Arden Farms Co.*, D. C. S. D. Cal. 1950, 94 F. Supp. 796, 800." (p. 365)

Judge Yankwich in *Fanchon & Marco v. Paramount Pictures, Inc.*, D. C. S. D. Cal., 1951 [1950-1951 TRADE CASES ¶ 62,909], 100 F. Supp. 84, wrote:

"The treble-damage action was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute. * * *" (p. 38)

In *Fleitmann v. Welsbach Co.*, 240 U. S. 27 (1916), Holmes, J., described a private Sherman Act case as involving "a penalty of triple damages." (p. 29)

In *United States v. Standard Ultramarine and Color Company*, D. C. S. D. N. Y., 1955 [1955 TRADE CASES ¶ 68,237], 137 F. Supp. 167, Judge Weinfeld wrote:

"Congress, to secure effective enforcement of the antitrust laws, provided both criminal and civil sanctions through governmental agencies. But it was not content to rely solely upon official action. It sought to encourage individuals to aid in the policing. And to help achieve the broad objectives of the Act the treble damage action was authorized in favor of those who had been injured by the condemned conduct. Its purpose was not only the redress of private wrong but also the protection of the public interest. And 'Congress intended to use private self-interest as a means of enforcement * * * when it gave to any injured party a private cause of action * * *.' Another purpose in permitting an injured party to recover three-fold his actual damage was that substantial verdicts against the wrongdoer would constitute punitive sanctions—to act as a deterrent against a repetition of the offense and to serve as a warning to potential violators." (p. 171)

As long ago as 1907, in the Circuit Court, Southern District of New York, in a case entitled *American Banana Co. v. United Fruit Co.*, 153 Fed. 943, Judge Lacombe said:

"* * * It seems entirely clear that this is a penal action. It is instituted by a person who claims to have been injured by the unlawful acts of defendant to recover, not only the damages which will compensate him for any loss he has sustained, but also a penalty of twice as much again, which represents no damages, but only a fine imposed for bad conduct." (p. 944)

In the Circuit Court of Appeals, Second Circuit, 1928, in the case entitled *Decorative Stone Co. v. Building Trades Council*, 23 F. 2d 426, involving the antitrust laws under the Clayton Act, Swan, Circuit Judge, stated on page 427:

"As to the claim for triple damages, the answer is found in the doctrine of *Fleitman v. Welsbach Co.*, 240 U. S. 27, 36 S. Ct. 233, 60 L. Ed. 505, where it was held that damages under section 7 of the Sherman Act (26 Stat. 209, 210 [15 USCA § 15]) could not be awarded in a shareholder's representative action in equity, inasmuch as the act contemplated that the infliction of '*the penalty of triple damages*' should not be enforced, 'otherwise than through the verdict of a jury in a court of common law.' * * * The right to *recover penal damages* still remains a right enforceable only in a common-law action." (Emphasis supplied)

In a later case in the Second Circuit, in 1955, *Lyons v. Westinghouse Electric Corporation* [1955 TRADE CASES ¶ 68,008, 68,032], 222 F. 2d 184, cert. denied 350 U. S. 825 (1955), a private triple damage action under the antitrust acts, Learned Hand, Circuit Judge, wrote:

"* * * The remedy provided is not solely civil; two thirds of the recovery is not remedial and inevitably presupposes a punitive purpose. It is like a qui tam action, except that the plaintiff keeps all the penalty, instead of sharing it with the sovereign." (p. 189)

To whom must the action upon a statute be a penalty or forfeiture? Judge Cardozo in *Cox v. Lykes Brothers,* 1924, 237 N. Y. 376, said:

"* * * We are to remember that the same provision may be penal as to the offender and remedial as to the sufferer (*Huntington v. Attrill,* 146 U. S. 657, 667; *Loucks v. Standard Oil Co. of N. Y.,* 224 N. Y. 99). The nature of the problem will determine whether we are to take one viewpoint or the other." (p. 380)

In connection with a consideration of the statute of limitations in determining the pertinent section of the New York Civil Practice Act, the impact of a suit under the federal antitrust acts is clearly upon the defendants. The defendants pay, and as to them a penalty is exacted.

[*Non-Penal Character of Action*]

There are a number of cases involving civil antitrust litigation in which an action for treble damages under the Clayton Act has been held to be one brought to recover upon a liability created by statute within the meaning of Section 48, subdivision 2 of the New York Civil Practice Act, rather than one to recover a penalty within the meaning of Section 49, subdivision 3 of the New York Civil Practice Act.

The leading decision in which this view is maintained is *Leonia Amusement Corp. v. Loew's Inc.,* D. C. S. D. N. Y., 1953 [1953 TRADE CASES ¶ 67,592], 117 F. Supp. 747. The court in the *Leonia* case viewed the problem as a two-fold one: "(a) what in federal law is the essential nature of a claim arising under Section 4 of the Clayton Act as amended; and (b) what New York statute of limitations would the New York courts hold applicable to this type or class of claim." (p. 752)

In many of the cases cited in the *Leonia* opinion in which a non-penal characterization of a treble damage action was employed, there is little or no discussion as to the basis for the court's conclusion.[1] Instead, there is often a mechanistic reliance on *Chattanooga Foundry and Pipe Works v. City of Atlanta,* 203 U. S. 390 (1906) as authority for such a non-penal characterization. The first question which had to be determined in the *Chattanooga* case was whether the federal five-year statute of limitations (Section 1047 of the Revised Statutes) was applicable to civil antitrust litigation. This state read as follows:

"No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued; provided, that the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property."

Based upon previous federal authority, the court concluded that a civil antitrust action was not a "suit for a penalty" within the meaning of Section 1047. However, it is apparent from a reading of the three *Chattanooga* opinions[2] that in determining the applicable Tennessee statute of limitations, the respective courts were guided by their conception of Tennessee law.[3] Thus,

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[1] See *Seaboard Terminals Corporation v. Standard Oil Co. of New Jersey,* D. C. S. D. N. Y., 1938 [1932-1939 TRADE CASES ¶ 55,188], 24 F. Supp. 1018, affirmed on other points 2 Cir., 1939 [1932-1939 TRADE CASES ¶ 55,225], 104 F. 2d 659; *Pastor v. American Telephone & Telegraph Co.,* D. C. S. D. N. Y., 1940, 76 F. Supp. 781; *Dipson Threatres, Inc. v. Buffalo Theatres, Inc.,* D. C. W. D. N. Y., 1948, 8 FRD 86; *Winkler-Koch Engineering Co. v. Universal Oil Products Co.,* D. C. S. D. N. Y., 1951 [1950-1951 TRADE CASES ¶ 62,892], 100 F. Supp. 15; *Momand v. Universal Film Exchange, Inc.,* D. C. D. Mass., 1942, 43 F. Supp. 996.

[2] *City of Atlanta v. Chattanooga Foundry & Pipe Co.,* D. C. E. D. Tenn., 1900, 101 Fed. 900, reversed 6 Cir., 1903, 127 Fed. 23, affirmed *Chattanooga Foundry and Pipe Works v. City of Atlanta,* 203 U. S. 390 (1906). For an excellent summary of the *Chattanooga* cases see footnote 26 of the *Leonia* opinion, 117 F. Supp. at p. 753.

[3] As was stated by Judge Lindley in *Hoskins Coal & Dock Corp. v. Truax Traer Coal Co.,* 7 Cir., 1951 [1950-1951 TRADE CASES ¶ 62,925], 191 F. 2d 912 at p. 914:

"* * * We think plaintiff's reliance upon *Chattanooga Foundry and Pipe Works v. City of Atlanta,* 203 U. S. 390, 27 S. Ct. 65, 51 L. Ed. 241 is misplaced. The court held that no federal limitation existed; that the applicable statute was that of Tennessee and, approving Judge Lurton's analysis of the decisions of that state, that the pertinent limitation was 10 years. Here, as there, the applicable limitation is that of the state. There the state determination was that the 10 year statute applied; here the state determination is that the two year statute controls. * * *"

Also pertinent is Judge Lindley's discussion in *Sun Theatre Corp. v. RKO Radio Pictures, Inc.,* 7 Cir., 1954 [1954 TRADE CASES ¶ 67,722], 213 F. 2d 284 at pages 287, 288.

the United States Supreme Court in affirming the judgment of the Circuit Court stated:

> "* * * Although the decision is appealed from, as this question involves the construction of local law we cannot but attribute weight to the opinion of the judge who rendered the judgment, in view of his experience upon the Supreme Court of Tennessee. And although doubts were raised by the argument, we have come to agree with his interpretation in the main." *Chattanooga Foundry and Pipe Works v. City of Atlanta,* 203 U. S. 390, 398.

It seems clear, therefore, that the *Chattanooga* case is at best dubious authority for the inelastic non-penal approach adopted by some of the courts which have been confronted with the statute of limitations problem.

In other cases cited in the *Leonia* opinion in which a non-penal characterization had been adopted, the courts were guided in their determination by analogous state court statute of limitations decisions.[4]

Nevertheless, the court in the *Leonia* case concluded that a treble damage action, while providing for "exemplary damages," is not in its nature and substance a penal action. Turning to New York authorities, the court concluded that such an action for "exemplary damages" would fall within Section 48, subdivision 2 of the New York Civil Practice Act. The following cases are cited as authority for this proposition:

1. *Layton v. McConnell,* 61 App. Div. 447 (2nd Dept. 1909).

This was an action under Section 654 of the Penal Code to recover treble damages for injury to property. Plaintiffs had judgment. On appeal, defendants urged as a basis for reversal that the action was for a penalty and that plaintiffs had failed to comply with Section 1897 of the Code of Civil Procedure, which provided that:

> "In an action to recover a penalty or forfeiture, given by a statute, if a copy of the complaint is not delivered to the defendant with a copy of the summons, a general reference to the statute must be indorsed upon the copy of the summons so delivered."

The Appellate Division held that Section 1897 did not apply to actions for treble damages brought under Section 654 of the Penal Code. Since the *Layton* decision did not involve a statute of limitations question but involved solely the sufficiency of an indorsement on a summons, it is of dubious authority for the position adopted by the court in the *Leonia* case.

2. *Syfert v. Lenett Realty Corp.,* 124 Misc. 871 (Sup. Ct. Kings Co. 1925).

The case likewise did not concern a statute of limitations question but rather involved a motion for change of venue of a treble damage action for forceable entry or detainer. The court in holding that the action was not one "to recover a penalty or forfeiture imposed by statute" within the meaning of Section 184, subdivision 1, of the New York Civil Practice Act, expressly and without discussion relied upon *Layton v. McConnell, supra.*

3. *DiBitetto v. Sussman,* 279 App. Div. 1033 (2nd Dept. 1952).

The question there involved was whether summary judgment would lie in an action for treble damages for overcharge of rent under the Federal Rent Control Law. Rule 113, subdivision 3 of the New York Rules of Civil Practice authorizes the granting of summary relief in an action "On a statute where the sum sought to be recovered is a sum of money other than a penalty." The court, referring to several federal decisions which it apparently regarded as definitive, concluded that the action was not one for a penalty within the meaning of Rule 113, subdivision 3. Here, again, a statute of limitations question was not involved. Furthermore, the greater weight of federal authority in regard to a treble damage action under the antitrust law supports a penal characterization of such an action.

The only other New York authority relied upon in the *Leonia* case was *Cox v. Lykes Bros.,* 237 N. Y. 376 (1924). There, plaintiff, a seaman, sued to recover additional wages under Section 4529 of the United States Revised Statutes, which read as follows:

> "* * * Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective

[4] *Shelton Electric Co. v. Victor Talking Machine Co.,* D. C. D. N. J., 1922, 277 Fed. 433; *Reid v. Doubleday & Co., Inc.,* D. C. N. D. Ohio, 1952 [1953 TRADE CASES ¶ 67,428], 109 F. Supp. 354 (action under Robinson-Patman Act).

periods, which sum shall be recoverable as wages in any claim made before the court."

The question involved was whether the state court had jurisdiction over the action in view of Section 256 of the Judicial Code, which conferred upon the courts of the United States exclusive jurisdiction "of all suits for penalties and forfeitures incurred under the laws of the United States." The New York Court of Appeals in holding that the action was not one for a penalty, stated:

"Congress has expressly said that the extra compensation, when due, 'shall be recoverable as wages.' This would seem decisive, without more, that in determining the bounds of jurisdiction, it is not to be classified as a penalty."

(p. 379) No such express indication of Congressional intent can be found in the language of the treble damage provision of the Clayton Act.

[*Leonia Case—Conclusion*]

I am, therefore, of the opinion that the disposition of this question in the *Leonia* case is erroneous for each of the following reasons:

1. It fails to recognize the fact that as to a defendant, for whose protection statutes of limitations exist, the treble damage provisions of the antitrust laws are, both from a historical as well as from a practical viewpoint, penal in nature;

2. It is in conflict with the greater weight of authority which supports a penal characterization of a treble damage action under the antitrust laws;

3. The New York authorities cited do not substantiate Leonia's determination of the applicable New York statute of limitations.

[*Bertha Building Corp. Case*]

The case of *Bertha Building Corporation v. National Theatres Corporation,* 2 Cir., decided September 10, 1957, Docket Nos. 24253-4 [1957 TRADE CASES ¶ 68,818], does not impel a contrary conclusion. There, the sole question before the Court of Appeals was whether Judge Galston had erred in determining without a jury that the defendant was amenable to suit in California between July 20, 1935 and July 20, 1938. The parties in the *Bertha* case conceded the applicability of a six-year statute of limitations in the event that the New York statute was found to be controlling.[5] The reference to Section 48, subdivision 2 of the New York Civil Practice Act appearing on the third page of the *Bertha* opinion must, it seems to me, be read in connection with the aforementioned concession of the parties and is, therefore, inapplicable to the case at bar.

[*Penal Nature of Action—Decisions*]

It is persuasive, although, of course, not controlling, that in similar cases arising in the federal district courts of Illinois, Wisconsin and New Jersey, the Circuit Courts in the Seventh Circuit and Third Circuit have reached identical conclusions as to the penal nature of a treble damage action under the Clayton Act: *Hoskins Coal & Dock Corp. v. Truax Traer Coal Co.,* 7 Cir., 1951 [1950-1951 TRADE CASES ¶ 62,925], 191 F. 2d 912, cert. denied 342 U. S. 947; *Schiffman Bros., Inc. v. Texas Co.,* 7 Cir., 1952 [1952 TRADE CASES ¶ 67,270], 196 F. 2d 695; *Sun Theatre Corp. v. RKO Radio Pictures, Inc.,* 7 Cir., 1954 [1954 TRADE CASES ¶ 67,722], 213 F. 2d 284; *Grengs v. Twentieth Century Fox Film Corporation,* 7 Cir., 1956 [1956 TRADE CASES ¶ 68,318], 232 F. 2d 325; *Gordon v. Loew's Incorporated,* 3 Cir., 1957 [1957 TRADE CASES ¶ 68,783, 68,820], 247 F. 2d 451.

In *Hoskins Coal & Dock Corp. v. Truax Traer Coal Co.,* 7 Cir., 1951 [1950-1951 TRADE CASES ¶ 62,925], 191 F. 2d 912, cert. denied 342 U. S. 947, Judge Lindley held that the two-year penal limitation statute of the State of Illinois[6] was applicable to a civil antitrust action. In doing so, Judge Lindley observed that:

[5] See Judge Galston's Conclusion of Law "2" appearing at page 290a of "Appendix to Brief for Plaintiffs-Appellants. On Appeal From the United States District Court for the Eastern District of New York."

[6] "Ill. Rev. Statutes, Chap. 83, § 15 provides that actions to recover damages for personal injuries, among others, and for 'a statutory penalty * * * shall be commenced within two years * * * after the cause of action accrued.' This provision, defendants assert, is controlling in the present case. On the other hand, plaintiff insists that its action is not one to recover a statutory penalty but one within section 16 of the statute which permits actions on unwritten contracts, 'and all [other] civil actions not otherwise provided for' to be commenced within five years after they accrue." (191 F. 2d at pp. 913-914)

"* * * When 'the object is clearly to inflict a punishment on a party for violating' the statute, it is penal in character, and the circumstance that in punishing, remedy is likewise afforded to those having an interest in the observance of the statute is unimportant. *Diversey v. Smith,* 103 Ill. 378. The Illinois court has adhered to this interpretation in its consideration of similar statutes in *Vestal Company v. Robertson,* 277 Ill. 425, 115 N. E. 629 and *Gridley v. Barnes,* 103 Ill. 211.

"Plaintiff, though conceding that the applicable statute is that of the state, insists that whether a federal cause of action falls within the provisions of a state statute is a question to be decided by the federal courts. Even should we admit arguendo that this is a proper postulate, no solace for plaintiff is to be found in federal decisions involving causes of action such as the one asserted here. Cases referring to such a recovery as 'a penalty' of triple or treble damages include *Fleitmann v. Welsbach Street Lighting Co.,* 240 U. S. 27, 29, 36 S. Ct. 233, 60 L. Ed. 505; *Milwaukee Towne Corp. v. Loew's Inc.,* 7 Cir., 190 F. 2d 561; *H. J. Jaeger Research Laboratories v. Radio Corp. of America,* 3 Cir., 90 F. 2d 826, 828; *Decorative Stone Co. v. Building Trades Council,* 2 Cir., 23 F. 2d 426, 427-428, certiorari denied 277 U. S. 594, 48 S. Ct. 530, 72 L. Ed. 1005; *Elizabeth Arden Sales Co. v. Gus Blass Co.,* 8 Cir., 150 F. 2d 988, 996." (191 F. 2d at page 914)

In *Schiffman Bros., Inc. v. Texas Co.,* 7 Cir., 1952 [1952 Trade Cases ¶ 67,270], 196 F. 2d 695, in which a similar result was reached, Judge Lindley stated:

"The word 'penal' is not one of definite specific meaning but has variable connotations depending upon the environment in which it is utilized. That this court has considered the action as in the nature of a penalty, though unimportant in this decision, is apparent from *Milwaukee Towne Corp. v. Loew's, Incorporated,* 7 Cir., 190 F. 2d 561, 570, wherein, referring to our earlier decision in *Bigelow v. R. K. O. Radio Pictures, Inc.,* 7 Cir., 150 F. 2d 877, 883, we said: '* * * the victim is permitted to use as a yardstick for measuring his damages what he would have gained as a member of or a beneficiary of the conspiracy, and is mandatorily awarded a judgment for three times the amount thus found. Certainly Congress did not intend to impose a *further penalty* upon the defendants * * *. Two-thirds of the judgment is *the penalty* imposed by Congress and automatically attaches to the damages found. *Bigelow et al. v. R. K. O. Radio Pictures, Inc.,* 7 Cir., 150 F. 2d 877, 883.' (Italics supplied.) And in *H. J. Jaeger Research Laboratories v. Radio Corp.,* 3 Cir., 90 F. 2d 826, at page 828, the third circuit said: 'The Sherman Act created a new tort damage right for damages actually suffered, but also imposed a statutory trebling penalty.' These comments are, however, as we have said, beside the point in this discussion, for the question now before us, presented to us in no case other than Hoskins, is, we repeat, what is the applicable statute of limitations in Illinois in an action for treble damages and attorneys' fees." (p. 697)

In *Sun Theatre Corp. v. RKO Radio Pictures, Inc.,* 7 Cir., 1954 [1954 Trade Cases ¶ 67,722], 213 F. 2d 284, Judge Lindley discussed the question of whether a plaintiff could avoid the effect of a penalty statute of limitations by suing only for actual damages and waiving the remaining two-thirds. On page 287 he said:

"The statute is explicit; the only remedy provided therein is 'threefold the damages' sustained. Giving to this language its plain meaning, we think the only permissible interpretation is that the remedy afforded is treble damages, penal in nature and susceptible therefore to all restrictions surrounding an action of such nature. The remedy has been so treated by this court in *Bigelow v. RKO Radio Pictures, Inc.,* 7 Cir., 150 F. 2d 877, reversed on other grounds 327 U. S. 251, 66 S. Ct. 574, 90 L. Ed. 652, wherein the court said, 150 F. 2d at page 883: 'The amount of this verdict was required by statute to be trebled by the judgment. In this respect neither the jury nor either court had any discretion. The verdict should represent actual damages sustained, and two thirds of the judgment is a penalty which Congress has seen fit to impose * * *.'"

In *Grengs v. Twentieth Century Fox Film Corporation,* 7 Cir., 1956 [1956 Trade Cases ¶ 68,318], 232 F. 2d 325, the Seventh Circuit also held a Wisconsin statute, providing for a two-year limitation based upon a penalty or forfeiture, applicable to a civil antitrust action. The provisions of the Wisconsin Statutes involved were incorporated in the opinion in the following exerpt:

"* * * Defendants claim that § 330.21(1) Wisconsin Statutes 1951 is applicable. It provides a two-year limitation for:

"'An action by a private party upon a statute penalty or forfeiture when the

action is given to the party prosecuting therefor and the state, except when the statute imposing it provides a different limitation.'"

Plaintiff claims that § 340.19(4) [This is obviously an error by plaintiff who undoubtedly means § 330.19(4)] of said statutes is applicable. It provides a six-year limitation for:

"'An action upon a liability created by statute when a different limitation is not prescribed by law.'

"Obviously, if the two-year limitation applies, the six-year limitation is inapplicable." (pp. 327-328)

In *Gordon v. Loew's Incorporated,* 3 Cir., 1957 [1957 TRADE CASES ¶ 68,783, 68,820], 247 F. 2d 451, the Circuit Court was required to determine the New Jersey statute of limitations applicable to a civil antitrust action. The following excerpt from the court's opinion is pertinent:

"The sections of the New Jersey Revised Statutes, N. J. S. A., having possible applicability here as statutes of limitations are as follows:

"'2A:14-1. 6 years

"'Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.'

"'2A:14-10. 2 years * * *; actions on penal statutes

"'All actions at law brought for any forfeitures upon any penal statute made or to be made, shall be commenced within the periods of time herein prescribed;

* * *

"'b. Within 2 years next after the offense committed or to be committed against the statute, or cause of action accrued, when the benefit of the forfeiture and the action therefor is or shall be limited or given to the party aggrieved;

* * *

"'Where, however, by any statute made or to be made it is provided that any such action is to be brought within a shorter time than that prescribed by this section, such action shall be commenced within the time so provided by that statute.' N. J. S. A. 2A:14-1, 10.

"Upon examining these statutes we observe that the period of limitation applicable to the actions here in question is six years, as provided by section 2A:14-1 unless the plaintiffs' actions for treble damages under section 4 of the Clayton Act are to be regarded as actions brought for a forfeiture upon a penal statute within the meaning of section 2A:14-10, in which case the limitation of two years provided by that section is applicable." (247 F. 2d at pages 454-455)

Relying upon the determination of the Supreme Court of New Jersey in *Addiss v. Logan Corp.,* 1957, 23 N. J. 142, 128 A. 2d 462, the Third Circuit decided that the applicable statute was the two-year statute. The New Jersey decision in the *Addiss* case involved an action for treble damages brought by a tenant against his landlord under the State Rent Control Act. The Circuit Court in commenting on the *Addiss* decision said:

"* * * To paraphrase what Justice Burling said in the *Addiss* case with regard to the State Rent Control Act, the person injured by reason of action forbidden by the antitrust laws recovers the measure of the injury to his business or property and by statutory direction is the recipient of the punitive award. The total recovery is arbitrarily computed; it takes cognizance of the actual loss only as a base. According to the statutory direction the defendant must pay an amount three times that base. This operates as a sanction. True it is largely a wrong to the individual but violations of the antitrust laws also impugn the Congressional purpose of freeing interstate commerce from restraints and monopolies and thus incidentally wrong the public. Indeed the violation of those laws is not only subject to this sanction but is also made a misdemeanor punishable by fine and imprisonment. We think it is clear, in the light of the *Addiss* opinion, that for the purpose of the application of section 2A:14-10 of the New Jersey Revised Statutes, section 4 of the Clayton Act must be regarded as a penal statute within the purview of that section." (247 F. 2d at pages 456-457)

[*Summary*]

To Conclude:

1. It appears that there are no authoritative New York decisions which are determinative of this issue. However, there is

evidence that certain New York courts in decisions dealing with federal statutes have, in fact, resorted to federal determinations for guidance purposes.

2. The weight of authorities in federal decisions and in federal expressions of characterization require the choice of the penalty limitations statute of Section 49, subdivision 3 of the New York Civil Practice Act.

3. Realistic considerations of the nature and impact upon the defendants of the treble damage clause of Section 15, Title 15 U. S. C. A., persuades this court to sustain the three-year statute.

Accordingly, I find that the pertinent statute of limitations in this action is three years pursuant to Section 49, subdivision 3 of the New York Civil Practice Act.

[¶ 68,882] New Home Appliance Center, Inc. v. W. G. Thompson, The Western Corp., doing business as Western Appliance Corp.; W. Dan Bell; William Gibbons; Frances Hammond; William Lujan; Emil Berkowitz; T. E. Braunschweiger; Allied Appliances, Inc.; The Denver Area Better Business Bureau, Inc.; New York Furniture House, Inc.; and The Daniels & Fisher Stores Company.

In the United States Court of Appeals for the Tenth Circuit. November Term, 1957. No. 5627. Dated November 27, 1957.

Appeal from the United States District Court for the District of Colorado. WILLIAM LEE KNOUS, Chief Judge.

Clayton and Sherman Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments to State Cause of Action—Restraint of Interstate Commerce.—Any "horizontal agreement among local competitors or with manufacturers, which has the purpose and effect of fixing or stabilizing prices at local levels, or apportioning territories, or suppressing competition, is illegal per se if interstate commerce is utilized, or if such concerted acts have the effect of restraining the free flow of interstate commerce." In these circumstances, the amount or quantity of interstate commerce is unimportant; it is the nature or the tendency of the agreement which is proscribed. The dismissal of a retailer's complaint alleging that wholesalers, competing retailers, and a business bureau engaged in a conspiracy to deny local retailers free access to the channels of interstate commerce, by preventing them from making interstate purchases and requiring them to purchase their requirements from local wholesalers, on the ground that the complaint did not sufficiently allege facts from which it could be determined as a matter of law that the alleged conspiracy unduly restrained interstate commerce, was reversed. In holding the complaint sufficient, the reviewing court noted that the liberal rules of pleading are applicable to antitrust cases.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.170, 9009.600.

For the appellant: Dayton Denious, Denver, Colo.

For the appellees: John F. Shafroth and George Louis Creamer (W. Clayton Carpenter, Allan R. Phipps, Samuel S. Sherman, Jr., John W. Low, and Philip S. Van Cise on briefs), Denver, Colo.

Reversing a decision of the U. S. District Court, District of Colorado, 1956 Trade Cases ¶ 68,354.

Before MURRAH, PICKETT and LEWIS, Circuit Judges.

[*Dismissal Judgment—Appeal*]

MURRAH, Circuit Judge [*In full text*]: Holding that the complaint in this case, as amended, and as attempted to be amended, did not state a claim under the triple damage provisions of the antitrust acts, the trial court dismissed the complaint, and this appeal is from the judgment of dismissal.

[*Complaint*]

The complaint, as amended, alleged that at all times complained of, the complainant

was a discount retail dealer of brand name electrical applicances in Denver, Colorado, whose profit depended in a large measure upon volume through extensive newspaper advertising; that certain of the defendants were distributors or wholesale dealers through whom the complainant purchased its products for resale; that certain other named defendants were competitive retail dealers in all or some of the brand name products sold by the complainant; that the defendant, Better Business Bureau, was an organization to which all of the defendants belonged except New York Furniture, Inc.; that all the products purchased and sold by the retailer through the wholesalers are manufactured outside the State of Colorado and are shipped interstate to the retailers' stores, thence to the ultimate consumer; that in the course of its business operations, complainant purchases substantial amounts of these products, some of which are shipped direct to it interstate, and some have already come to rest prior to purchase. The complaint then states that the defendants formed a combination or conspiracy, the purpose, object and effect of which was to deny retail appliance dealers in Denver, Colorado free access to the channels of interstate commerce by preventing them from making interstate purchases; and requiring them to purchase their requirements of home appliances from local wholesalers in Colorado, and thus to fix the prices at which such products were to be sold retail by Denver retail dealers; to monopolize interstate commerce in wholesale appliances and to eliminate the complainant as a competitor in such trade.

Specific overt acts in furtherance of the conspiracy were set out in the complaint, namely: the refusal of the wholesalers to sell the complainant electrical appliances at the instance of the named retail competitors. It was further alleged that as a part of the same conspiracy, and in furtherance thereof, the defendants, acting in concert obtained agreements with the two daily newspapers in Denver to limit and restrict complainant's advertising by excluding it from the advertising columns for a period of seven weeks, and thereafter requiring complainant to advertise only those items "obtained through regular Denver wholesale channels" at prices and on terms approved by the supplying distributors, and forbidding the complainant to advertise certain brand name products on any terms.

It was further alleged that to accomplish the conspiracy, the Denver Better Business Bureau circulated disparaging matter of the complainant, calculated and intended to cause termination of its financing arrangements; and that it otherwise coordinated the efforts of the defendants in excluding and restricting the complainant's access to the advertising media in Denver. It was specifically alleged that by such concerted action, the defendants had restrained and monopolized a substantial part of interstate commerce by eliminating the plaintiff's competition and raising prices for home appliances to consumers in Denver and vicinity. Then followed specific allegations showing business losses to the complainant for the years involved.

[*Trial Court Rulings*]

After dismissal of the amended complaint, the complainant tendered further amendments tending to show in more specific detail the manner in which the acts complained of affected interstate commerce with resulting damages to the complainant. These tendered amendments were denied on the grounds that they added nothing to the validity of the complaint.

Basing its judgment squarely on *Fedderson Motors v. Ward* [1950-1951 TRADE CASES ¶ 62,579], 180 F. 2d 519; and *Shotkin v. General Electric Co.* [1948-1949 TRADE CASES ¶ 62,341], 171 F. 2d 236, the trial court concluded that the complaint did not sufficiently allege facts from which it could be determined as a matter of law that the alleged conspiracy unduly restrained interstate commerce with requisite harmful effect to the public interest; that the complaint failed to allege with sufficient definiteness the volume of interstate trade, or that complainant's interstate purchases were adversely affected by the defendants' activities. Nor did the court think the defendants' refusal to deal with complainant on a purely local basis had any prohibited effect on interstate commerce as in *Mandeville Farms, Inc. v. American Crystal Sugar Co.* [1948-1949 TRADE CASES ¶ 62,251], 334 U. S. 219. And see *Spears Free Clinic and Hospital v. Cleere* [1952 TRADE CASES ¶ 67,276], 197 F. 2d 125.

[*Sufficiency of Complaint*]

At the outset, it seems appropriate to say that nothing in either the *Shotkin* or *Fedderson* cases was intended to suggest that a

special form of pleading is indicated or sanctioned in antitrust cases. Indeed, the liberal rules of pleading are as applicable to these cases as any other case. Under these rules, it is not the office of a complaint to plead detailed facts or state particular theories for recovery. It is sufficient, and indeed all that is permissible, if the complaint concisely states facts upon which relief can be granted upon any legally sustainable basis. Only a generalized statement of the facts from which the defendant may form a responsive pleading is necessary or permissible; and "where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified. If a party needs more facts, it has a right to call for them under Rule 12(e) of the Federal Rules of Civil Procedure." And, the free use of summary judgment is available to avoid expensive trials of frivolous claims. See *United States v. Employing Plasterers Assn.* [1954 TRADE CASES ¶ 67,692], 347 U. S. 186. See also *Package Closure Corp. v. Sealright Co.* [1944-1945 TRADE CASES ¶ 57,227], 141 F. 2d 972; *Nagler v. Admiral Corp.* (2 CA) decided Oct. 2, 1957 [1957 TRADE CASES ¶ 68,839], — F. 2d —; Clark "Special Pleading in the 'Big Case' ", —F. R. D. —.

We also know from experience that motions to make more definite and certain, or for a bill of particulars under Rule 12(e), tend only to promote verbiage. Particularization of the issues is indeed the first order of business. But the Rules do not contemplate their definition by paper pleadings. They are to be ascertained and articulated by the free use of controlled pre-trial discovery under the guiding hand of the judge who has the responsibility for the trial of the case. See "Procedure In Antitrust and Other Protracted Cases", a Report adopted by the Judicial Conference of the United States on September 26, 1951. Ultimately the issues, when defined by discovery and pre-trial conference, are embodied in a pre-trial order in which the factual and legal issues are defined and the plan for trial delineated, i.e. Clark "Special Pleading in the 'Big Case' ", *supra.* Adherence to and utilization of these simple rules will undoubtedly result in a more expeditious and creditable disposition of this type of litigation. The *Shotkin* and *Feddersen* cases must be considered in the light of these fundamental precedural concepts.

[*Cases Distinguished*]

The complainant in the *Shotkin* case, who was also a retail dealer in electrical appliances, sued certain manufacturers and retail dealers, charging a conspiracy in restraint of trade. There was a charge of price fixing with injury to the public. But, looking at the whole complaint, drawn *pro se,* we concluded that it stated only a personal grievance "based solely and exclusively upon the declination" of the manufacturer to do business with the complainant "as an outlet for its manufactured merchandise with no evil consequences to the consuming public." The defect there was not that the complaint did not state enough, but that the substance of what it did state was legally insufficient on which to grant relief on any accepted theory.

Feddersen Motors v. Ward, supra, followed the same pattern of the *Shotkin* case. There, a retail dealer complained of a conspiracy on the part of the manufacturer and a retail dealer to exclude him from the interstate market and to fix prices. But the court, looking at the agency contract, was able to conclude that the substance of the complaint was a permissible declination on the part of the manufacturer to further deal with his agent in a prescribed territory.

[*Interstate Commerce*]

It is of course true without dispute that a manufacturer is free to make vertical agreements with local agents and dealers for the sale of his wares or products in a given territory for a stated price; and, he is also free as far as the antitrust laws are concerned, to discontinue his relations with any dealer so long as his conduct is not conceived in monopolistic purpose or market control. See *Paramount Film Distributing Corp. v. Village Theatre* [1955 TRADE CASES ¶ 68,239], 228 F. 2d 72; and cases cited.

But, any horizontal agreement among local competitors or with manufacturers, which has the purpose and effect of fixing or stabilizing prices at local levels, or apportioning territories, or suppressing competition, is illegal per se if interstate commerce is utilized, or if such concerted acts have the effect of restraining the free flow

of interstate commerce. See *Moore v. Mead's Fine Bread Co.* [1954 TRADE CASES ¶ 67,906], 348 U. S. 115; *United States v. Frankfort Distilleries* [1944-1945 TRADE CASES ¶ 57,338], 324 U. S. 293; *United States v. McKesson & Robbins* [1956 TRADE CASES ¶ 68,308], 351 U. S. 305. In these circumstances, the amount or quantity of interstate commerce is unimportant, it is the nature or the tendency of the agreement which the act proscribes. *Gamco, Inc. v. Providence Fruit & Produce Bldg.* [1952 TRADE CASES ¶ 67,219], 194 F. 2d 484; *United States v. McKesson & Robbins, supra.*

[*Reversed*]

Judged by these standards, we think the complaint stated a claim upon which relief can be granted under the antitrust laws. The judgment is reversed.

[¶ 68,883] Charles Walder, et al. v. Paramount Publix Corporation, et al.

In the United States District Court for the Southern District of New York. Civil 69-217. Filed September 30, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Defenses—Statutes of Limitations—When Cause of Action Accrues—Tolling of Statutes of Limitations—Pendency of Government Antitrust Action.—Defendants' motion for a summary judgment on the ground that the claims asserted on behalf of a theatre operating company were barred either by the Florida or New York statutes of limitations was denied. The defendants asserted that all of the company's claims accrued prior to a specified date, and that the running of the applicable statute of limitations was not tolled by the pendency of a Government antitrust action. There was no indication that all of the alleged illegal acts which adversely affected the company occurred prior to the specified date. Also, the instant action involved matters based in whole or in part on the matters complained of by the Government in its antitrust action; therefore, the running of the applicable statute of limitations was tolled during the pendency of the Government action. On the present state of the record, there was no basis for granting the defendants' motion.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.200, 9010.275.

For the plaintiffs: Claudia Pearlman (Edgar A. Buttle, of counsel), New York, N. Y.

For the defendants: Louis Phillips for Paramount Pictures Inc. (In Dissolution), Paramount Pictures Corp., and Paramount Film Distributing Corp.; J. Miller Walker for RKO Radio Pictures, Inc.; Robert W. Perkins for Warner Bros. Pictures Distributing Corp.; Herbert B. Lazarus for American Broadcasting-Paramount Theatres, Inc.; Dwight, Royall, Harris, Koegel & Caskey for Twentieth Century-Fox Film Corp. (In Dissolution); Schwartz & Frohlich for Columbia Pictures Corp.; and E. Compton Timberlake, of counsel for all defendants; all of New York, N. Y.

For prior opinions of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,650; 1956 Trade Cases ¶ 68,572 and 68,275; and 1955 Trade Cases ¶ 68,170 and 68,097.

[*Motion for Summary Judgment*]

DAWSON, District Judge [*In full text*]: This is a motion by the defendants for a summary judgment dismissing so much of this action as is brought on behalf of Tivoli Operating Corporation, on the ground that any claims asserted on behalf of Tivoli Operating Corporation are barred either by the Florida or New York statute of limitations.

[*Nature of Action*]

The action is one for treble damages and injunctive relief for alleged violations of the anti-trust laws in connection with the distribution and allotment of films for exhibition at the Tivoli Theatre in Miami, Florida.

For an analysis of the parties to the action and the contentions of the various parties reference should be made to the opinion

of Judge Weinfeld reported in [1955 TRADE CASES ¶ 68,097], 132 F. Supp. 912 (S. D. N. Y. 1955). That opinion was rendered upon a motion for summary judgment made by the defendants in this action. So far as the action involves claims on behalf of the Tivoli Operating Corporation Judge Weinfeld said:

"Likewise, with respect to Operating, a cause of action appears to have been stated. It is true that the complaint admits that Operating was able to obtain desirable runs on a competitive basis, after it had issued 50% of its stock to the defendant Paramount, and as a consequence the conspiracy in this regard had no further impact upon it. But there is no suggestion that Operating was not adversely affected by the other illegal acts complained of in paragraph sixty-five of the complaint, or any of them. Moreover, the gravamen of the complaint, insofar as Operating is concerned, appears to be that by reason of the conspiracy it was coerced into surrendering half of its stock and a larger share of its profits to one or more of the defendants. These allegations are sufficient to state a claim upon which relief can be granted." 132 F. Supp. at 920.

[*Statute of Limitations*]

Now the defendants urge that even if the allegations of Tivoli Operating Corporation do state claims upon which relief may be granted the claims are barred by the statute of limitations. The bases of this contention are (1) that all the claims asserted on behalf of Tivoli Operating Corporation accrued prior to September 4, 1945, and (2) that the running of the statute of limitations is not tolled by the pendency of the *Paramount* case. *United States v. Paramount Pictures, Inc.,* [1946-1947 TRADE CASES ¶ 57,470], 66 F. Supp. 323 (S. D. N. Y. 1946); [1946-1947 TRADE CASES ¶ 57,526], 70 F. Supp. 53 (S. D. N. Y. 1946), reversed and remanded in part, [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131 (1948); [1948-1949 TRADE CASES ¶ 62,473], 85 F. Supp. 881 (S. D. N. Y. 1949), *aff'd,* 339 U. S. 974 (1950).

[*Prior Proceedings*]

It appears that this action has heretofore been referred to Judge Leibell for pre-trial pursuant to Rule 16 of the Rules of Civil Procedure. One purpose of a pre-trial is to simplify the issues. This motion should have been brought on before Judge Leibell, but it appears that counsel for plaintiff refused to have the matter referred to him. So we have a situation where the issues in the case have been exhaustively studied by Judge Weinfeld (on motions brought on before him) and then by Judge Leibell (in pre-trial proceedings) and thereafter this motion is brought on before a third judge, perhaps in the hope that he will reach conclusions different from those judges who have previously considered the matter. If any such hope exists it will be vain, for I will consider the determinations previously made to state the law of the case which I should follow.

[*Accrual of Claims*]

On the question as to whether all the claims asserted by the plaintiffs accrued prior to September 4, 1945, I would point out that Judge Weinfeld has previously held that "there is no suggestion that Operating was not adversely affected by the other illegal acts complained of in paragraph sixty-five of the complaint, or any of them." There is no indication that all these acts occurred prior to September 4, 1945; in fact, quite the contrary would appear from the complaint.

[*Tolling of Statute of Limitations*]

Furthermore, § 5 of the Clayton Act, 15 U. S. C. A. § 16, provides for the running of the statute of limitations in private actions for triple damages during the pendency of an anti-trust case when the action is based "in whole or in part" on "any matter" complained of in the Government's anti-trust suit. The defendants properly state in their brief (p. 24): "The precise question presented here is whether Tivoli Operating Corporation's actual claim is based in whole or in part on any matter complained of by the Government in the *Paramount* case"; and they further contend, "Moreover, the words 'complained of' cannot be considered in a vacuum but only in the light of the actual complaint made by Tivoli Operating Corporation and the actual matters complained of by the Government in the *Paramount* case."

Defendants urge that the only claims asserted by Operating relate to dividends and management fees. Plaintiffs deny that these are the only issues, and the language of Judge Weinfeld, previously quoted, would indicate that he found the issues to be not so limited. The complaint claims in paragraph eighty-five that the injuries suffered

by the plaintiffs covered a period from January 1, 1937 to May 24, 1947. Whether these claims can be sustained at the trial is not now before this Court. If issues of fact are presented these issues must be determined at the trial.

The defendants also urge that the matters complained of by Tivoli Operating Corporation are not based in whole or in part on any matter complained of in the *Paramount* case. Whether this is true or not must depend upon what matters are complained of by Tivoli. Certainly the acts complained of in paragraph sixty-five were specifically based on the complaint in *United States v. Paramount*; and paragraph sixty-six of the complaint states that the same illegal practices are complained of in the instant action.

Judge Weinfeld has heretofore said, in his previous opinion in this case:

> "In substance the plaintiffs claim that from 1928 to date the defendants, who are motion picture distributors, conspired among themselves and with Paramount Enterprises, Inc., an exhibitor operating in Miami, to prevent the Tivoli Theatre from exhibiting pictures on a 'first run' and from obtaining subsequent runs on a competitive basis; that this conspiratorial action coerced the individual plaintiffs into agreeing to the formation of Operating, in which Paramount Enterprises, Inc. received a 50% stock interest, and the plaintiff Walwal the other 50%; further that in 1937 Walwal as owner and Tivoli as lessee or operator of the Tivoli Theatre, and the individual plaintiffs as stockholders of the two corporations, were coerced into substituting Operating as lessee in place and stead of Tivoli; that plaintiffs were further coerced into surrendering to several of the co-conspirators over half the proceeds of the theatre during the period when Operating was the lessee. The complaint incorporates by reference the decrees entered against the defendants in *United States v. Paramount Pictures, Inc.*" 132 F. Supp. at 915.

This analysis of the case would indicate that the action involves matters based in whole or in part on matters complained of by the Government in the *Paramount* case; and under such circumstances the running of the statute of limitations was tolled during the pendency of that case and therefore there is no basis for granting the motion for summary judgment.

[*Pre-Trial Proceedings*]

This is the type of action where formal pre-trial proceedings for the simplification of the issues would be eminently desirable. The complaint is a hodgepodge of accusations. How many of the accusations constitute issues which will have to be tried and how many are inserted merely for atmosphere cannot be decided on the face of the pleading. Any attempt to secure a limitation of issues by motions addressed to the complaint would seem to be regarded with disfavor in some circles.* However, formal pre-trial proceedings can do much to achieve a proper resolution of the issues in dispute. See "The Lost Horizon in Pleading under the Federal Rules of Civil Procedure," by Hon. James Alger Fee, 48 Colum. L. Rev. 491 (1948). We must recognize, however, that even this procedural device will break down if one side is given the opportunity, as it was in the instant action, to bring the pre-trial proceedings to a halt by refusing to continue before a particular judge.

[*Motion Denied*]

It may be that if pre-trial proceedings had continued in this action and an order been entered as to the specific issues in dispute, the issues of law raised by the instant motion would then have been susceptible of determination and the time consumed by the trial court in trying the issues would have been appreciably shortened. However, this has not been done and on the present state of the record there would be no basis for granting defendants' motion for summary judgment.

Motion denied. So ordered.

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* See "Special Pleading in the 'Big Case'" by Hon. Charles E. Clark—Paper Prepared for the Seminar on Protracted Cases held at New York University, August 26-30, 1957.

"Occasionally there is a direction to prune off surplusage, a theoretically sound point of view since these complaints, far from being models, are usually singularly verbose and full of unnecessary conclusions, cliches and counts. . . . But is there time in the Southern District for such pruning and perfectionism when the easier course is just to treat such excesses with silent disdain?"

It may be suggested that it is just this unwillingness to require an early definition of the real issues that results in "little cases" becoming "big cases" from the standpoint of judicial time consumed, and helps to create the "protracted case."

[¶ 68,884] Electric & Musical Industries Limited v. The Honorable Lawrence E. Walsh, United States District Judge for the Southern District of New York.

In the United States Court of Appeals for the Second Circuit. October Term, 1957. Docket No. 24837. Argued November 4, 1957. Decided November 13, 1957.

Petition for Writ of Mandamus and Prohibition.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Grand Jury Investigation—Validity of Service of Subpoena on Foreign Corporation—Appealability of Order Denying Motion to Quash Subpoena.—Where a grand jury subpoena *duces tecum* was served upon a British corporation by delivering a copy to a subsidiary corporation doing business in the Southern District of New York and where the District Court denied a motion to quash the subpoena, the British corporation's petition for a writ commanding the District Court to vacate its order denying the motion and to refrain from asserting jurisdiction *in personam* over it was denied. The order attacked by the corporation was interlocutory and non-appealable. The "All Writs Statute" (28 U. S. C., Sec. 1651) is to be used only in exceptional cases where abuse of discretion or usurpation of judicial power is "clear and indisputable."

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8021, 8029.930.

For the petitioner: Dwight, Royall, Harris, Koegel & Caskey, New York, N. Y. (John A. Wells, H. Allen Lochner, Justin W. D'Atri, and Herbert C. Earnshaw, of counsel). (Appearing Specially.)

For the respondent: Harry G. Sklarsky, Ralph S. Goodman, and Richard B. O'Donnell, Attorneys, Department of Justice, New York, N. Y.

Denying a petition for a writ commanding the U. S. District Court, Southern District of New York, to vacate an order of the Court, 1957 Trade Cases ¶ 68,773.

Before: SWAN, HINCKS and WATERMAN, Circuit Judges.

[*Prior Proceedings*]

PER CURIAM [*In full text*]: Petitioner, referred to as EMI, is a British corporation. A subpoena *duces tecum* to appear before a grand jury was served upon it by delivering a copy to a subsidiary corporation doing business in New York. EMI moved to quash the subpoena. This motion was denied by Judge Walsh by order dated June 27, 1957. The present petition seeks a writ commanding Judge Walsh to vacate his order and to refrain from asserting jurisdiction *in personam* over petitioner.

[*Non-Appealable Order*]

The order attacked by the petitioner is interlocutory and non-appealable. *Cobbledick v. United States* [1940-1943 TRADE CASES ¶ 56,011], 309 U. S. 323. As stated at page 328, whatever right the witness may have requires no further protection than that afforded by the district court "until the witness chooses to disobey and is committed for contempt." The All Writs Statute, 28 U. S. C. A. § 1651, is to be used only in exceptional cases where abuse of discretion or usurpation of judicial power is "clear and indisputable." *Bankers Life & Cas. Co. v. Holland* [1953 TRADE CASES ¶ 67,626], 346 U. S. 379, 383-4. See also *Ex Parte Fahey*, 332 U. S. 258, 260; *Ward Baking Co. v. Holtzhoff*, 2 Cir., 164 F. 2d 34; *Massey-Harris-Ferguson, Ltd. v. Boyd*, 6 Cir. [1957 TRADE CASES ¶ 68,680], 242 F. 2d 800, 803; *Comfort Equipment Co. v. Steckler*, 7 Cir. [1954 TRADE CASES ¶ 67,731], 212 F. 2d 371. The issue is whether the court has usurped and is enforcing a non-existent jurisdiction over the petitioner. This is not so "clear and indisputable" as to require issuance of the writ.

Petition denied.

[¶ 68,885] Youngs Rubber Corp. v. Sirbel Sales Corp.

In the New York Supreme Court, New York County, Special Term, Part III. 138 N. Y. L. J., No. 120, page 4. Dated December 20, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Temporary Injunction—Necessary Proof—Defenses.—On a motion for reargument, a fair trader was granted a temporary fair trade injunction where the defenses asserted by the defendant were incapable of defeating the issuance of the injunction. Previously, a motion for a temporary injunction had been denied where the defendant had claimed to be a wholesaler, and the claimed offending sales had been vigorously denied and not identified except by a statement of a shopper.

See Fair Trade, Vol. 1, ¶ 3354.34.

On reargument of a decision of the New York Supreme Court, New York County, 1957 Trade Cases ¶ 68,863.

[*Injunction Granted*]

STREIT, Justice [*In full text*]: Plaintiff moves for reargument of its motion for a temporary injunction in this Feld-Crawford action. The occasion for the present application, as stated, was the failure of the defendant to supply the plaintiff at the time of argument with a copy of its opposing affidavit. It clearly appears on the basis of the present submission that the defenses urged are incapable of defeating the motion for temporary injunction. Accordingly, the motion for reargument is granted and upon such reargument the original motion is likewise granted with bond in the sum or $1,000. Plaintiff is directed to serve and file a note of issue for the next ensuing term. Settle order.

[¶ 68,886] Maryland and Virginia Milk Producers Association, Inc. v. United States [also Maryland Cooperative Milk Producers, Inc. v. United States].

In the United States Court of Appeals for the District of Columbia Circuit. Nos. 13,893 and 13,894. Decided December 19, 1957.

Appeals from the United States District Court for the District of Columbia. ALEXANDER HOLTZOFF, District Judge.

Case Nos. 1260 and 1259, respectively, in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Grand Jury Proceedings—Production of Documents—Return of Copies of Documents After Dismissal of Criminal Actions—Use of Copies in Civil Action.—During a grand jury proceeding which resulted in the return of indictments against an association, the Government obtained and copied thousands of documents from the files of the association. These criminal actions were terminated favorably to the association, and the Government filed a civil suit against the association based on the same transactions as those involved in the indictments. The Government returned to the association the original documents, but it refused to return the copies. The denial of the association's motion to require the Government to return the copies was affirmed. The reviewing court held that the Government may retain the copies of the documents, subject to the following limitation: that it may use in the trial of the pending civil action, or in the trial of any future civil action against the association, only such of the documents, of which it has retained copies, as it could obtain through discovery processes applicable to civil actions.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8021.750, 8225.590.

For the appellant: Daniel J. Freed, with whom William J. Hughes, Jr., Herbert A. Bergson, and Daniel H. Margolis were on the brief.

For the appellee: Henry Geller, Attorney, Department of Justice, with whom Daniel M. Friedman, Attorney, Department of Justice, was on the brief.

Affirming, as modified, an order of the U. S. District Court, District of Columbia, 1957 Trade Cases ¶ 68,701; for prior opinions of the Court, see 1956 Trade Cases ¶ 68,518 and 68,517.

Before WILBUR K. MILLER, FAHY and DANAHER, Circuit Judges.

[*Copies of Documents*]

PER CURIAM [*In full text*]: During the grand jury proceedings which preceded these criminal cases, the United States obtained and copied thousands of documents from the files of the Maryland and Virginia Milk Producers Association. After the cases had terminated favorably to the Association, the Government returned to it the original documents but refused to return the copies, claiming them as its own property and saying it will or possibly may rely upon some of them in the trial of a civil action now pending in the United States District Court for the District of Columbia (Civil Action No. 4482-56, *United States v. Maryland and Va. Milk Producers Ass'n Inc.*)

The Association moved the District Court to require the return of the copies. The motion was denied, [1957 TRADE CASES ¶ 68,701] 151 F. Supp. 438 (1957), the trial judge holding that, as the documents could be reached by the Government through discovery process in the civil action, it would be vain to order the copies delivered to the Association. This appeal is from the denial of the motion.

[*Limitations Imposed*]

We hold the United States may retain the copies of the documents in question, subject to the following limitations:

1. That it may use in the trial of the pending civil action only such of the documents, of which it has retained copies, as it could obtain through discovery processes applicable to civil actions, and only such as are enumerated by it as those upon which it will or possibly may rely, in a list to be served upon the Association on or before March 10, 1958, and in no event less than 60 days prior to the commencement of such trial;

2. That the United States may use in the trial of any future civil action against the Association only such of the documents, of which it has retained copies, as it could obtain through discovery processes available to civil actions and only such as are enumerated by it as those upon which it will or possibly may rely, in a list to be served upon the Association not less than 60 days prior to the commencement of the trial of any such future civil action;

3. That in the lists the documents intended to be relied upon shall be described and referred to by the identification numbers placed thereon by the Association at the time of their submission.

[*Order Modified*]

The order appealed from should be modified to include the foregoing provisions.

Affirmed as modified.

[¶ 68,887] Bernard Fein, Harry B. Leslie and Warren S. Schoenthaler, individually and as directors of Security Banknote Company v. Security Banknote Company, et al.

In the United States District Court for the Southern District of New York. Civil 126-6. Filed December 16, 1957.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Injunctive Relief—Who May Bring Suit—Directors of Corporation.—Plaintiffs, either as directors of a corporation or individually, were not proper parties to bring an action to enjoin their corporation from commingling the assets of a competitor which the corporation had allegedly acquired in violation of Section 7 of the Clayton Act. There was no authority sustaining the institution of such an action by directors under Section 16 of the Clayton Act, and, while a New York corporation law apparently authorizes the bringing of a "directors' derivative action" in certain cases, such a cause of action will not be engrafted upon an exclusively federal

right of action provided for under Section 16 of the Clayton Act. It appeared from papers outside the complaint that the plaintiffs were stockholders of the corporation, and the plaintiffs were granted leave to file an amended complaint.

See Private Enforcement and Procedure, Vol. 2, ¶ 9020.

For the plaintiffs: Stroock & Stroock & Lavan (Morton L. Deitch, Milton N. Scofield, David Lubart, E. Millimet, and Roger S. Kuhn, of counsel), New York, N. Y.

For the defendants: Dwight, Royall, Harris, Koegel & Caskey (John A. Wells, H. Allen Lochner, Justin W. D'Atri, and Herbert C. Earnshaw, of counsel), New York, N. Y.; and Crowell & Leibman (Morris I. Leibman and Donald S. Macleod, of counsel), Chicago, Ill., for Security Banknote Co., James A. Austin, George W. Goldsworthy, Jr., Oswald Maland, Charles H. Sulzberger, William P. Hunt, and Charles R. Koerwer, Jr., Duke and Landis (David B. Landis and Herbert A. Harris, of counsel), New York, N. Y., for Columbian Bank Note Co.

For a prior opinion of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,858.

Memorandum

[*Capacity to Sue*]

LEVET, District Judge [*In full text*]: Certain of the defendants have moved for orders pursuant to Rule 12(b) of the Federal Rules of Civil Procedure dismissing the complaint herein for failure to state a claim upon which relief can be granted on the grounds that:

"a) plaintiffs, as individuals and directors of defendant Security Banknote Company, are not proper parties to maintain the action and have no capacity to sue; and

"b) plaintiffs are not entitled to maintain an action for the relief they seek."

[*Clayton Act*]

Defendants' claim that plaintiffs lack capacity to sue would appear to be well founded. This action is one for an injunction and certain other relief. Jurisdiction is allegedly conferred upon the court by section 16 of the Clayton Act, 15 USCA § 26, which is as follows:

"§ 26. Injunctive relief for private parties; exception

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of chapters 1 and 8 of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

The plaintiffs have brought this action *individually* and as *directors* of Security Banknote Company. No authority sustaining the institution of such action by directors under Title 15 USCA § 26 has been cited by the plaintiffs. The court has found none. No basis therefor appears.

[*New York Corporation Law*]

Even though relief by way of preliminary injunction under Section 16 of the Clayton Act has been denied plaintiffs and their claim for a permanent injunction is at best colorable, plaintiffs contend that they are proper parties to maintain this action. This right, they assert, is grounded upon Sections 60 and 61 of the New York General Corporation Law. Section 60 is in part as follows:

"§ 60. Action against officers of corporation for misconduct.

"An action may be brought against one or more of the directors or officers of a corporation to procure judgment for the following relief or any part thereof:

"1. To compel the defendants to account for their official conduct, including

any neglect of or failure to perform their duties, in the management and disposition of the funds and property, committed to their charge.

"2. To compel them to pay to the corporation, or to its creditors, any money and the value of any property, which they have acquired to themselves, or transferred to others, or lost, or wasted, by or through any neglect of or failure to perform or other violation of their duties.

. . .

"5. To set aside a transfer of property, made by one or more directors or officers of a corporation, contrary to a provision of law, where the transferee knew the purpose of the transfer.

"6. To enjoin such a transfer where there is good reason to apprehend that it will be made."

Section 61 is as follows:

"§ 61. Who may bring such action

"An action may be brought for the relief prescribed in the last section [Section 60] by the attorney-general in behalf of the people of the state, or except for the relief specified in the third and fourth subdivisions, by the corporation or a creditor, receiver or trustee in bankruptcy thereof, or by a director or officer of the corporation.

"Upon the application of either party the court shall make an order directing the trial by jury of the issue of negligence, and for that purpose the questions to be tried must be prepared and settled as prescribed in section four hundred and twenty-nine of the civil practice act."

While Section 61 apparently authorizes the bringing of what we might term "directors' derivative actions" in certain cases —at least, in the New York court and in federal courts when diversity of citizenship exists—this, in my opinion, is insufficient under the circumstances of this case to permit such a cause of action to be engrafted upon an exclusively federal right of suit provided for under Title 15 USCA § 26.

[*Stockholders*]

It appears from papers outside the complaint but not from the complaint itself that all the plaintiffs are stockholders of Security Banknote Company. On the argument of this motion, plaintiffs' counsel conceded that the reason plaintiffs were bringing this action as a directors' rather than a stockholder's derivative action was to avoid furnishing security for costs under Section 61-b of the New York General Corporation Law. Whether or not this would be a circumvention of the security for costs requirements is not the issue here. The fact is that plaintiffs either as directors or individually are not proper parties to bring an action under Title 15 USCA § 26.

[*Motion Granted*]

Since this is not a diversity of citizenship case there is no other valid basis for any of the relief requested by these plaintiffs in this court. Therefore, the present complaint by these plaintiffs in the capacities under which they have sued herein must fall in its entirety.

Accordingly, defendants' motions to strike the complaint are granted with leave, however, to plaintiffs to serve an amended complaint within ten days from the date of entry hereof.

So ordered.

[¶ 68,888] Safeway Stores, Incorporated v. Oklahoma Retail Grocers Association, Inc., and Louie J. Speed, Inc.

In the Supreme Court of the State of Oklahoma. No. 37326. Filed December 24, 1957.

Appeal from the District Court of Oklahoma County, Oklahoma. Hon. F. B. H. Spellman, Assigned Judge.

Oklahoma Unfair Sales Act

Sales Below Cost Under State Acts—Sales Below Cost—Meeting Competition—Good Faith—Legality of Competitor's Prices.—A retail grocery chain violated the Oklahoma Unfair Sales Act when it sold groceries at prices below the minimum statutory cost to meet the alleged reduced prices of competitors who were giving trading stamps with the purchase of groceries. The chain could not justify its price cutting by asserting that, under the Act, it had the right, in good faith, to meet the prices of its competitors, and,

therefore, it could reduce its prices to the extent of the value of the trading stamps issued by its competitors. The chain admittedly did not, in good faith, set the prices of its groceries on the basis of its competitors' prices, which it in good faith believed to be legal prices under the Act, but, on the contrary, it set illegal prices for the sole purpose of meeting prices of its competitors which it thought to be illegal. Alleged wrongful acts of competitors cannot justify the chain's price cutting, and the chain should have sought injunctive relief against the competitors' acts. Under the Act, the appropriate remedy was by injunction and not by retaliation or retaliatory action.

See Sales Below Cost, Vol. 2, ¶ 7151, 7161, 7263.

Sales Below Cost Under State Acts—Giving of Trading Stamps—Double Stamps—Legality.—The giving of trading stamps, valued at approximately 2.5 per cent of the sale price of merchandise, in the usual manner with merchandise sold at the statutory minimum price, does not constitute a disguised form of price cutting in violation of the Oklahoma sales below cost law. A trial court did not err in refusing to issue an injunction to force a retailer, who was giving single trading stamps in the usual manner and in accordance with a court order enjoining him from giving double stamps, to price his merchandise at the statutory markup plus the value of the single trading stamps issued in the usual manner to consumers. The giving of such stamps does not constitute a price cut or unfair competition; trading stamps merely constitute a discount for cash.

See Sales Below Cost, Vol. 2, ¶ 7201.

Sales Below Cost Under State Acts—Oklahoma Unfair Sales Act—Constitutionality.—The Oklahoma Supreme Court found it unnecessary, in view of a prior ruling of the Court, to consider the contention that the Oklahoma Unfair Sales Act is violative of certain provisions of the Oklahoma Constitution and the United States Constitution.

See Sales Below Cost, Vol. 2, ¶ 7111.38.

Sales Below Cost Under State Acts—Enforcement of Laws—Who May Bring Suit—Trade Association.—"Since actions for injunctions may be filed by a trade association for the benefit of all its members, the practice of resorting to the same practices to meet competition is materially reduced, for the natural restraint against suing a competitor is less present in the seeking of immediate relief against threatened piratical price wars."

See Sales Below Cost, Vol. 2, ¶ 7241.

For the plaintiff in error: Embry, Crowe, Tolbert, Boxley & Johnson; V. P. Crowe; and John W. Swinford, all of Oklahoma City, Okla. Drummond Wolde and R. J. Van Gemert, Oakland, Cal., of counsel.

For the defendants in error: Miskovsky and Miskovsky, William J. Holloway, and Looney, Watts, Looney and Nichols, Oklahoma City, Okla.; and Samuel M. Lane, New York, N. Y.

Affirming a decision of the Oklahoma District Court, Oklahoma County, 1955 Trade Cases ¶ 68,195.

Syllabus

1. The Oklahoma Unfair Sales (Practices) Act, 15 O. S. 1951, Sec. 598.1, *et seq.*, provides a remedy by injunction against repetitive violations thereof, and the availability of the injunctive remedy and that of interlocutory decrees based on actions therefor precludes competitors from immediately indulging in, or resorting to, the same practices themselves violative of the Unfair Practices Act governing merchandising; and, where a corporation operating a chain of grocery stores, admittedly cut prices of its merchandise below the statutory minimum cost violative of the Unfair Sales (Practices) Act, in order to meet what it thought was illegal, or below cost prices of its competitors, it thereby became amenable to the injunctive action of the trial court against such corporation, as shown in this opinion, was proper and timely.

2. Single trading stamps given by a grocer in the usual and customary manner, of the value of 2.5 percent of the cost of the merchandise, and which were redeemable by cash or merchandise, constituted a device

for giving a discount for cash, and the giving of such stamps with commodities sold at minimum prices under the Unfair Sales (Practices) Act, did not constitute a violation of the Act, and the trial court's refusal of injunctive restraint against giving such stamps was not error.

[*Appeal*]

Action by Oklahoma Retail Grocers Association against Safeway Stores to enjoin it from selling merchandise below statutory minimum cost in violation of Unfair Sales Act, and wherein Safeway by cross-petition made Louie J. Speed, Inc., a corporation, and others defendant, and sought to have them enjoined from giving trading stamps to their customers allegedly in violation of the Unfair Sales (Practices) Act. From a judgment permanently enjoining Safeway from selling merchandise below statutory minimum cost and refusing to enjoin Speed from issuing trading stamps to his customers in the usual manner as cash discounts, Safeway appeals. Affirmed.

[*Nature of Action*]

JOHNSON, Justice [*In full text*]: This is an action brought by Oklahoma Retail Grocers Association, Inc., a corporation against Safeway Stores, Incorporated, a foreign corporation, to enjoin it from selling groceries below cost in violation of the Oklahoma Unfair Sales Act, 15 O. S. 1951, Sec. 598.1-598.11.

[*Cross-Petition*]

The Safeway Company by cross-petition made Louie J. Speed, Inc., a corporation, and other grocers parties defendant. Safeway in its cross-petition asked for injunctive relief against Speed, et al., alleging that they, as its competitors, had violated the Unfair Sales Act.

[*Defense*]

Safeway in its answer admitted selling groceries below minimum statutory cost, but denied that its advertisement, offer for sale, or sale of the alleged articles, was in violation of the Oklahoma Unfair Sales Act, and alleged that its prices were made in good faith to meet the prices of its competitors who were, on the dates complained of, selling the same articles or products of comparable quality at such prices, or below minimum cost by giving trading stamps in violation of the Unfair Sales Act.

[*Trial Court Ruling*]

In the trial of the case Speed admitted that it issued single trading stamps to its customers on all purchases of groceries, and on certain days that it issued double stamps, and that sales below the statutory cost were accomplished by use of even the single stamps, but contended that the stamps were in the nature of a cash discount and not violative of the Unfair Sales Act.

The court issued a permanent injunction against Safeway prohibiting it from advertising, offering for sale or selling merchandise below the minimum prices as fixed by the Oklahoma Unfair Sales Act.

As to Speed, the court found that the giving of stamps in accordance with the trading stamp contract was in the nature of a cash discount and not in violation of the Unfair Sales Act, but made permanent the injunction restraining Speed from issuing or giving double stamps to its customers with purchases of merchandise.

Safeway and the Retail Grocers Association and, by agreement, Speed, were the only parties involved in the trial, and Safeway alone appeals.

[*Constitutional Issue*]

Safeway contends that the Unfair Sales Act is violative of certain provisions of the Oklahoma Constitution and the Constitution of the United States. However, the constitutionality of the Unfair Sales Act as amended, after *Englebrecht v. Day et al.* [1948-1949 TRADE CASES ¶ 62,393], 201 Okl. 585, 208 P. 2d 538, was upheld in *Adwon v. Oklahoma Retail Grocers Association, Inc.* [1950-1951 TRADE CASES ¶ 62,791], 204 Okl. 199, 228 P. 2d 376. Therefore, the constitutional questions herein raised, being substantially the same as in the *Adwon* case, *supra*, we deem it unnecessary to consider the issue of the constitutionality of the Unfair Sales Act in the instant case.

[*Cases—Other Jurisdictions*]

Many cases from other jurisdictions and authorities have been cited and quoted from by all parties involved in this lawsuit. But a study of them clearly indicates a large variety of statutes, differing materially from ours in concept, if not in purpose, to such an extent that we deem it unnecessary to refer to all such cases herein by citing and considering them.

[*Interpretation of Oklahoma Act*]

We are concerned herein only in the interpretation and application of Oklahoma's Unfair Sales Act as applied to the particular facts in this case. See 15 O. S. 1951. Sec. 598.1, *et seq.*, Laws of 1949, p. 103, Sec. 1, *et seq.* We must construe and interpret the Unfair Sales Act so as to give it practical meaning and effect within the legislative intent. However, until a proper factual case is presented which requires a clear determination and offers a practical situation in which all the conflicting problems and considerations of the area involved are [present,] this court will refrain from theorizing. This is particularly true in cases involving the field of economic regulation. The eventual goal of any interpretation must be viewed in the practical situation existing in the field to be regulated.

[*Meeting Competition*]

Safeway contends that it was not and is not amenable to injunctive restraint from admittedly selling merchandise below the statutory cost under the Unfair Sales Act, 15 O. S. 1951, Sec. 598.3, because under Sec. 598.7 of the Act it had the right to advertise, offer to sell, or sell merchandise at a price made in good faith to meet the price of a competitor who was selling the same article or products of comparable quality at cost to it as a retailer. It seeks to justify its price cutting action on the ground that when its competitors gave trading stamps, cash register receipts or things of like nature of such value with their sales of merchandise, which in effect reduced the price of their merchandise below minimum cost, that that constituted sales below cost or price cutting in violation of the Unfair Sales Act, and that it had a right to meet such competition by reducing its prices to the extent of the value of the trading stamps.

[*Good Faith*]

In other words, Safeway contends that its action was justifiable because of the alleged wrongful acts of its competitors, and that its actions in the premises constituted "good faith" in accord with Sec. 598.7, which exempted it from the injunctive provisions of Sec. 598.5 of the Unfair Sales Act. We do not agree.

In this connection our attention has been called to the recent case (10-4-57) of *State v. Wolkoff*, (Minn.) [1957 Trade Cases ¶ 68,826] 85 N. W. 2nd 401, wherein it was held that "(I)f a merchant in good faith sets the price of an article on the basis of a competitor's price, which price he in good faith believes to be a *legal one,* there is no violation," which clearly is not the case herein. In the instant case, Safeway obviously and admittedly did not, in good faith, set the price of its articles which were subject to the Unfair Sales Act on the basis of its competitors' prices, which it in good faith believed to be legal prices under the Unfair Sales Act, but on the contrary it set illegal prices for the sole purpose of meeting prices of its competitors, which it thought to be illegal.

[*Injunction Upheld*]

In considering unfair sales practice acts from a procedural viewpoint, commentators have observed the wisdom of the legislatures in providing the remedy by injunction, and the increasing tendency of the courts to enjoin, at the suit of competitors, repeated violations affecting the unfair conduct of business. Availability of the injunctive remedy and that of interlocutory decree based on actions therefor precludes the practice indulged in by many fair minded competitors immediately to meet competition by resorting to the same practices themselves. Since actions for injunctions may be filed by a trade association for the benefit of all its members, the practice of resorting to the same practices to meet competition is materially reduced, for the natural restraint against suing a competitor is less present in the seeking of immediate relief against threatened piratical price wars. 10 So. C. L. Rev. 22. See also 21 Iowa L. Rev. 175, 236; 42 Harv. L. Rev. 693; 13 Tex. L. Rev. 136; and 25 Cal. L. Rev. 1088, and cited cases.

We are of the opinion that this injunction granted by the trial court against Safeway was proper, because under our statute the appropriate remedy was by injunction and not by retaliation or retaliatory action, such as was practiced by Safeway. In this respect the judgment of the trial court is affirmed.

[*Competitor's Activity*]

We come now to Safeway's cross-petition and its contention that the trial court erred in refusing to enjoin Speed and restrain him from distributing trading stamps with articles priced at the minimum under the Unfair Sales Act.

Safeway's cross-petition charged that Speed by the use of trading stamps was selling his merchandise below the statutory minimum cost in violation of the Unfair Sales Act.

Speed in his answer to the cross-petition admitted that he was a retail grocer, in competition with Safeway; that for a number of years he had been distributing S & H trading stamps with all merchandise, including those items which were offered for sale at the statutory minimum; that the stamps were worth approximately 2.5 percent of the sales price of the merchandise, but did not deduct the sales price because they constituted the only practical means of allowing a discount for cash.

Speed defends on the grounds that single trading stamps (the court having enjoined him from issuing double stamps on his sales) do not reduce the price of merchandise, but constitute only a discount for cash on his sales.

[*Trading Stamps*]

In recent years there have been many appellate court decisions dealing with the subject of trading stamps, and several Law Review articles have been written concerning them and their legal effect upon economic regulatory measures. See cited authorities *supra* and *infra*.

An extensive article appears in 105 Pa. L. Rev. 242, *et seq.* entitled "Trading Stamps: A Challenge to Regulation of Price Control" wherein in referring to trading stamps it is said (quoting from Wall St. Journal, April 23, 1956, p. 1, col. 6.):

> "Assailed by some 'as a costly device that raises family food bills' and hotly defended by others as 'a perfectly legal promotional tool,' trading stamps have become a center of controversy in the merchandising field. Though stamp plans have enjoyed a rapid upsurge in growth since World War II, the idea itself is over fifty years old." (See 24 Tenn. L. Rev. 557-58, 1956.)

Description of the various stamp plans may be found in 24 Tenn. L. Rev. *supra*. However, there being no statute in Oklahoma prohibiting the use of trading stamps as such, we are concerned herein only with the application of and/or relation of trading stamps to unfair competition and below cost sales under our statute; see "The Unfair Sales Act," Laws 1949, p. 103, Sec. 1, *et seq.;* 15 O. S. 1951, Sec. 598.1, *et seq.,* which as noted by the title of the Act, is designated as

> "An Act defining and prohibiting unfair sales practices with a view to preventing the advertising, offering for sale, or the selling of merchandise below cost for the purpose of injuring competitors, destroying, or substantially lessening competition; providing remedies for violation thereof; establishing a penalty therefor, etc."

[*Issue*]

The question of whether giving trading stamps in the usual manner with merchandise sold at the statutory minimum constitutes a disguised form of price cutting in violation of our Unfair Sales Act, or whether they (trading stamps) are to be regarded as a discount for cash, as a means of advertising, a device to entice customers and to retain their trade, is new in this jurisdiction, and our decision on this matter will be one of first impression. It is a question upon which appellate courts, economists and accountants have diverse and conflicting opinions.

The question has, however, been considered by the courts of California and Utah, which states have statutes similar and comparable to ours in content and substantially identical to ours in purpose on unfair trade practices and fair trade contracts. See Cal. Bus. & Prof. Code, Fair Trade Contracts, Sec. 16900-16905, Unfair Trade Practices, 17000-17100, and *Food and Grocery Bureau v. Garfield* (Cal.) [1940-1943 TRADE CASES ¶ 56,205], 125 P. 2d 3; *Weco Products Co. v. Mid-City Cut Rate Drug Stores, et al.* (Cal.) [1940-1943 TRADE CASES ¶ 56,242], 131 P. 2d 856, and cited cases. See also the Utah case, *Trade Commission v. Bush* (1953) [1953 TRADE CASES ¶ 67,537], 259 P. 2d 304, and cited cases, and Utah statute cited in footnote of the case.

[*Decisions*]

In the case of *Food and Grocery Bureau v. Garfield, supra,* there was no contention as herein that the use of the stamps resulted in sales of commodities below cost under the Unfair Sales Practices Act, but it was said in that case that

> "(I)t is well settled by the decisions of this Court, as well as other jurisdictions, that the practice of merchants in issuing trading stamps with the purchase of articles is merely a method of discounting bills in consideration for the immediate payment of cash." Citing cases.

In the California case of *Weco Products Co. v. Mid-City Cut Rate Drug Stores, et al., supra,* the question of price cutting or selling below cost was involved, and the factual situation was similar, if not identical, to the case herein, except that the latter case involved the Fair Trade Act and the case before us involves the Unfair Sales Practices Act which was true of the California case of *Food and Grocery Bureau v. Garfield, supra,* but the court made no distinction in the application of the cash discount rule to the Fair Trade and Unfair Sales Practices Acts. In the *Weco Products Co.* case, *supra,* it was said:

"Defendant, even antedating plaintiff's availing itself of the protection of the Fair Trade Act, regularly gave to his customers trading stamps at the rate of one stamp with each ten cents of the sale price of articles purchased. These were given on purchases of any of the thousand and one things sold in defendant's drug stores, with the exception of liquors. At infrequent intervals there were 'double stamp days,' when two stamps were given for each unit of sale price. Upon each stamp was imprinted 'Cash Discount Stamp.' Each stamp had a cash value of two mills. Stamps were given to every customer paying cash at the time of purchase and requesting trading stamps. They were redeemed by defendant upon presentation of five hundred stamps collected in a book given by defendant to customers for that purpose, redemption value for a book of five hundred being $1.00 cash or, at the option of the purchaser, $1.25 merchandise.

"Inasmuch as trading stamps were given by defendant upon sales of plaintiff's commodities, plaintiff contends that the scheduled minimum prices of his commodities were reduced by exactly the amount of the cash value of the stamps, to wit, by two mills upon each ten cents. In other words, plaintiff insists that the giving of trading stamps was in reality a disguised form of price cutting.

"The question before us for consideration, therefore, may be stated as follows: Does the giving of trading stamps, redeemable for cash or merchandise, constitute a violation of the Fair Trade Act when such stamps are given with commodities sold at the minimum prices stipulated by the producer under said act? This query is best answered, we believe, by a consideration of the nature and purpose of the trading stamp coupons. Are they to be regarded as a discount for cash, as a means of advertising, a device to entice customers and to retain their trade, or do they simply represent a cut in the sale price of the articles with which they are given? If the latter, they accomplish a cut in the established price of merchandise; and where such merchandise is sold at minimum Fair Trade Act prices, the giving of trading stamps then amounts to a sale below such prices.

"If, however, the stamps are given by the merchant in the nature of an inducement to customers to attract them to his store, the practice is in the nature of an advertising device, and is no more to be condemned as violative of the Fair Trade Act than would be such commonly employed devices as free parking room, care of infants and other plans offered by some mercantile establishments in competition with their rivals. Free parking for automobiles of customers might be said to result in a lesser price paid by a customer for goods purchased, yet it could hardly be reasonably contended that thereby a violation of the Fair Trade Act had been worked.

"Neither can it be asserted that by giving discounts for cash the terms of the statute in question are contravened. A cash discount is a reward for prompt payment. It is a trade practice long established, and is authoritatively recognized as being not a deduction from the purchase price. Montgomery, Auditing Theory and Practice, pp. 499-500.

"Consideration of such authorities as are available leads us to the conclusion that the giving of trading stamps as in the instant now before us does not effect a reduction in the price of the articles sold such as to constitute a violation of the Fair Trade Act. The matter has not been passed upon by the appellate courts of this state. *However, aside from the consideration of the Fair Trade Act, the status of trading stamps is definitely fixed in this state as being a discount for 'the immediate payment of cash.'* This pronouncement finds its latest expression in the case of *Food and Grocery Bureau v. Garfield,* 20 Cal. 2d 228, 125 P. 2d 3, 5, decided April 28, 1942, where the defendant is the same as in the instant case and where the very trading stamps as in the instant case and where the very trading stamps here involved were under consideration. *It is true that the Food and Grocery Bureau case involved a different statute, the Unfair Practices Act rather than the Fair Trade Act, but the ruling of the court must be regarded as conclusive of the status of the trading stamp in commercial retail business.*

"'*It must be concluded,*' says the court in the Unfair Practices Act case, '*that the trading stamp plan adopted by the appellant * * * is a discount given the customer in consideration of his paying cash.*' And at page 6 of 125 P. 2d: '*It is well settled by the decisions of this Court, as well as those in other jurisdictions, that the practice of merchants in issuing trading stamps with the purchase of articles is merely a method of discounting bills in consideration for the immediate payment of cash.*'

"This latter pronouncement is buttressed by numerous citations to decisions in California and other jurisdictions, where trading stamps are characterized as 'merely one way of discounting bills in consideration for immediate payment in cash.' *Ex parte Hutchinson,* C. C., 137 F. 950, 951; 'a benefit to the customer, who practically receives a discount, and who will buy more cautiously and judiciously if he pays cash,' *Winston v. Beeson,* 135 N. C. 271, 47 S. E. 457, 461, 65 L. R. A. 167, and 'a convenient means of allowing or granting a discount to the merchants' customers on small as well as on large purchases which were paid for in cash', *State v. Holtgreve,* 58 Utah 563, 200 P. 894, 897, 26 A. L. R. 696.

"To denominate appellant's trading stamp plan as a device for giving a discount for cash payment on merchandise, rather than as a cut in price upon the articles sold, gains force when we consider that the stamps are given uniformly and without regard to the type of goods sold or the purchaser of the same. The only condition is that cash be paid for the purchases. Respondent's 'Fair Trade' minimum-priced articles are not singled out by appellant as objects to which alone the trading stamp privileges attach. No discrimination is made for or against them. The policy may be said to be of uniform application both as to goods sold and as to purchasers of the same, and logically falls into the classification of 'cash discount' rather than 'price cut'" (Italics ours).

The California rule is expounded in the above quotation holding that giving of trading stamps with purchases of merchandise sold at the minimum price under the Unfair Sales Practice Act is not a violation of the Act because the stamps represent a "cash discount" which, according to accounting procedure, is a cost of selling rather than a reduction in price, is a rule of long standing. In 105 Pa. L. Rev. 248, in discussing discounting procedures, it was said:

"While in the case of stamps a stronger argument may be made for treatment as a selling cost, since seller receives in cash the full list price regardless of the discount in stamps and must therefore account for the cash income as well as for his payment to the stamp company for the use of the stamps."

As early as 1904 in *Ex parte Hutchinson,* 137 Fed. 949, the Court, in nullifying anti-trading stamp legislation, said:

". . . (T)he giving of trading stamps is merely one way of discounting bills in consideration for immediate payment in cash, which is a common practice of merchants, and is doubtless a popular method, and advantageous to all concerned, and it is not obnoxious to public policy. . . ."

In the same year (1904) in *Winston v. Beeson,* 135 N. C. 271, 47 S. E. 457, the court in holding that the issuance of S & H stamps did not constitute a "gift enterprise" said:

"We can discern no practical difference between this arrangement of the parties and one by which the merchant agrees to discount his bills where cash is paid by his customer at the time of purchase, and the giving of stamps redeemable at a store of another in goods to be selected by the holder, instead of an actual discount by the merchant, does not in law vary the case or change the real and substantial character of the transaction * * *"

In 1922, in the case of *Sperry & Hutchinson Co. v. Siegel-Cooper & Co.,* 225 Ill. App. 540, aff'd 309 Ill. 193, 140 N. E. 864, (1923) in 225 Ill. at page 548, the court referred to the practice as follows:

"The practice of giving trading stamps to customers buying merchandise at retail constitutes a method of discounting the bills in consideration of prompt payment in cash. This is a common practice among merchants advantageous to all concerned. * * *"

In 1942 the same rule was applied in *Food and Grocery Bureau Inc. v. Garfield, supra.*

In 1951 in *Sperry & Hutchinson Co. v. Hudson,* 190 Ore. 458, 226 P. 2d 501, the court said:

"In a practical sense, the issuance of these trading stamps to cash customers is simply a method adopted for giving these purchasers a discount for cash. By the use of these stamps discounts are available on small purchases. As explained by

the witness Shirer, vice president of plaintiff corporation: 'There is no coin small enough to give a discount on a ten or fifteen cent purchase.' By the issuance of one of these stamps for each ten cent purchase, such a discount is made possible."

In 1954 in *Sperry & Hutchinson v. Margetts* [1954 TRADE CASES ¶ 67,747], 15 N. J. 203, 104 A. 2d 310, the court held that giving trading stamps was a form of discount for cash and "should be treated as a non-operating item, rather than as a deduction from sales price."

And as late as December of 1956, in *Gever v. American Stores Co.* [1956 TRADE CASES ¶ 68,569], 487 Pa. 206, 212, 127 A. 2d 694, the court said:

"Viewed realistically, the giving of trading stamps may be regarded as nothing more than the equivalent of a normal cash discount, which is merely a term of payment and not a price reduction. Indeed, in a sense, the stamps have no value in themselves but acquire it only if the stipulation amount of other purchases is made. They cannot be regarded as cutting prices any more than free delivery service or free parking could be so regarded although these are practices which obviously save money for the customers of stores offering such advantages. Accordingly, the use of trading stamps, pursued as a general business practice by a commercial establishment, does not violate either the letter or the spirit of the Fair Trade Act."

[*Affirmed*]

Generally, the law of trade regulations has moved swiftly, and our statutes relating thereto are relatively new; however, from an examination of our statutes and those of other states, together with appellate court decisions construing same, we conclude that the weight of law, logic and reason clearly and distinctly show that the practice of giving trading stamps in the usual customary manner does not amount to, nor will it sustain a charge of price cutting.

The trial court did not err in refusing injunctive relief to force Speed, who was giving single trading stamps in the usual manner and in accord with a court order enjoining him from giving double stamps, to price his merchandise at statutory markup plus the value of the single stamps issued in the usual manner to the consumers, and we hold that the giving of such stamps did not constitute a price cut or unfair competition, but that such stamps merely constituted a discount for cash.

Therefore the judgment as to Speed is affirmed.

Concur: WELCH, C. J., CORN, V. C. J., and DAVISON and CARLILE, JJ. Concur in part and dissent in part: HALLEY, WILLIAMS, BLACKBIRD, and JACKSON, JJ.

[Concurring and Dissenting Opinion]

JACKSON, Justice: Concurring in part and dissenting in part.

[*Discount Not Authorized*]

Sales at retail below cost, as defined in the Act, are prohibited. 15 O. S. 1951, § 598.3.

Speed is selling, or giving, two articles for the price of one. Speed does not admit that this constitutes selling below cost nor does the majority opinion specifically so hold. Speed argues, and the majority agrees, that Speed is giving a discount for cash.

The Act does not authorize discounts for cash in retail sales. It does not authorize any scheme or device that would result in sales below "cost to the retailer." We are not dealing herein with sales at wholesale or by the manufacturer wherein discounts for cash appear to be authorized by § 598.2 (a) of the Act.

Insofar as material here § 598.2(a) defines "cost to the retailer" in substance as invoice cost, plus freight, plus a 6 percent markup to cover a part of the cost of doing business.

Speed was selling items at "cost to the retailer" (Speed) but in addition was giving trading stamps to the purchaser. The stamps were valued at 2.5 percent. That is, if a pound of coffee cost Speed $1.00, as defined in "cost to the retailer," Speed was selling the coffee at $1.00 and giving the customer a stamp.

Even if it could be said that a cash discount by the retailer is authorized, the foregoing practice does not constitute a discount for cash in the ordinary acceptance or understanding of the term. A "discount for cash" ordinarily connotes a taking away, or reduction. The word "discount" is defined in Webster's New International Dictionary as follows:

"Discount. 1. To deduct from an account, debt, charge, or the like; to make an abatement of; as, to discount a per cent of a bill for early payment."

In Black's Law Dictionary "Discount" is defined as follows:

"Discount. In a general sense, an allowance or deduction made from a gross sum on any account whatever."

In Black's Law Dictionary "Cash Discount" is defined as follows:

"A deduction from billed price which seller allows for payment within a certain time. *Leonard v. U. S.*, Ct. Cl., 7 F. Supp. 295, 297."

Speed is not giving a discount for cash but is selling two articles for the price of one. Under the illustration above given Speed is selling a pound of coffee and a stamp for $1.00 which, together, cost One Dollar and Two and One-Half cents. This is contrary to an express provision of the statute. § 598.2(d) provides in substance that when one or more items are advertised or sold with one or more other items at a combined price, or offered as a gift, or given with the sale of any one or more other items, each of said items shall be deemed to be advertised or sold, and the price of each item named shall be governed by the definition of "cost to the retailer."

We have been furnished extensive briefs citing decisions from other jurisdictions. Most of these decisions seem to be influenced by experts in the field of accounting and auditing. Experts in these fields testified in this case. Reasons which compel an accountant's conclusion do not compel the same legal conclusion. The issues are not the same. Accountants are concerned with auditing principles. We are concerned with the meaning of the Act as intended by the Legislature.

[*Injunction*]

In my opinion the injunction against Safeway was proper. Safeway does not contend that it has a right to sell below cost. It does contend that it had a right to meet Speed's prices. § 598.7 of the Act authorizes a retailer to sell merchandise at a price made in good faith to meet the price of a competitor who is selling the same article at cost to him (competitor). Safeway was taking 2.5 percent from cost. Speed was adding or giving 2.5 percent above cost. But if it could be admitted that Safeway was meeting competition it was meeting unlawful competition. An illegal price on Speed's part would not authorize an illegal price on Safeway's part. This is one of the evils that the Act seeks to prevent.

For the reasons assigned, I respectfully concur in the order enjoining Safeway from selling below statutory cost and dissent to the opinion wherein it authorizes Speed to give stamps on articles sold at statutory cost.

I am authorized to say that HALLEY and BLACKBIRD, JJ. concur in the views herein expressed.

[¶ 68,889] United States v. Federation Suisse Des Associations De Fabricants D'Horlogerie; The Watchmakers of Switzerland Information Center, Inc.; Bulova Watch Company, Inc.; Hamilton Watch Company; Waltham Watch Company, Inc.; Elgin National Watch Company; Carl Hirschmann Company, Inc.; Russell, Holbrook & Henderson, Inc.

In the United States District Court for the Southern District of New York. Civil Action No. 105-210. Filed December 19, 1957.

Case No. 1267 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Pretrial Motions—Summary Judgment—Judgment on Pleadings—Mootness.—Motions by a defendant for summary judgment and for judgment on the pleadings on the ground that the action against it was moot were denied. As to summary judgment, the court ruled that there were genuine issues of material fact which could be resolved and properly adjudicated only upon trial. Such questions of fact included the defendant's good faith, whether the defendant violated the controlling statutes, and the degree of probability that the defendant

would again violate the controlling statutes. As to judgment on the pleadings, the court ruled that there was a genuine issue as to the reasonable likelihood of a recurrence of conduct on the part of the defendant in violation of the controlling statutes.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8229.150, 8229.225, 8229.675.

For the plaintiff: Richard B. O'Donnell, Attorney, Department of Justice, New York, N. Y.

For the moving defendant: Debevoise, Plimpton & McLean, New York, N. Y., for Elgin Natl. Watch Co.

Memorandum

[*Pretrial Motions*]

WILLIAM B. HERLANDS, District Judge [*In full text*]: Defendant Elgin National Watch Company, one of the eight defendants named in this antitrust action, has moved as follows:

1. To dismiss the complaint as to this defendant because, as to it, the case is moot and that, therefore, the Court lacks jurisdiction over the subject-matter. F. R. C. P. rule 12.

2. For summary judgment on the ground that there is no genuine issue as to any material fact. F. R. C. P. rule 56.

These motions by defendant Elgin are denied in all respects.

The moving and opposing papers and briefs are voluminous and well-documented. Several hours were devoted to the oral argument of these motions. The stenographic transcript of said argument was taken, has been submitted to the Court and is now part of the record. All of the foregoing material has been closely studied.

[*Issues of Fact*]

It is the Court's clear conclusion that there are genuine issues of material fact and that such issues can be resolved and properly adjudicated only upon the trial.

Such questions of fact include, *inter alia*, (1) the good faith of the moving defendant; (2) whether the moving defendant violated the statutes here involved; and (3) the degree of probability that the moving defendant will again violate the controlling statutes. The Government has persuasively demonstrated that said defendant's position on the motion for summary judgment is basically unsound.

With respect to the moving defendant's motion for judgment on the pleadings, it is likewise clear that the case is not moot, but that, on the contrary, there is a genuine controversy and issue as to the reasonable likelihood of a recurrence of conduct on the part of the defendant Elgin in violation of the controlling statutes.

There is no need for the Court to expound and particularize the respective contentions and arguments of the defendant Elgin and the Government. Such contentions are set forth not only in the moving and opposing papers and brief, but in the transcript of the oral argument, in the course of which the Court closely questioned counsel. The Court agrees substantially with the factual analysis and legal contentions submitted in behalf of the Government.

[*Motions Denied*]

The defendant Elgin's motions for summary judgment and for judgment on the pleadings are denied.

Settle order on notice.

[¶ 68,890] United States v. National Malleable & Steel Castings Co., American Steel Foundries, The Buckeye Steel Castings Co., The Symington-Gould Corporation, McConway & Torley Corporation, Foundries Export Co., Inc., and Association of American Railroads.

In the United States District Court for the Northern District of Ohio, Eastern Division. Civil Action No. 30,281. Dated November 26, 1957.

Case No. 1166 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Practices—Price Fixing—Price Leadership—Standardized Product—Sufficiency of Evidence.—The fact that manufacturers of railroad car couplers operated, for nearly 30 years, under a trust agreement allegedly fixing prices was not evidence that the manufacturers, at the time of suit, were monopolizing or were engaged in a conspiracy to monopolize or restrain trade in such couplers. The agreement was apparently a necessary concomitant to the production of a standard coupler, which the country needed. The agreement was not illegal at the time it was entered into, and it would not be declared illegal at the present time. Furthermore, there was no evidence that the alleged conspiracy to fix prices continued after the termination of the agreement. While there was uniformity of prices in the industry, the parallelism of action as to prices was the result of a strong and well-informed competition. There was no evidence that prices were fixed jointly by the manufacturers. The price leader in the industry, although it published its prices, did not conspire with the other manufacturers in the establishment of its prices. The similarity or uniformity of prices came about in a purely natural way, not the result of any conspiracy, but the result of intense competition. Also, the fact that the couplers were standardized contributed to price uniformity. The manufacturers followed the prices of the industry price leader because they could not make the same identical product any cheaper.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.360, 2011.181; Monopolies, Vol. 1, ¶ 2610.600.

Combinations and Conspiracies—Monopolies—Practices—Allocation of Markets—Sufficiency of Evidence.—The fact that manufacturers of railroad car couplers operated, for nearly 30 years, under a trust agreement allegedly allocating business was not evidence that the manufacturers, at the time of suit, were monopolizing or were engaged in an unlawful conspiracy to monopolize or restrain trade in such couplers. The agreement was apparently a necessary concomitant to the production of a standard coupler, which the country needed. The agreement was not illegal at the time it was entered into, and it would not be declared illegal at the present time. Furthermore, there was no evidence that the alleged conspiracy to allocate business continued after the termination of the agreement. Evidence showing fluctuations in the amount of business handled by the manufacturers and showing that the smaller manufacturers increased their business at the expense of the larger manufacturers disproved that there was an allocation of business. Also, the evidence established that each of the manufacturers fought for every customer and for every sale. The market for couplers, the railroad industry, was limited, and there was intense competition to hold and gain customers.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.468; Monopolies, Vol. 1, ¶ 2610.240.

Combinations and Conspiracies—Monopolies—Practices—Exclusion of Trade—Lack of New Venture Capital as Evidence of Conspiracy To Exclude Competition.—The fact that there was a lack of new venture capital in the railroad car coupler industry was not evidence that manufacturers of railroad car couplers monopolized or conspired to monopolize or restrain trade by preventing others from manufacturing and selling such couplers. Evidence established that nobody wanted to get into the business and nobody was ever kept out of the business, and the evidence and common knowledge on the subject indicated some good reasons why new venture capital would avoid the business. The expense of getting into the business was great, and the railroad industry, the customer of the manufacturers, was in a state of contraction. Also, the evidence did not establish that the manufacturers improperly threatened patent infringement suits.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.660; Monopolies, Vol. 1, ¶ 2610.

Combinations and Conspiracies—Monopolies—Patents—Pooling of Patents—Refusal To Grant Licenses—Threatening Infringement Suits—Sufficiency of Evidence.—The fact that manufacturers of railroad car couplers granted non-exclusive patent licenses to each other was not evidence that the manufacturers were monopolizing or were engaged in a conspiracy to monopolize or restrain trade in the manufacture and sale of such couplers.

The contention that the manufacturers imposed upon themselves the authority to issue patent licenses was rejected. The evidence established that no application for a license had been made for a number of years and that nobody had been denied a license. There was evidence that the licensing policy of one of the manufacturers was fair, and that one of the defendant manufacturers, holding no patents but operating licenses from the others, was successful in its operations. Also, the two-year licenses issued by the manufacturers did not impose quotas on the smaller manufacturers, and the manufacturers did not improperly threaten infringement suits.

The fact that the manufacturers had previously operated under a trust agreement was not evidence that the manufacturers, at the time of suit, were engaged in the alleged conspiracies. The agreement was a necessary concomitant to the production of a standard coupler, which the country needed. For the benefit of the entire country, the manufacturers gave up their exclusive patent rights to make possible the development of a standard coupler. There was no legal wrong in their method of mutual sacrifice of patent rights to attain this end.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.225, 2013.600; Monopolies, Vol. 1, ¶ 2610.525, 2610.575.

Combinations and Conspiracies—Monopolies—Practices—Pooling of Interests—Operation of Technical Committee by Competitors—Legality.—The activities of a technical committee composed of engineers of manufacturers of railroad car couplers did not constitute evidence that the manufacturers were monopolizing or were engaged in a conspiracy to monopolize or restrain trade in the manufacture and sale of such couplers. The work of the committee was scientific and mathematical, and its purpose was to develop the best standard coupler. Whatever was done by the committee with respect to its holding of its own drawings and gages, and with respect to its alleged denial of the drawings and gages to others, was done in the interest of standardization, in the interest of protecting standardization, and in the interest of the safety of passengers and crews on trains. Standardization was necessary to prevent the manufacture of obsolete or inadequate parts which would endanger those who ride and those who work on the trains. The fact that one who sought to engage in the business of manufacturing couplers might have to go to the committee for its help is not evidence of the committee's illegality.

See Combinations and Conspiracies, Vol. 1, ¶ 2005, 2005.751; Monopolies, Vol. 1, ¶ 2610.

Combinations and Conspiracies—Monopolies—Practices—Exchange of Information—Costs, Royalty Reports, and Plant Visitation—Legality.—The fact that manufacturers of railroad car couplers visited each other's plants, exchanged cost information, and furnished royalty reports to each other did not constitute evidence that the manufacturers were monopolizing or were engaged in a conspiracy to monopolize or restrain trade in the manufacture and sale of such couplers. There was no legal harm in the manufacturers' fraternizations in view of the intense competition among them. The manufacturers visited each other's plants to see new furnaces, new processes, and new methods, and the reasons for such visitation did not indicate that it was a part of an illegal conspiracy. Furthermore, they visited plants of manufacturers not named as defendants. The manufacturers did not exchange cost information to raise prices; they did it to check costs so that they could get costs down. Cost information was exchanged to improve productive efficiency and to lower costs. Also, there was nothing illegal in the exchange of royalty reports.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.730; Monopolies, Vol. 1, ¶ 2610.

Combinations and Conspiracies—Monopolies—Trade Association—Boycott—Recommendation of Standardized Equipment—Unwitting Conspirator—Sufficiency of Evidence.—In an action charging that manufacturers of railroad car couplers and a railroad association monopolized and conspired to monopolize or restrain trade in railroad car couplers, it was held that the railroad association did not engage in a boycott by recommending the adoption of standards for couplers. Under the rules, any railroad could accept cars not equipped with standard couplers. Also, no rule required the purchase of any special coupler.

The court noted that the association was charged with being an unwitting conspirator, that is, with intentionally doing something which it did unintentionally. The court commented that it did not quite comprehend such a charge because it always believed that a conspirator had some consciousness of the existence of the conspiracy of which he was a part.

See Combinations and Conspiracies, Vol. 1, ¶ 2005, 2017; Monopolies, Vol. 1, ¶ 2610.720.

Monopolies—Conspiracy To Monopolize—Monopolization—Intent—Sufficiency of Evidence.—A complaint charging that manufacturers of railroad car couplers and an association of railroads conspired to monopolize and did monopolize trade in the manufacture and sale of such couplers was dismissed on the ground that the Government failed to establish a monopoly or a conspiracy to monopolize. "One of the general characteristics of monopolies is that we find them in good businesses which are profiting and expanding, which everybody else wants to get into, and we have people on the inside who have such a good thing they do not want to let anybody else in because they are so jealous of the good things they have." This indicia of monopolies was absent in the instant case. The Government defined monopoly as being a joint acquisition or maintenance of a conspiracy formed for the purpose and to such extent that it is able to exclude others, accompanied by an intention to do so. However, the court ruled that there was no unlawful acquisition, no unlawful maintenance, no unlawful exclusion, and no unlawful intention. The intense competition among the manufacturers did not indicate a monopoly. Furthermore, no "monopolist monopolizes unconscious of what" he is doing; however, the association was charged with having gone into the alleged monopoly unwittingly. The fact that no new manufacturers had gone into the industry for a long time was not evidence of an intent on the part of the defendant manufacturers to monopolize.

See Monopolies, Vol. 1, ¶ 2510.275, 2510.400, 2520.10.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Circumstantial Evidence—Sufficiency.—A complaint charging that manufacturers of railroad car couplers and a railroad association monopolized and conspired to monopolize or restrain trade in railroad car couplers by fixing prices, by allocating markets, by excluding others from the manufacture and sale of such couplers, and by pooling patents was dismissed on the ground that the Government failed to establish an unlawful monopoly or conspiracy. The Government had relied upon the following circumstantial evidence to establish its case: the fact that the defendants had, in the past, operated under a trust agreement allegedly fixing prices and allocating business; the fact that prices were uniform; the fact that a technical committee, utilized in the past, was still being utilized; the fact that the defendants revealed costs to each other and visited each other's plants; the fact that no new capital had ventured into the industry for some 30 to 40 years; and the defendants' alleged improper retention of control over their patents. The Government sought to prove a present conspiracy and monopoly by this chain of circumstances. However, the court, in examining each of the circumstances separately, did not find any present antitrust violation. Actual conditions in the industry, in general, disproved the existence of the alleged conspiracy and monopoly.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225.420.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Evidence—Applicable Period of Time.—In an injuctive suit charging a conspiracy, evidence could have been limited to that which had happened since 1944; however, the court permitted the Government to go back to 1916 and decades previous to that year for the purpose of showing motivations, alleged illegalities, intentions, habit patterns, and other matters relevant to the current situation.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Injunctive Decrees—Discontinuance of Practices—Necessity of Relief.—For the Government to prevail in an injunctive suit, there must be improper conduct which is susceptible of injunction and the thing enjoined must be happening as of the present time or likely to

happen in the immediate future. The sole function of an injunction is to forestall future violations. In the instant case, the court found that, even if there were past violations, there was no activity going on at the present time or likely to occur in the near future which was either properly susceptible of injunction or which would justify equitable relief in any form.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8229.550, 8233.100.

For the plaintiff: Robert B. Hummel, Lewis Bernstein, Lester P. Kauffman, Robert M. Dixon, and Dwight B. Moore.

For the defendants: Jones, Day, Cockley & Reavis by Luther Day, Victor DeMarco, Curtis C. Williams, Jr., George H. Rudolph, and Raymond J. Durn; and Fish, Richardson & Neave, by William K. Kerr, for National Malleable & Steel Castings Co. Squire, Sanders & Dempsey by James C. Davis and George I. Meisel; and Dallstream, Schiff, Hardin, Worth & Dorschel, by John B. Robinson, Jr., for American Steel Foundries. Vorys, Sater, Seymour & Pease by Webb I. Vorys, James A. Gorrell, and Russell P. Herrold, Jr., for The Buckeye Steel Castings Co. Mechlin & Mechlin by Wilmer Mechlin; and Bingham, Collins, Porter & Kistler, by Roger Robb, for The Symington-Gould Corp. Thompson, Hine & Flory, by C. W. Sellers and Andrew C. Hartzell, for McConway & Torley Corp. Arter, Hadden, Wykoff & Van Duzer by Ashley M. Van Duzer and Thomas A. Quintrell; Sidley, Austin, Burgess & Smith by Kenneth F. Burgess, D. Robert Thomas, and James R. Bliss; and Philip F. Welsh, General Attorney for the Association of American Railroads, for the Association of American Railroads.

For a prior opinion of the U. S. District Court, Northern District of Ohio, Eastern Division, see 1954 Trade Cases ¶ 67,741.

Court's Opinion

[*Preliminary Statement*]

CONNELL, District Judge [*In full text*]: May it please my brother lawyers: we must first say that we all regret the illness and absence of Mr. Luther Day throughout that part of the trial which ensued after he had to leave us. With due regard to all other great lawyers our State has produced, especially in this area, he is considered, I believe, by our leading lawyers as possibly the greatest trial lawyer in Ohio's history, and it is a matter of great and sincere regret to all of us, I'm sure, that his participation in this trial had to end because of an illness. We hope he is soon back at the trial work he so loves.

Today you will have to be patient with me, for I work throughout from longhand notes, and I do that for your convenience today because quite a few of you have expressed a desire to complete our matter as reasonably early as is possible before the great holiday which approaches.

I must say our case terminates today with regret. It will not seem right for those of us who work here every day to get back to just two trial tables and to put the witness back in the right chair, and to operate in your absence, for we have been together for a long time.

I join all other eminent counsel in thanking the reporters who have done a perfect job throughout, and Mr. Rogers, and Messrs. Mancini and Wetherbee, who have helped you get everything you wanted, and Mr. Stevens who kept perfect track of our 2,000 odd exhibits these many weeks. Mr. Stevens' exhibit record was a great convenience to all of us throughout the trial of the case, putting us in a position where we could instantly recognize, on the part of 30 or 40 men in the room, just exactly which exhibit a lawyer was speaking of.

You have all mentioned the fact that all here sought to make you feel at home. This we did, insofar as I was concerned, because as a lawyer we know from experience what it is to go a long way from home to espouse a cause which may be on the unpopular side, and sometimes against local legal heroes.

As lawyers, we all know and understand exactly what it feels like to walk into a strange court room with a frosty atmosphere, just as surrounded the Phophet Daniel in the Den of Lions, and as lawyers we have all had Daniel's experience that in order to win we had to work from a dietary viewpoint in which cross-examination was our only weapon, and we had to concoct such a dish as would cause our opposition to split asunder.

Every comfort we gave you we owed you. We wanted you to be so comfortable that nothing would interfere with your capacity to fight.

This has indeed been a difficult, lengthy and onerous case. It has kept you professional men quite busy for some years. After you had worked out a timetable between you, you did a splendid job of boiling the case down to its main issues: on agreeing to everything susceptible of agreement; you worked it down to a point where most of the factual situation was not in dispute, except that the Court must decide the motivations behind much of the factual situation, and the intent with which certain acts were and are being done.

You have taken a case which was early anticipated by all to require a year for trial and you have agreed to so much between you that actual trial work will have been less than two months. You have done such a perfect job of streamlining your case; you have cooperated with the Court and assisted the Court to the fullest possible degree, for which we are grateful indeed. In fact, you cooperated so well that for a short time, at the beginning, the Court did not fully understand the degree to which you had cut down on the work both you and the Court would have to do.

This case was some years in coming to trial. It has been a solid year in immediate preparation by you. You men worked continuously for months on depositions, pleadings, admissions, and other evidentiary agreements between yourselves. All of you supplied me with splendid advance briefs, citing your authorities, and thus gave me ample early time to check them out, for which I am grateful. In fact, I personally feel if those pages that you gentlemen supplied me with were put in one book it would make as fine a textbook on this subject as has ever been written.

On trial you have produced many witnesses and numerous exhibits. We have had approximately 1200 exhibits of plaintiff, some of which are but a page and some of which are leaflets, and records, and some of which are almost books. The defendants have produced approximately 650 exhibits and many witnesses, some of whom had previously been plaintiff's witnesses.

I have had opportunity of looking at these exhibits both during our many weeks of trial and during the intervening days between hearings. I must say that yours has been the best documented lawsuit I have ever seen.

At the outset of trial, we seemed to get a slow start. At first I misunderstood plaintiff's counsel's method of introducing his exhibits. It is the rule that exhibits should be inquired of and qualified before being offered, but here counsel seemed to be offering them before qualifying them. I didn't at first quite appreciate how much of my work you men had arranged to do for me in advance.

Later counsel for plaintiff was being so meticulously careful as he initiated his inquiries that our case seemed to be going too slowly. Then defense counsel indicated they did not desire to be too technical; and after we got past those first roadblocks at times plaintiff's counsel moved so rapidly that it was difficult for the defense to keep up with him.

May I at this point thank all counsel for their courtesy, their efficiency, their hard work, their patience, and kindness, and I I am grateful too for the brotherly and kindly spirit in which you men all fought with each other so hard, so fairly, and so zealously, as you presented your respective contentions. I have never been in a lawsuit where men lived together with each other in the court room so long and fought so valiantly and kept their amiability so well. You have all had a difficult case here. It represents four and a half years of hard work by all, and it includes many months of immediate and intensive preparation.

It is too bad that after such mutual and joint efforts on the part of such splendid trial men anybody must be on the losing side. But such is the ultimate in the life of every lawyer now and then.

[*Antitrust Charges*]

Now for the case. Ours is fundamentally an injunction question. Your pleadings boiled down to your opening statements. I will now cover those.

It is here claimed by the plaintiff that these defendants are in active violation of law; that they currently combine to accomplish an unlawful purpose; that they restrain trade by fixing prices, by dividing business, by holding down the less powerful members within their group, and by permitting no others to join their group.

It is further claimed that such conspiracy has existed for over four decades. That prices were set in an agreement going back to 1916. That the exchange of cost information between cost accountants employed by defendants was part of the combination. That their engineers met as a Mechanical Committee to make certain improper decisions also considered unlawful.

It is further claimed by plaintiff that defendants operated this combination through the instrumentality of a Board of Trustees from 1916 to 1945, which it then dissolved because, plaintiff claims, defendants knew it to have been unlawful.

The plaintiff further claimed that defendant The Association of American Railroads was a part of this unlawful combination. That they took no safeguards to prevent these alleged illegal acts and results of other defendants.

In opening statement, plaintiff said it would offer some 50 witnesses and 1200 exhibits to prove its case; that the combination to fix prices continues to date; that the business is allocated to date; and that patents are maintained to exclude others to date; that, in effect, the aid of this Court should be invoked to enjoin this current illegal combination. Counsel for plaintiff said it would have a circumstantial case as to these defendants, and that it would not prove its case by direct evidence.

[*Defendants' Contentions*]

In its opening statement, it is here claimed by defendant National, meaning National Malleable & Steel Castings Company, that no such condition now exists which could be properly susceptible of injunction. They rely particularly on the authority of the case of *United States v. The Oregon Medical Society* reported in [1952 TRADE CASES ¶ 67,264] 343 U. S. 326, in the year 1952.

Defendant National says it is violating no law; that it does have patents, and properly so; and that it has joined with others to give the country the most safe and efficient coupler; that it did operate under an agreement, and did use a Board of Trustees between 1916 and 1944 when, by reason of what appeared to be possible changing thought on the subject of its legality, the Board dissolved itself.

National says the 1916 agreement was lawful throughout its entire existence; that the best available counsel, including a former United States Attorney General, so instructed them.

Counsel for National denies they were in a patent pool. Counsel says the Justice Department investigated this entire matter in 1932 and found nothing illegal about it at that time.

Counsel says each defendant got all the work it could; that customers were not divided; that there was no price-fixing.

Counsel says that between November 15, 1944, and April 6, 1946, the OPA was in effect, and that between January 26, 1950 and February 12, 1953, the OPS was in effect, which brought Governmental control of the situation down to a time just three months before the within case was filed.

Counsel says National made the decision to determine its own prices on couplers; that others would adopt similar prices. Counsel says such prices were based on its own business judgment, and never were based on any agreement with anybody else; that uniform prices are due to economic and business reasons, and are not the result of any illegal agreement.

In his opening statement, counsel for American Steel Foundaries suggested that the plaintiff had the burden of establishing a present threat to violate the law today. Counsel further said that as to the uniformity of prices others follow the prices set by National on couplers, as they follow the prices by National on freight differentials.

Counsel said allocations of business were made before 1945, but never since, and that today each defendant goes after all the business he can get.

Without too much repetition, may I say that counsel for Buckeye stated that they sell all they can, as did counsel for Symington-Gould.

Counsel for McConway & Torley said the same, and added that patentors should be encouraged so that the public gets the greatest amount of benefit from their work. Counsel also related that in 1893 the law required automatic couplers; that the results achieved by the manufacturers in order to comply with the Government's suggestion resulted in the saving of lives and property, and in the expedition of passenger and freight travel; that such result was possible only by team-work and cooperation on the part of all concerned, for the benefit of the entire nation.

Counsel for the Association of American Railroads stated that his clients are purchasers and users of the products involved. He stated his clients are really being accused here of raising prices on parts which they would have to pay. He stated that the standard coupler was the result of the cooperation of all, and stated that the AAR was no part of the 1916 agreement, nor did it know of its 1945 dissolution until three years after it happened.

[*Evidence in General*]

The plaintiff has here presented its circumstantial case against defendants on the question of fixing prices, dividing business and controlling who can get into this business, and defendants have here presented their defense consisting of their refutation and explanation of the circumstances claimed by plaintiff, and by eliciting the direct and positive testimony of all witnesses so concerned, to the effect that there was never any combination amongst them to do anything unlawful.

We shall, of course, make no effort to review the testimony. We have listened to many witnesses on both sides. They were generally the executives and representatives of the defendant companies. They were all accomplished and honorable professional men. Many of them were self-made. Many started at the bottom. They all seemed to me to be honest, hard-working engineers and executives.

[*Standard Coupler*]

The original accomplishment of these defendant companies was unquestionably a boon to this country. To follow the Government's suggestion, they got together with all the genius they could muster, and produced the standard coupler. They made the American Railway the world's best, and they made American products the best in their field.

Their information had to be channeled through some kind of a clearing-house. They had to use such a means to assemble and perfect their finished product, as otherwise it could never have been, in all probability, produced. Their method of conducing to the country's safety met with universal success. Their lawyers assured them their method was legal, and one of these opinions came from a former Attorney General of these United States. They say that the Government checked them out and found no complaint.

But times change, and from their viewpoint it seems that, as they regarded it, legal thinking changed; and fear of such change caused them in 1944 to discontinue operating under the 1916 agreement.

After such discontinuance they, nevertheless, all continued thereafter, and up to date, to manufacture their products. Each continued to use all of the facilities for manufacture which it already had; each continued to utilize the full manufacturing capacity which it already had; each continued to do so up to this very date.

Meanwhile, Government price-fixing intervened during most of the time which has since elapsed, and was discontinued just three months before this and the criminal case, which has been here mentioned, were filed.

I think it is fair for me to say that I am one of the few people in this court room who ante-date the history of this lawsuit. I do believe that the standard coupler was a boon to our civilization. For one thing, although it is no part of this record, I can remember when our city, which was then something of a railroad city, I can remember when all the trains were on the ground and none elevated. We had a lot of men around who had lost arms and legs by the old couplers. Such amputees were noticeable when I was young. Everybody knew a few men who had been crippled in that way.

All of you Cleveland lawyers in the room will remember a splendid municipal judge who died not so long ago, David Moylan, who lost both of his arms to couplers. While it is no part of this record, it is worthy of mention, the way he overcame his handicaps as a student, as a lawyer, and as a judge, and made the local lawyers ever conscious, not only of what couplers could do to a man but equally conscious of what men could do to overcome what couplers had done to men.

I can remember when there were a lot of coupler lawsuits both in this United States Court and in our local Common Pleas Court. But in my sixteen years on the bench I have never seen one. That type of human misery seems to have quite come to its end. And while ours is the profession which theorizes on how to end human misery, it is fair to say that there can be no question here but that the engineering

genius we have herein observed in this very court room is accountable for this particular improvement.

[*Circumstantial Case*]

At the outset here, as we have said, plaintiff's counsel informed us that theirs was a circumstantial case. Plaintiff has here undertaken to forge a chain of circumstances against these defendants, and there here appeared to be certain circumstances in plaintiff's favor, which I will list as follows, much as they have listed them:

First, the fact that for nearly 30 years defendants operated under a Trust Agreement fixing prices and allocating business;

Secondly, the fact that prices are quite uniform today;

Thirdly, the fact that a Mechanical Committee, as has been utilized in the past, is still utilized today;

Fourth, the fact that these defendants reveal costs to each other today and visit each other's plants today;

The fact that no new capital in some 30 to 40 years has ventured into the business;

The alleged improper retention of control over their patents.

Now, may I observe at this point, to digress a moment, please, that when Mr. Victor DeMarco started in with his argument he made reference to the cases he had to try in the prosecutor's office and said that cases often because much simpler than they at first blush appeared. That may well be. I once heard one of the partners of the partnership of which he and Mr. Kerr and Mr. Williams are members here, I once heard one of their partners, Mr. Patrick Mulligan, one of our greatest trial lawyers, say that a murder case was really an assault and battery case in which the victim died.

The within case is really a case in conspiracy, if there be a case, and a conspiracy whether to rob a bank in fifty seconds or to violate the Sherman Act over a continuous period of 50 years, such conspiracies are provable in exactly the same way. So that even this case may be simpler than appeared at first blush, as has been said.

[*Present Conduct in Issue*]

This is, as we have said, an injunction case, and the law of injunction applies. So we are here concerned with that alleged conduct now going on, improperly, the continuance of which improper conduct ought to be prevented and stopped by injunction, according to the plaintiff's theory of the case. So there must here be that improper conduct which is susceptible of injunction for the plaintiff to prevail, and the thing enjoined must be happening as of the present moment, or likely to happen in the immediate future.

Plaintiff claims there is going on at this moment, and likely to go on in the immediate future, a course of conduct on the part of all defendants which is most improper; that such defendants are in an illegal conspiracy and combination to restrain trade in interstate commerce in violation of law, and that such illegal combination has been actively violating federal laws for four or five decades.

The plaintiff's claim herein is a most serious accusation. If it is true, then the department of the Government which examined into the question on several occasions should have brought this action long ago. If it is true, it is regrettable indeed that the Government for some years under OPA and some years under OPS, consciously or unconsciously, conduced to the evil when it exercised full control over the situation. If it is true, this action and the remedy sought is long overdue.

[*Circumstantial Evidence*]

Now, just what is before us to prove that it is true? Well, counsel told us at the outset of the case that he was going to present here what he called a circumstantial case; that he was going to prove this active present conspiracy by a chain of circumstances. And the presentation plaintiff has made has been entirely one of circumstance alone, for no witness they have produced here has said there was ever any illegal combination. In fact, every witness who was asked—and they were all plaintiff's witnesses, and then many of them thereafter became defense witnesses—but every witness who was asked testified directly and positively to the contrary. The only one who says there is any illegal combination is plaintiff's counsel himself, and he bases his statement solely and only on the circumstances he has offered.

There have been in the case on the side of both plaintiff and defendants many circumstances which may have a tendency both to prove and to disprove plaintiff's claim. And our ultimate findings must necessarily

here be based on such circumstantial evidence both ways, and on the direct and positive evidence of the witnesses who have testified before us.

Our findings of fact and conclusions of law we will herein give you verbally, leaving to counsel the task of later translating the same into appropriate written form.

[*Evidence—Period of Time*]

Since this is an injunction case, we might well have limited the evidence to that which has happened since December of 1944, because a 13-year period ought to have been sufficient to prove a current conspiracy, if one exists, but we have permitted the plaintiff to go back beyond the Trust Agreement of 1916 which was dissolved in December, 1944, and into some events of decades previous to that, for the purposes of showing plaintiff's claims as to the motivations, alleged illegalities, the intentions with which certain wrongs were done, habit patterns, etc., all with a view to throwing light on the current situation which plaintiff claims is here susceptible of injunction and concerning which plaintiff claims that the people of these United States cannot be otherwise protected from this 40 to 60-year-old illegal combination.

[*1916 Trust Agreement*]

Now we come to the first circumstance having to do with the 1916 Trust Agreement. There is no question but that the operation of this industry was conducted completely under a Trust Agreement from 1916 to 1945. It seems to have been a necessary concomitant to the production of the device which America so needed at that time. Men gave up rights for the common good; they joined together and fought a little war to save arms, legs, lives, and freight and time. They had to invent instrumentalities for that purpose, as men first invented legal entities for other purposes. They had to create a clearing-house of genius and ideas and patents and parts.

They were successful beyond expectation. And at the time the country and the world acclaimed their end result.

As to the Trust Agreement of 1916, as of the date it was made I see no illegality in it then, and since 1945 no court has ever found it to be illegal. Nor do I. Nor do I believe in the correctness of plaintiff's theory that it ended only in its outward manifestations, because the provable outward manifestations, which seem to be quite immune from plaintiff's attack, namely, the graphs which are here in the form of exhibits in evidence, and from which I will later quote—these graphs prove without any refutation whatsoever that from 1945 to date there has been a veritable, if I may use a colloquial expression, a veritable "cat and dog fight" between these defendants to get all the business away from each other that they can.

What these manufacturers did before 1916 was unique in the history of patents and inventions. For the benefit of the entire country they so gave up their exclusive rights for the use of each other as to make it possible for the development of their ultimate mechanical masterpiece.

If they didn't have this team-work for the benefit of our people, they might still be fighting over patent differences, and we might never have perfected a standard interchangeable coupler.

I can see no legal wrong in their method of mutual sacrifice of patent rights to attain this end. I find their intentions to have been perfectly lawful. I think the contention that their intentions were then improper is an unreasonable contention.

[*Recurrent Violation*]

I agree with Jim Davis that to prevail the Government must here prove some cognizable danger of recurrent violation on the part of the defendants, which he quoted from a United States Supreme Court citation.

Now, here the plaintiff has said the defendants can present a legal justification for every act they have done singly—or that was the way I understood Mr. Bernstein to have said, and that's the way the defense understood him to have said, and then he added that considered together they become illegal. Perhaps I should withdraw that because of what Mr. Bernstein later said.

The plaintiff claims they prove a conspiracy between 1916 and 1945 here. Mr. Davis says, and I agree with him, that if they have so proved a conspiracy between 1916 and 1945, they have equally proved, on the part of the plaintiff, that it was completely terminated in 1945.

[*Activity After 1945*]

The plaintiff claims other practices here ensued which constituted a continuance of

the conspiracy they claimed. They claim that the agreement ended only in its outward manifestations. The evidence before us contravenes the claim. On the one side we have that accusation. On the other side we have the compilations which were translated into graphs which showed exactly what happened in this business after 1945. Some of this evidence came from the plaintiff.

[*Percentage of Business*]

The evidence introduced by the plaintiff proves that American, a big company, whose quota in 1944 was 20.54 percent has averaged 18 percent from 1945 through 1956. They went down 2 percent from their old quota, while Buckeye, a little company with a quota of 13.41 percent averaged 15 percent. They went up the equivalent of the loss of the big company. Symington-Gould, with a quota of 11.68 percent, averaged 14 percent —up 3 points. And this percentage is a percentage with reference to the entire business of all the coupler manufacturers in the United States. So that when Symington-Gould, for instance, goes up 3 percent of all the business in the United States, its own business may be increased 10 or 12 percent.

McConway & Torley had a quota of 10 percent in the old days and averaged 13 percent ever since. National Malleable's quota which had been 44.37 percent has averaged 40 percent ever since. So that loss of 5 percent of the total business of all coupler manufacturers, that 5 percent of all the business, might very well be 10 or 12 or 15 or 20 percent of their own business. These are percentages of a total of 100 percent of all business of all companies. As to each individual company each of these percents would average a higher percent of that company's total business. National's annual fluctuations run from 37 percent to 42 percent. But this 5 percent fluctuation of all business would be one-seventh to one-eighth of their own total, which would be 14 percent to 12½ percent.

Thus McConway & Torley, which was once on a 10 percent quota up to 1945, ran in the following years immediately thereafter, 16 percent, 12.51, 13.78, 13.89, 15.94, and so on. And this percentage of all business would rate a far higher percent of its own individual business.

Symington-Gould's quota of 11.68 has since gone to 18.23 percent, and has averaged 14.5 percent over the period of the last 12 years.

It is the claim of the plaintiff that the little companies were being bullied here, the big companies told them what to do. But, strangely, from the figures which have been compiled—there is no dispute on it, there is no claim they aren't true, not a question was asked about them, and plaintiff ignores the subject completely throughout two full days of argument—but, nevertheless, the little companies which are theoretically bullied here under the plaintiff's contention have had all the increase in business at the expense of the larger companies which, under plaintiff's theory of the case, have been doing the bullying.

None of this information is questioned. None of this evidence is rebutted. There is no question about its mathematical certainty whatsoever, and these figures, and other figures which I will later on mention, completely disprove the premise on which plaintiff bases all its claims as to quota-allocation.

For instance, on bodies Buckeye's 1944 quota was 13.41 percent, and in 1957 it became 42.5 percent. On knuckles Buckeye's quota was 13.41 percent, and in 1952 it became 42.5 percent. They multiplied their business three times over.

As I find with reference to quotas, so it may be said, from one end to the other in this case, that one must always measure what is claimed by plaintiff to have theoretically happened against what is mathematically proved by defendants to have actually happened. When the issues can be so squarely met by proof to mathematical certainties, our task becomes less difficult than as it first appeared.

[*Uniform Prices*]

Now we come to the second circumstance, uniform prices, and we will go to the other graphs which prove what a lively battle has been going on here since 1945. The glaring circumstance from end to end of the case seems to be the claim that prices are uniform, and business is allocated, and the combination is so satisfied that there is a complete lack of any healthy competition among these conspirators.

[*Competition in Industry*]

The real complaint of plaintiff's counsel is that they are doing so well as the result of their conspiracy that they don't have to

fight with each other. The theory is that business has been so good for 40 years, due to their successful violation of the law, that the spirit of competition between them, so necessary to the country's well-being, is dead.

What do we find in the evidence? Let's at first ignore animate witnesses, for all animate witnesses testified positively and directly to the opposite of plaintiff's claim here. There is no question where the animate witnesses stand—and all were plaintiff's witnesses, and many were defendant's witnesses.

Let us look to a few inanimate witnesses which completely disprove plaintiff's claims in this respect—witnesses which have in no wise been refuted—witnesses which have been meticulously ignored and avoided by plaintiff in all argument.

I refer particularly to ASF Exhbit 66-165-A, and National Malleable's Exhibit 301, and Buckeye's Exhibits 383 and 384. These exhibits prove what happened to all this business from 1945 to the present date.

This Exhibit, ASF Exhibit 66-165-A, is worthy of comment. It covers 100 percent, or the total business of all involved. It shows that on the Type E couplers between 1954 and 1957 National's business is down 5 percent—not just 5 percent or one-twentieth of National's own business, but 5 percent of the total business done by all. In business that is a terrific cut.

I cannot believe that this is the result of any agreement between them, because no one would ever agree to lose that much.

At the same time ASF went up 4 percent. So they got 80 percent of National's loss. Now, ASF might like that, but National wouldn't like it.

Buckeye picks up 6 percent between 1954 and 1955; McConway & Torley went down 6 percent from 1956 to June of 1957. It looks like Buckeye got what McConway & Torley lost.

It seems to me results like these, and compilations like these, and mathematical certainties like these, talk louder than the accusations.

Again, in 1948 National had 42½ percent of all business in E couplers, new equipment, repair and maintenance sales, and in June, 1957, they were down to 35 percent of all business. This is a terrific drop because that 7½ percent loss of the total of all business done by all constitutes a reduction in National's own business of a little more than a 19 percent loss of National's own business. And Symington-Gould and American Steel Foundries gained nearly all of National's loss.

I cannot believe these losses and deficiencies are the result of any deliberate scheming, conspiracy and combination of the manufacturers, to violate the law, but I believe this is the result of natural competition, and not the result of unnatural or unlawful combination.

At the same time Buckeye's gain was approximately equal to McConway & Torley's loss. This does not look to me, gentlemen, as if the lions and lambs lay down together. It has more the appearance of what is colloquially called a cat and dog fight, for business and survival.

Every defendant is out to get all the business he can get. They have all so sworn, and the mathematical certainties prove it. And the way their businesses have gone up and down—and there is only 100 percent to fight about—the so-called largest operator loses close to 20 percent on a gradual 9-year decline. I think human nature is such that no such loss would ever be suffered by it as a result of an unlawful combination. They lost 20 percent because they had more competition than they or anybody else ever bargained for.

This doesn't sound like a situation to me in which a group of men got together and agreed not to fight. It looks to me as if the only way in which it could be fairly said that they sought to allocate work was by giving everybody the same chance to fight for it. So much for the fight on the Type E couplers.

Another graph, National Malleable's Exhibit 301, showed National's participation in the sale of all railroad specialties, which includes couplers and everything else it sells. In 1936 National had 12 percent of all such business. In 1939 it moves up to 19½ percent. In 1941 it went down to 14 percent. Nine years later it was 15 percent. And in 1956 it got back to 20 percent, approximately where it had been 20 years before, in 1936.

Such fluctuations in these percentages, which refer to the total of all the country's business, indicate, as I see it, such variations as constitute a refuting circumstance to the

claim that there is here an unlawful combination by which National or any other defendant here seeks, gets or controls such particular quantity of business as is unfair or unjust to the people of these United States.

The fact is that the country gets that benefit which inures as the result of the increasing effort of these defendants to get all the business they can away from each other.

Note, gentlemen, these figures and percentages appearing on these graphs were not attacked or rebutted in any manner whatsoever by plaintiff. I take it they are correct and true in every detail.

Buckeye's Exhibits 383 and 384 give us information on changes in the number of customers to whom they sell. The customers necessarily must be railroads. They have no other customers.

Now, the AAR has 110 Class 1 members, meaning Class 1 railroads, meaning railroads with a gross of over $3,000,000 a year, and 160 associate railroads which are not in Class 1. So the number of prospective customers involved here is always limited to a possible 270.

Buckeye's graph, in Exhibit 283, indicates that between 1940 and 1957 Buckeye had 110 specific customers, and that in the 1940-1944 period, under the Board of Trustees operation, they had 37 other customers who it later lost. Those customers ceased to buy from Buckeye after 1944.

On the other hand, after the Board of Trustees dissolved, and between 1945 and 1957, Buckeye picked up 138 customers which it never had before. Considering how few prospects there are, this looks like natural competition to me. There were 270 possible customers and Buckeye picked up 138 new ones—over half of all possible prospects. I find that to be very spirited competition.

Buckeye's Exhibit 383 shows that after the 1944 dissolution Buckeye went out and gained 138 new customers and, at the same time, lost 37 of their old customers. Therefore they have a net gain of 101 customers when there were only 270 possible customers to solicit. In other words, they got more than one-third of all customers from any sources, which were also sources for the other defendants. This proves the fallacy of the claim that there is no competition here.

It did not have a proportionate increase in business, but this does prove it is highly competitive, that there is turmoil and change, that nobody lays down on the job, and there is a very sincere fight to get everybody else's customers.

Buckeye's Exhibit 384 shows, by graph, the years in which these new customers for couplers and parts were acquired between 1945 and 1957. In 1945 they picked up eleven; in 1946 they picked up eighteen; 1947 they picked up seventeen; in 1948, seventeen; in 1949, nine; in 1950, seven; in 1951, ten; in 1952, eight; in 1953, six; in 1954, eight; in 1955, eleven; in 1956, eight; and in 1957 so far, eight, for a total of 138, all out of the same 270, or more than half.

Again considering how few the prospects are this indicates that Buckeye is no more satisfied with the status quo than are its competitors. Each fights for every customer and every sale. This circumstance, so proved by these graphs, is another proof that the industry is one of ceaseless competition and not one of planned limitation.

O'Kane of Buckeye said that since 1945 they went after all the customers they could get and their coupler customers almost doubled.

To increase one's business in this industry does not mean one creates business which did not exist before. It means you must take it away from somebody else. There is only 100 percent of the business and it is limited to railroads only, and no salesman creates any new prospects. Sales ability constructs no new railroads. You have to fight for what there is. They all have to fight to get all they can from the other fellow and to hang on to what they have, and the fluctuations of sales and production in all these defendant companies proves that they are competing to the best of their capacity and illegally agreeing not at all.

[*Prices—Parallelism of Action*]

Buckeye's counsel says they followed National prices; that they are constrained to do so because couplers are exactly alike and completely interchangeable and fungible. All must go to the same small group of customers represented by astute purchasing agents. They know a small company can't get more money for the same thing than a large one. They followed National's prices but couldn't learn them until they were

published. Moriarty never told them until he told the world. That was the plaintiff's proof, and I believe it, and I find that the parallelism of action here which plaintiff construes as constituting proof of an implied conspiracy here is really the result of a strong and informed competition.

Now, Mr. Suttie testified, he being an officer of the American Steel Foundries, that after the United States decontrolled, and OPS ended, he published his price list in the Chicago Journal of Commerce. To me, that is pretty fair evidence of a company's willingness to tell the world what its prices are. He also related that Moriarty told him that he, Suttie, was getting too much business, and he told Moriarty his superiors told him to get all the coupler business he could, and that that was what he was trying to do.

O'Kane of Buckeye said he was trying to get all the business he could and that the number of his customers had doubled since the dissolution of the agreement.

What Suttie and O'Kane said was amply factually demonstrated by ASF Exhibit 66-165A, and Buckeye's Exhibits 383 and 384, which we have previously discussed, all of which, by animate and inanimate witnesses, demonstrates that prices herein were the result of legal competition and not of illegal lack of competition.

Another circumstance here which cuts both ways, these exhibits which prove rather fierce competition since 1945, prove equally well the plaintiff's contention that there wasn't any competition before 1945.

So my question still is: what misconduct obtains and exists today susceptible of and requiring an injunction?

[*Prices—Witnesses*]

Now, there were some animate witnesses on price-fixing, too, and all animate witnesses testified there was never a conspiracy or combination here or any agreement to fix prices.

It may be ever natural for the accused to deny a charge against him; it may even accord with their instinct of self-defense. We have all observed that as lawyers. But it seems to me these were intelligent, educated, honorable professional men, these were men to whom dishonesty in a court room would be as alien as a deliberately false reading from one of their own slide rules. To me they tell a completely honest story of their businesses, and of the events with which we are here concerned.

I have often heard lawyers and doctors testify. I never heard testimony any more exact or cogent or correct than theirs seemed to be. And since Moriarty of National takes all responsibility of the alleged fixing of prices on couplers which he originates and which others imitate, we will consider Moriarty first.

I believe his testimony that prices went up and down from year to year, depending upon conditions. Prices are increasing on everything else. Why shouldn't they on couplers?

I believe that until he made up his own mind he did not tell his prices to anybody, as he testified, and that after that he told the world he sent copies to customers and to the public, including even his competition, as a matter of courtesy and convenience. And I think from observing him he would be courteous to anyone, even a competitor.

I believe others followed his prices, as they have testified. I believe they couldn't charge more for the same exact thing and get the business at all; that they couldn't charge less and get the business because National would have to meet their competition if they did so.

I believe in the three-month interval between OPS and the filing of this petition that it was perfectly natural for all defendants to continue to follow the uniform prices theretofore obtaining under Government control.

Mr. Moriarty testified that in his company he had complete jurisdiction in pricing; that he did not confer with any of his competition on prices; he did not even confer within his own plant, except to get the data which he needed to set a price. He assumes entire responsibility for prices. He has never had any agreement with anybody on prices. When the OPS authorized a 5 percent increase he refused to follow their suggestion because, as he testified, he couldn't justify their suggestion by his costs. That sounds like an unusually honest and honorable gentleman to me.

When he says he set his own prices I believe him. And when others say they follow his prices as a matter of uniformity because they can't make the same identical

thing he makes any cheaper than he can make it. I believe them.

I think we are here dealing strictly with the law of supply and demand, the mathematics of costs and the vagaries of economics, and it is difficult for me to see wherein any of these natural results can be properly considered as susceptible of injunction.

On the other hand, when others put their prices below Moriarty's, he always followed the lowest price to meet the competition. What other method could he or they or anyone else use? He gathers together all the data he needs and he alone decides the price. And because of the position his company occupies in the field others imitate that price. It is sent to all their customers. They send it as a matter of courtesy and convenience to anybody who wants it, including competition and everybody else. Others, for the reasons given here in their testimony, as far as couplers are concerned, follow the leader, National Malleable. They all sell the same identical thing.

To me it seems a perfectly natural thing that they do so. And, indeed, from their testimony what else could they do, since they must meet their competition?

I believe nobody here conspired or combined or agreed to do anything unlawful. I believe we can't enjoin Moriarty from thinking, from figuring out what the cost ought to be based on, economic, business conditions, changing labor costs, changing commodity costs, and other data he described. We can't enjoin nature, which so operates when an article is offered for sale that whoever else offers the same thing is in a position where he can't charge much more. You can't enjoin supply and demand.

You can enjoin only such wrong as is susceptible of injunction. I think similarity or uniformity of price here has come about in a purely natural way, not the result of any combination, but the result of intense competition.

What happened in the business, as some took business away from the others, and lost it in turn, proves that. I believe the testimony of the men who said they fight for business because the business in its ups and downs, from these exhibits, proves exactly what they say.

Now Emerson once said that "What you are talks louder than anything you can say." Here the changing course of business, the way some take business away from others, the way sales go up and sales go down, the graphs which prove the degree of change, all of this talks louder and more convincingly to the effect that there is a healthy competition here and everybody is getting all the sales he can.

These facts and this evidence in exhibit form talk louder against the theory of illegal combination than do the suspicions of plaintiff's counsel or any contrary evidence which plaintiff has produced. In fact, to the evidence which I have mentioned plaintiff produced no rebutting testimony at all.

And not only do the changes in their sales so prove by circumstance that there is here no illegal combination or agreement, but every witness in the case who was inquired of on the subject without any exception so directly testified. Some witnesses testified they would learn from their customers if National had put out a new price list and they would then call or write National to get one.

I see no impropriety in that.

Mr. Suttie of American Steel Foundries said he had to follow National's prices because the parts were all to exactly the same specifications and of the same standard quality so that no railroad would pay any other price for the same identical thing. The only difference was the imprint, the name plate on the parts.

His testimony and his reasoning sounds very cogent to me. It lends credence to the defense that prices are a matter of economics and competition resulting in a price to the public which is the result of the law of supply and demand and not the result of an unlawful combination.

It is claimed here that there is today allocation of customers. I think each defendant gets all the customers and all the business he can. The graphs which we have mentioned so prove.

[*Allocation of Business*]

I find no convincing evidence on this subject of either quotas or allocations. The chart compilations here are irrefutable. Of course, they contain only that period of time after 1945. Plaintiff made no effort to meet this evidence. Plaintiff in argument ignored this evidence.

When I consider the preeminent capacities of plaintiff's lawyers as they have so well demonstrated throughout these weeks, I believe they stayed away from the subject because they realized that this feature of the defense is absolutely true.

I find it true. I find that since January 1st, 1945 all of these defendants have been making every effort to hold and get customers and to take them away from each other because there is no other business to get. What business there is contracts and there are no future possibilities of expansion in this business. One is limited to what he can take away from somebody else.

[*"Mechanical Committee"*]

The third circumstance here is the Mechanical Committee, and it is suggested that its activities are circumstances here proving an illegal combination.

Mr. Kerr for the defendants said that the Mechanical Committee serves a useful and lawful purpose. I believe it does.

Its work is scientific and mathematical and precise. I do believe patent or legal considerations have no influence whatsoever on what these precise scientific engineers do in their work. Theirs is an exact science.

They were criticised a little bit here for having read the reports of the United States Supreme Court, but I do not believe that such reading had any deleterious bearing on the work they do, nor any insincere connotation in its having been read.

From my observation of these men, I do not believe any consideration would cause them ever to produce any device but the best they could put together. I do not believe they would tolerate or permit any perversion of their art for any unlawful purpose such as would endanger the men who couple trains or those who ride them.

As to the Mechanical Committee's holding its own drawings and gages and the claim of their denying others access thereto, I do believe that whatever was done in this respect was done in the interest of standardization and in the interest of protecting standardization and in the interest of the safety of passengers and crews on trains.

I agree that standardization is necessary to prevent the manufacture of obsolete or inadequate parts which would endanger those who ride and those who work that others may ride.

Plaintiff's counsel suggests there is some illegality in the way in which the Mechanical Committee holds onto its drawings and gages; that this sort of secrecy indicates some unlawfulness in the way it retains its own property. Plaintiff's counsel is under the impression that the duplication of this coupler would be a prodigious and impossible task, and that it would be a terrible injustice if a prospect who wanted to get into this business had to go to some one of these defendants or the Mechanical Committee with his hat in his hand and ask, "How to make this thing," as counsel says.

What a catastrophe that if he wants something that somebody else now has as the result of that person's own creation, that he should have to ask his so-called competitor for it. Obviously if the defendants are his competitors, they have no way of knowing it as yet, have they? And the fact that he must ask is in itself a violation, plaintiff suggests.

Just what must manufacturers do to keep within the law? Must they go around with their drawings in their hand offering them to those who might possibly be enticed into becoming their competitors? Is it wrong to create something and to possess it and to wait for someone who did none of the work to ask for it? And if you want something that belongs to somebody else, because he put it all together, and you didn't put any of it together, were we not told long ago to "ask and we shall receive"? And whether one's hat is in his hand or not, it seems to me it is more just to tell one man to go through the red tape of speaking up for himself than it is to make a criminal out of one who didn't give up his possession because a prospective manufacturer who doesn't yet exist—according to the testimony in the case to date—has coveted his neighbor's goods and is willing to take them but is not willing to go through the indignity of asking for them.

It is my impression from what I have heard here that these defendants do a beautiful job mechanically of casting their parts, because to cast something means to throw—like casting a die or casting a fishing net. And in the early days they threw or dropped the hot metal into molds wherein patterns had once been placed to form an emptiness or vacuum, and after the metal cooled they then removed the sand from the box and they had a little piece of cast iron conformed

to the hole in the sand which had been put there by a pattern.

You all know the calibrations on a one-inch ruler, the twelve little parts that go to make an inch. These men have mastered their art by their genius to the point they cast or throw their hot metal into a receptacle of some kind and it emerges to within one thirty-sixth of an inch, to a point where it takes no machining to complete the article.

The little machine that we had in here, the little coupler that we had in here looked very pretty and it was intended to look pretty. When you fellows are going home on the railroads tonight, take a look at the freight train on the adjoining track and look at the couplers. You won't find any of them shined up.

What a job to make these parts to within one thirty-sixth of an inch by casting. And it comes out so perfectly it doesn't require machining and it never requires lubrication. It works till it wears out. Who could improve on that?

You lawyers who work in Cleveland are well aware that this is a machine shop city, a city of toolmakers and gage makers. We make the tools which make the tools. But whenever we get a thousandth of an inch on a part, it takes machines. Our more precise work is in ten-thousandths.

I have seen a piece of steel expand a certain number of millionths of an inch when I tapped it with my forefinger because one-twentieth of a second of the heat from your forefinger can cause a piece of metal to expand a millionth of an inch. We have machines around here which so record.

What a wonderful thing that these people can turn out their product just in the form of a cast or casting. One wonders how any of us could improve on their work.

The more I hear about the Mechanical Committee, gentlemen, the more I marvel at the perfection of its productions.

[*Plant Visitation*]

Now as to the circumstance of reciprocally revealing costs and of plant visits and royalties.

If there were no competition between these defendants such as has been well and mathematically proven, I could understand the suspicions of plaintiff's counsel on these subjects. But as long as they are all giving each other a well-proved battle royal to take each other's customers away from the other fellow as well as they can, I see no legal harm in their fraternizations.

There was lots of visiting back and forth here. Engineers do it, just like bar associations, just like visiting lawyers and judges.

It seemed to me that the men who did the visiting gave far more cogent and logical reasons for it, and reasons far more true than the suggestion that it was all part of an illicit combination. They went to see new furnaces, new processes, new methods, and they went to many foundries belonging to many corporations other than these particular half dozen defendant companies.

When you listen to these highly-educated and trained engineers explaining their purposes and the benefits they or their companies derive in thus learning from others, the suggestion that it is all to facilitate a 40-year-old conspiracy becomes most untenable. Indeed, instead of a circumstance tending to prove guilt, it proves the contrary.

[*Cost Information*]

I don't believe or find that these defendants reciprocated cost information to get prices up, as part of an illegal combination at all. I think they did it to check costs with each other so that they could get their costs down.

I believe the evidence so shows. There was no chance to get labor and material costs down, so they checked costs with each other to see what else they could get down, and they gave pertinent examples of it to me. I find that plant visitation was all for the same ultimate purpose, to improve their work, to observe new machinery, to observe new methods. All done ultimately to reduce costs, because these defendants must compete with each other even in efficiency, because labor and material was increasing costs so much in one direction that it behooved them to cut costs in every other direction, if they could.

I find getting costs down by either of these methods of imitating the other fellow to cut costs or learning more efficient methods to better compete with him ultimately keeps prices down, too.

I find that cost information was here exchanged to improve productive efficiency and to lower costs. If costs were to be lower, it could come only from such costs

because labor and material costs were beyond everybody's control.

The professional meetings of accountants had to do with an exchange of technical, theoretical professional ideas of organization in the steel castings industry. From the testimony they never had any discussions of pricing problems.

[*Royalty Reports*]

As to royalty reports, many industries and businesses furnish reports to others of their activities, such as trade associations, credit associations and others. I can see no violation in furnishing such reports.

They all show, insofar as this case is concerned, that the little one gets more business and the big one gets less. So I cannot see wherein royalty reports have the efficacy which is here claimed by the plaintiff's side.

[*Lack of New Venture Capital*]

Now the circumstance that lack of new venture capital proves that others are unlawfully excluded from this industry is something we should consider here.

There was a lot of talk about why no one else gets into this business, why in all these 50 years only three or four people asked. If it's so good why does everybody keep away from it except a few that were in it in the first place?

As to any inquiries seeking to get into this business since 1945, National alone received one in these last 13 years, and no other defendant even knew they had it. And the one it received, as I will mention later, I do not believe was of any serious consequence.

Now Mr. Kerr cited some economic factors which he said would account for the failure of others to go into this industry. He mentioned that the present capacity was adequate to meet the demand; that they are in a shrinking market—they have less cars now than 25 years ago; that special rigging and equipment would be required at great expense; and that their licensing policy to give licenses to any qualified manufacturer is fair to all.

Plaintiff claims that since no new competitors have come into the business that they have therefore been kept out. That's the intimation they make and the circumstance they wish me to follow.

Not once in all these weeks of trial have we learned of anybody in particular who desired to actually get into this business and who had the competency to get in the business, who was kept out.

I find that nobody ever wanted to get in. I find that nobody was kept out.

And the evidence before us and common knowledge on the subject indicates some good reasons why new venture capital would avoid it. The circumstance that no new candidates applied is no more cogent than the circumstance that any candidate with money would be very careful about applying. Venture capital is what we call "smart money," gentlemen. It doesn't make any silly mistakes. The question here is would it not have been silly and ridiculous for them to get in this kind of a business.

Now to prove its contention plaintiff has dug up over a half century search what it considers as real applicants for the business. I find from the evidence before us that the Ohio Brass, which is one of their candidates, if I may call them that, never intended to manufacture the standard coupler at all and so stated.

I find that another of these four or five over a 50-year period is the Maritime Steel matter. No license could be given them since the license for Canada had been given to the Canadian Steel Corporation to whom they were referred. They are an outfit looking for what those in the theatrical business would call an "angel." They want somebody to finance them. They'd get into the business if someone else paid. They had their hand out, too.

In the Southern Railway matter I find no proof to show defendants combined to exert the pressure herein claimed. Southern Railway weren't serious at all, and said so. They used the expression they were only "toying" with the idea. So I find Southern Railway never asked for a license and the evidence shows they didn't want one. As they said, they were toying with the idea of getting into the manufacture of coupler parts. When people "toy" with ideas, the Court shouldn't take them any more seriously than they did themselves.

In the Pratt & Letchworth matter we find they wanted information on the necessary procedures to manufacture a yoke, namely the Y-30.

They were told to whom they should write, to Symington-Gould who designed that yoke and to Buckeye who had a patent on the pin support. They were then told to ask the Chairman of the Mechanical Committee for drawings. They asked how to do that and they were told how to do that, and they were never heard from again.

To me none of this 50-year evidence in these four isolated cases or instances constitutes any circumstance in plaintiff's favor. To me it proves the exact opposite of what the plaintiff claims for it.

[*Threatened Patent Suits*]

It is further said that suits were improperly threatened by some of these defendants here as a matter of pressure, patent suits. They were going to be brought in three or four instances in over a 50-year period, namely in 1921, 1924 and in 1940.

May I say, gentlemen, if that's all the patent suits that were ever threatened, there wasn't any barratry involved.

Who has a better right to sue over patents than the patentors who are given such right by another branch of our own Government? Since there has been no such suit threatened in 17 years, it doesn't concern our injunction suit here very much, does it?

[*Lack of New Entries—Reasons*]

Plaintiff here says others are improperly kept out of this business. The defendants have proved nobody wants in.

After so proving the defense offers some very cogent reasons as to why nobody wants to get in.

We have a 20-page exhibit here—well, I can't quite find the name of it but it is this blue book which you all have, National Malleable's Exhibit 294, indicating it would cost a little over $900,000 for a foundry already well-equipped with its own machine shop set up, a foundry already in a going business, with its own plant in operation and with space for such use to become equipped to make the type of railroad parts with which we are here concerned.

There is evidence here by defendant ASF that the railroads are in an industry which is in a condition of contraction. Defendant ASF suggests that railroads are going out of business and losing business; that planes and buses are picking up their passenger service; that trucks are picking up their freight business. It is a matter of common knowledge that the industry is in some state of contraction; that planes give much faster travel to passengers at practically similar costs; and that buses charge passengers about one-half as much; and that the trucks which carry freight from door-to-door have become a great convenience to the public. And door-to-door means you are only dealing with one transporting company, and when you deal with a freight train you have to hire somebody to take your produce to the railroad dock, you pay the railroad to move it somewhere and then you pay somebody else to move it from that railroad dock to its destination. The trucks move door-to-door. They are a great convenience, gentlemen.

On the other hand it is equally a matter of common knowledge that capital of the size required here seeks to enter businesses which have a fair chance to both profit and expand. New sciences and arts now claim the attention of prospective capitalists. The aircraft industry does not have to buy the airports. Buses use the public roads. New capital has little interest in the purchase and maintenance of heavy equipment, tracks, roadbeds, bridges, signal equipment, and depots. I do believe that no part of the railroad business today has what it takes to entice new venture capital to risk itself, because it cannot either profit or expand and its future is comparatively dismal alongside of the investment opportunities in the ventures which entice America today, such as in the electronic and nuclear fields.

None of this was in the evidence except that which was said about buses, trains and planes. We all know as a matter of public knowledge investors aren't going to put their money into anything except that which looks like a winning venture with a capacity for some ultimate actual profit. As a matter of circumstantial evidence it is far more probable that venture capital stays out of this business because it doesn't want to get in rather than it is kept out by unlawful combination.

I find that nobody of the industry here decided to keep anybody out. The ones on the outside never evinced any desire to get in, and that means that over a 50-year period not one applicant evinced such desire. The reason[s] why they wouldn't are very apparent and those reasons are not the result of any illegality.

Transportation ever changes in this great country. The Ohio Canal made our city great back in 1832. A few years later came the railroads and the Canal went out of business. Buses, planes and trucks now push these railroads around a little bit.

Railroads are selling their depots. No railroad today can afford to replace its own bridges or buildings. Since our case began here—it doesn't hurt to say it for it cannot influence any jury very much, nor will it concern any finding I am making—our oldest railroad, the B. & O., asked for the privilege of ending its passenger service, and the two biggest wish to join each other, I presume if the within plaintiff doesn't object.

It's what we call in the divorce court a business marriage and here necessity is the shotgun. Up to now these two great railroads would never get under the same roof anywhere. Every road in Cleveland goes into our Terminal Building but one, and when this lawsuit was just middle-aged back in the 1920's and 1930's, the same two built great monumental depots in New York City so they could tell the world, in a sense, that no love was lost between them. But times have changed. All of this is worthy of illustration though it is not a circumstance before us by way of evidence.

Another feature which concerns venture capital is its desire, if it can do so and it has the choice to do as it will, to avoid any business subject to Governmental regulation, even though it be common carrier.

And I ask each of you good lawyers, forgetting the record and forgetting the lawsuit, since we had rent controls, which one of you ever heard of anybody in the form of venture capital who built one single house so he could rent it? At the same time, the venture capital which will no longer go into private homes will buy into industry which produces what goes into homes, such as cement and lumber and glass. The analysis of what causes people to invest or not to invest is a study far beyond our task today. But from the viewpoint of circumstantial evidence, the fact that no serious new investor took this business seriously in half a century doesn't prove that the door was shut against them. To me it proves they were too smart to step into any such financial trap.

Mr. Bernstein in his closing argument says that the defendants here have an intent to monopolize and that in favor of his contention is the fact that no new manufacturers have come into the picture in a long time. Against this contention is all the evidence we have had showing no serious competent applicant ever has applied, in addition to which it does appear to me that venture capital would be too intelligent to get into a business with no capacity for profit and no possibility for expansion, as I have outlined. This business never looked as good to venture capital as it seems to appear to the plaintiff.

Mr. Bernstein argues as to how defendants react when prospects appear who are concerned with the business. And from the activities of these various defendants he thereupon argued they just wouldn't let anybody in.

Now the truth is, gentlemen, that applicants of no really serious nature ever appeared on the scene except at very rare intervals and many years apart.

And the strongest conclusion one comes to is not how defendants reacted to keep them out, but the strong conclusion one gets is how repugnant this business must be when it elicits so little interest. It must be repellent because nobody wants to gamble when there is no chance to win.

I believe that is why there has been no venture capital here.

[*Patent Control*]

Circumstance No. 6 has to do with improper patent control.

The evidence shows that after the end of the Trust Agreement in 1944 there was need to continue patent licensing to enable manufacturers to avoid infringement. They were renewed on a two-year basis up to 1956, and are still in process.

Plaintiff's great complaint on this is as to the method. Since the protection of the people requires the continuity of some system of scientific and progressive efficiency such as been hereinbefore utilized, I can find no illegality in the preservation of that efficiency in the same hands as heretofore. The suggestion of change, in what amounts to the custodial care, suggested by Mr. Bernstein, of all these instrumentalities might or might not be effective. I don't know. It certainly isn't our function to authorize such experimentation with somebody else's property and somebody else's industry. Ours is to decide whether there

is such current illegality here as to require current injunction.

It is true that after 1945 non-exclusive licenses were issued by defendants to each other. Price-fixing from that time on was eliminated, quotas thereafter were eliminated, concert of action after '45 was eliminated.

Since 1945 non-exclusive patent licenses have been issued to accomplish the interchange of patent rights necessary to continue the manufacture of the standard coupler, and these have been kept up on a two-year basis to date.

I can see no illegality in that.

Mr. Bernstein objects to the method and system of those who have patented these products and who have joined their various geniuses to standardize parts in the way in which they have issued licenses.

He says, and I quote, "They impose themselves as the authority to issue licenses." Since it pertains to their own patents in which the Government has guaranteed their property rights for the purpose of inventor encouragement, who else has any better right to exercise such authority?

And if patent laws give them authority, then can it be justly complained that they impose authority on themselves just because they decide how they will share it with others? If those having rights are not to be fairly permitted to share them with those to whom such rights can be safely entrusted, then shall some other agency be invented to hold and dispose of such property rights? I find from the evidence that no applications for licenses have been made since 1945, thirteen years ago. Since nobody wants one and nobody asks for one, I cannot consider in today's case for injunction this invisible man who has been conjured up with a hat in his hand and who has been around here for twelve years, if he exists.

I must find that since there has been no evidence that anybody wants one, that for lack of such proof, nobody wants one.

The National Malleable witnesses have said it is their policy to consider any qualified manufacturer for a license. I don't believe any qualified manufacturer has applied. There has been no such evidence here. I don't believe anyone has ever been excluded except that imagined personality that was invented here in the process of the case.

We find that Buckeye holds no patent here whatsoever. It operates completely on licenses from someone else to make what they have patented. The royalties are so nominal that a non-owner is at no disadvantage whatsoever. Royalties are never equal to one-half of one percent of the selling price, so the owners have taken no advantage whatsoever of the non-owners.

The Government has here suggested that the method followed in the renewal of licenses is a factor of what they consider a conspiracy herein. The success of Buckeye since 1945 disproves the claim. Holding no patents, operating on licenses from others, receiving them without asking for them as they have testified, they give the patent owners the biggest competitive headache they get.

[*Theories of Case*]

There has been some argument of counsel here which deserves particular mention.

Mr. Davis in argument calls attention to the fact that plaintiffs changed their theories during the case. He says they originally charged that after 1945 the manufacturers met and by discussion would fix prices among themselves and make agreements, and that later National would announce results and others would follow. But that they didn't then claim that National would make its own independent decisions and that others would follow as the evidence they have adduced has since disclosed.

I find herein that Moriarty did make his own independent decision on prices for National, and I find from the evidence of plaintiff that all others then followed National's prices as to couplers, in particular.

It does appear that as to this phase of the case the plaintiff shifted. It does appear that plaintiff did not amend. It does leave plaintiff to some degree in a situation wherein it seeks to advance the theory here that parallel business behavior on the point of similarity of price constitutes a violation of the Sherman Act, which it does not.

Counsel for Symington-Gould suggests here that if the plaintiff is right then a lot of fine people must have committed perjury. He says they get National's price list first from a friend at the New York Central, and then they call and get a copy.

But they never got a copy until after it has gone out to the trade.

I find from all the evidence that this is how it was done. There is no evidence to the contrary and I believe all those witnesses spoke the truth.

Plaintiff here contends that two-year leases imposed quotas on the little companies. Plaintiff's Exhibit 1143-1781 shows on tons shipped little Symington-Gould had 18.23 percent of all coupler business in 1954, and ASF, a big one, had 16.59. Mathematics can be very convincing, gentlemen.

Symington-Gould's official said that after 1945 the new licenses opened the way to solicit business everywhere. The doors were opened wide. I find that the mathematics here submitted have so proven.

Mr. Sellers for McConway & Torley says that while plaintiff's counsel cited [1940-1943 TRADE CASES ¶ 56,209] 316 U. S. 265 and [1932-1939 TRADE CASES ¶ 55,205] 306 U. S. 208, he forgot to cite [1954 TRADE CASES ¶ 67,640] 346 U. S. 540 which overrules the two cases previously mentioned.

He also denies that the defendants are dominated because licenses must be renewed, and says his company receives them every two years without even asking for them.

He says they get all the business they can and the figures which we have particularly shown for them indicates that that is true.

Now Mr. Thomas for the AAR argues that the Bernstein proposal for changing this whole operation as he outlined it in argument would undermine the standardization which the Government has heretofore approved. Mr. Kerr had previously argued it would deprive defendant manufacturers of rights guaranteed by another branch of the Government.

Frankly after I heard how Mr. Bernstein was going to put the Court into this business, and after I heard his ideas as to how the business could be run right, if they weren't only so cheap, as he stated in his argument, the more I heard of his substitute committees, the better the present system looked to me, with all due respect to Mr. Bernstein as a lawyer.

[*Unwitting Conspirator*]

But my first concern is always as to whether or not plaintiff has here proved its case. Mr. Thomas quotes Mr. Bernstein as saying that the AAR has done something unwittingly here in failing to police what others have done. Unwittingly means unknowingly, unconsciously and not intentionally. Defendant AAR is really here charged with intentionally doing something which it did unintentionally. They are accused of being an unwitting conspirator.

I must confess that I have participated in criminal practice many years, both in prosecution and in defense and on the bench, too, and a charge of having been an unwitting conspirator is one I do not quite comprehend. I have always believed that a conspirator had some consciousness of the existence of the conspiracy of which he was a part.

[*Boycott*]

Mr. Thomas says that under the AAR rules any railroad may accept cars not equipped with standard couplers, and that no rule requires purchase of any special coupler. They recommend only adoption of standards. He says that they have encouraged, approved and recommended many railroad parts whether certain defendants liked it or not, and that they boycott no one.

Mr. Thomas says, and he argued quite logically on the subject, that Mr. Bernstein's proposal if ever put into effect would result in boycotts. Mr. Thomas gave us a detailed history of events in his Association, and I believe that what he said had a ring of truth in its every word. And I believe that he spoke truly when he attested to the honorable dealings of his clients over the years.

There is something about the ring of truth, which a great writer, Alexander Dumas, mentioned as having been strange when you hear it in a court room. And in his book on Les Miserables, the miserable, he said that when truth rang out even the judge had to listen.

When Mr. Thomas gave his recital on what his Association had done, I say again it had the ring of truth in it. I agree with Mr. Thomas that Mr. Bernstein's suggestion as to how this business ought to be run would not give us in this instance any panacea.

I agree with Mr. Thomas that his people boycotted no one.

[*Final Argument*]

Now Mr. Bernstein in his final argument said that no one will appear on the horizon tomorrow to go into this business. Well, I think that is quite true because no one has appeared on the horizon for the last 50 years to go into the business.

I don't think there is any question but what plaintiff's witnesses here who were connected with the defendants' case also told the truth throughout when they said there was no combination. I noticed the engineers in particular—and they have come in for a little criticism in this particular—they were so anxious to explain their answers particularly on engineering problems, because in their work whoever asks a question must be given a mathematically complete answer because otherwise terrible consequences might ensue, to the point where to cut down on a lot of conversation not legally responsive, defense counsel had to ask me a number of times to strike the unresponsive answer of these witnesses. They were so anxious to talk they couldn't stop. I have always found men that did that quite honest. They are too anxious, one might say, to limit their answers, and I am not thinking of verbose individuals because engineers are not.

Mr. Bernstein asks in his final argument, would the defendants license an outsider at nominal royalties today? I don't know the answer to his speculative question. And since no competent bidder ever appeared, one doesn't know.

Mr. Bernstein says, "Let us predict the future." As I have said, gentlemen, in this business there is no future. The railroads as a class are appreciated in wartime because no one else can move heavy material in bad weather, and no one else gets through in floods or catastrophes. But other than in this one war service, as a rule their contribution to industry is quite unappreciated except by those who know them well.

It does appear to me as if the contraction in their business will result in a constriction and ultimate strangulation. I don't know what Mr. Bernstein meant when he said let us predict the future, but I do believe in this business the lack of future is what has kept others from investing in it.

[*Monopoly*]

Mr. Bernstein argues that there is monopoly here. One of the general characteristics of monopolies is that we find them in good businesses which are profiting and expanding, which everybody else wants to get into, and we have people on the inside who have such a good thing they do not want to let anybody else in because they are so jealous of the good thing they have. We are not dealing here with any such attractive future possibility.

This indicia of monopolies is conspicuously absent here. I see no such monopoly going on today. I see no cognizable danger of recurrent violation here.

If there has been violation in the past, and I am really not called upon to find there has or has not been up to 1945, there is surely no cognizable danger of its recurrence today, thirteen years thereafter. Whether or not there has been a violation in the past, my question here is as to whether or not injunction is required today to forestall future violations.

Mr. Bernstein talks about the *American Tobacco* case, [1946-1947 TRADE CASES ¶ 57,468] 328 U. S. 781, and instructions to a jury in such case, which instructions were approved by the Supreme Court. And he defines monopoly as being a joint acquisition or maintenance, from such case, of a conspiracy formed for the purpose and to such extent that they are able to exclude others from such business, accompanied by intention so to do.

I find no unlawful acquisition, no unlawful maintenance, no unlawful exclusion, and no unlawful intention here.

I find quite a battle for business among these defendants in an industry so unprepossing that in a period of 50 years no manufacturer of any competence was ever interested in entering the field. One or two letters evinced no such interest.

If rivalry is a stimulant to industrial success, which was another test mentioned by Mr. Bernstein as he quoted from these decisions, then surely the rivalry here over the last thirteen years indicates that this is not a monopoly.

Mr. Bernstein quotes another U. S. opinion to the effect: "No monopolist monopolizes unconscious of what they are doing."

Now, it is time the AAR learned of that because they are here accused of having gone into a monopoly unwittingly.

[*How To Run Business*]

As to Mr. Bernstein's final suggestion as to how this industry should be run; I must say I cannot agree with him that the Court should experiment to the extent he asks, and I must say I see no particular efficacy in the suggestion. I can understand his opinion on the law, and I can understand his opinion on evidence, but when it comes to running somebody else's business, gentlemen, even if it isn't in the record here, it is worthy of comment that there is a human tendency to recognize a weakness in another when he's on the job—and every time you sit and look at television you imagine how much better you could do if you were only in that boxing contest, you can tell exactly when some fighter should have ducked, you can tell exactly how he should have swung and what kind of uppercut he should have brought up from the floor; when you watch a football game you can see so many opportunities of interception and you wonder why these athletes don't intercept and you figure you could have intercepted; it's got so we build special places, at least in this town, for observers who are called sidewalk superintendents to watch buildings going up and figure how much better it could be done—and I do not say this critically.

I am trying to get at the proposition that we lawyers cram our minds for a lawsuit this week and empty it Sunday afternoon and get ready to cram our minds for another lawsuit next week. Our great art is the capacity to fill our minds and then empty them as if it were a sieve to get ready for the next case.

Jim Davis had to argue a case in the United States Supreme Court within the last week in the middle of trial here. He had to forget all about this six-week venture in this room and go down there, and then he had to forget about his case there—and he hasn't yet told us how he came out—and get back here and then cram himself about this. Our art is to get it together and then tear it apart for the next lawsuit.

We should leave the engineers to their own field, because generally, and I do not say this unkindly.

I have noticed all my life when lawyers become businessmen or turn into real estaters or insurance brokers they always become that much less of a lawyer, and I think we should go on the assumption here that these people have done a good job and they know better how to protect and preserve their industry for the benefit of these United States than we who learned it for the purpose of a lawsuit and must forget it for the immediate purpose of the following lawsuit.

[*Cases*]

I find that the case of *Cole v. Hughes Tool* [1954 TRADE CASES ¶ 67,857], 215 Federal 2nd 924 has application here. In the facts which it outlines it has more facts resembling ours than any other case in the books, I believe.

I do not find the *Interstate Circuit* case [1932-1939 TRADE CASES ¶ 55,205], 306 U. S. 208, of application. I cannot find for the plaintiff on it that as a matter of law, as plaintiff suggests, he is entitled to such finding. I see no cogent similarity between that case and ours.

I think the case of *U. S. v. Grant* [1953 TRADE CASES ¶ 67,493], 345 U. S. 629 is of direct application here. It requires a cognizable danger of recurrent violation of which I here find none.

The same is true of *U. S. v. Oregon Medical Society* [1952 TRADE CASES ¶ 67,264], 343 U. S. 326, stating that the sole function of injunction is to forestall future violations of which I here see no danger.

[*Court Observation*]

I would like to make one observation here. I believe that of all the graphs before us, all the information before us as to the proof of the intense competition between these parties since 1945, and the fluctuation of their sales as they all fought to take some part of that 100 percent of the business away from each other for there was no other business they could take or procure, if all the proof before us here about the efforts these defendants have been making in competition with each other since the wraps of the Trust Agreement have ceased to limit them, if all that was known to Lewis Bernstein before the civil and criminal actions were filed, I do not believe they would ever have been filed.

In our war with the criminal class we always ask them what they have to say about any crime of which they are accused. In criminal procedure we give all a chance to talk so that if their defense be that their act was excusable or justifiable or accidental or in self-defense or intentional or not, they may have the privilege of saying so.

Here it seems that all these defendants were ever asked was to furnish information against themselves. And our legal life is so constituted that the defense later on didn't dare expose its defense after these actions were filed.

It is a shame that somewhere along the line Mr. Bernstein didn't know of the compilations of these graphs showing the fluctuations of these sales as appear in this particular exhibit showing how some went up and some went down and only one appeared to be stationary whatsoever, and how the big ones went down here and how the little ones crept up in the years particularly between '48 and '57. This complete mathematical demonstration of the falsity of the premise of the plaintiff here in assuming that just because there are so many people in the business they must keep everybody out, and because they once fix prices they must now be fixing prices in the same way as was outlined, as Mr. Davis claimed, in the petition here. Of course the proof had to do with a different matter, namely, that of following the leader, as it is called.

It seems unfair that men of the high standing with which we here dealt, and companies of the high standing with which we have here dealt, should suffer such stigma and disgrace and publicity, and financial loss, and they and their familiaries [*sic*] and friends should be so chagrined, when it was all avoidable in the first place, had all the facts been known—and I blame nobody because that seems to be the regular system.

But it does seem comparatively unfair that they do not get the same rights as would be given anyone else accused of any other kind of crime. I will say again, having observed the competency and fairness and courage of Government counsel here, I do not believe if he originally knew the material which was evolved on this defense that we would be here at all. And I say that because I honor and respect him.

Now all of you lawyers must appreciate that I cannot here cover every possible difference of opinion between your contending sides on each and every item on which you have differed over all these weeks.

I have tried to keep track of this evidence with voluminous notes, and I have sought to follow and digest or agree with or disagree with every point all counsel has made for the purpose of telling you crystal clear what I ultimately find from all the evidence in the case and all the law you have cited to me.

[*Findings*]

I find no conspiracy and no unlawful combination here whatsoever, nor any unlawful price-fixing or quotas or improper controls over littler companies.

I find that the evidence discloses that lack of any inquiries since 1945 as to the possibility of getting into the coupler manufacturing business is due to economic causes which have been mentioned, and not to any illegalities on the part of these defendants. I see no requirement whatsoever that injunction be here granted.

I find that there is no activity going on at the present time or likely to occur in the near future which is either properly susceptible of injunction or which would justify equitable relief in any form.

I cannot recognize any need for this Court's attempting to operate this industry along the lines of Mr. Bernstein's plan.

[*Judgment*]

I find that this complaint should be dismissed in its entirety and judgment rendered for defendants.

I now ask counsel at your early convenience—and it applies to all counsel—to submit written findings of fact and conclusions of law and journal entry in accordance with my verbal findings herein.

I thank counsel for the honor of your having graced our court room for these past two months.

All of which is said to the objection and exception of plaintiff.

Now, is there anything else, gentlemen?

Mr. Bernstein: Plaintiff has nothing further, your Honor.

The Court: Anything else, gentlemen? (No response.)

The Court: We will now take an adjournment, Mr. Rogers.

[¶ 68,891] John P. O'Shea, et al. v. Tile Layers Union, Local 19, et al.

In the California District Court of Appeal, First District, Division Two. Civ. No. 17386. Dated November 21, 1957.

Appeal from a judgment of the Superior Court of Alameda County and from an order granting an injunction. CHARLES WADE SNOOK, Judge. Modified and affirmed.

California Cartwright Act

Combinations and Conspiracies Under State Laws—Labor Unions—Picketing—Legality of Collective Bargaining Provision Restricting Methods of Tile Installation—Preliminary Injunction.—Tile contractors were entitled to a preliminary injunction restraining a union of tile layers from striking or picketing for the purpose of securing or enforcing a provision of a proposed collective bargaining contract which would prohibit the application of tile in any area exposed to water unless setting beds were first installed in mortar backing by qualified tile layers. Evidence that an association of competing tile contractors secured the contract provision, that the plaintiff contractors competed with members of the association, and that the plaintiff contractors' competition would be restricted if they were unable to use an assertedly cheaper method of tile installation could warrant the inference that a combination was formed by the union and the association to restrict trade in violation of the Cartwright Act. The business of installing tile is trade or commerce within the meaning of the Cartwright Act. The Act embraces far more than the mere sale of tangible commodities. The defendants' contention that their activity was exempt from the operation of the Cartwright Act was rejected.

See Combinations and Conspiracies, Vol. 1, ¶ 2385, 2449.05.

Combinations and Conspiracies Under State Laws—Procedure—Right to Injunctive Relief—Preliminary Injunction Against Labor Union—Scope of Injunction.—A preliminary injunction was modified to prohibit a union of tile layers from striking or picketing for the purpose of securing or enforcing a provision of a proposed collective bargaining contract which would prohibit the application of tile in any area exposed to water unless setting beds were first installed in mortar backing by qualified tile layers. The trial court erred in making an injunction which would prohibit any strike or picketing by the union, even for objectives wholly unrelated to the issue in dispute. Also, the court erred in prohibiting the union and an association of tile contractors from enforcing such a provision in an existing agreement between them because their agreement was not the subject of attack in the instant action.

Although the Cartwright Act does not specifically provide for injunctive relief, such relief is available to one injured by a violation of the Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2421.05, 2453.05.

For the appellants: P. H. McCarthy, Jr., F. Nason O'Hara, and Herbert S. Johnson.

For the respondents: Wallace B. Colthurst and Orlando J. Bowman.

Action for injunction and for damages under the Cartwright Act. Judgment for plaintiffs modified and affirmed.

[*Parties*]

DRAPER, Justice [*In full text*]: This is an action for injunction and damages under the Cartwright Act (Bus. & Prof. Code, §§ 16700-16758). Plaintiffs are tile contractors, and are nine of the approximately 25 members of Tile Contractors Association of Northern California, Inc. (hereinafter called "association"). Defendant Peninsula Tile Contractors Association has about 30 tile contractor members, who do business principally in San Mateo, Santa Clara and San Benito Counties. Defendant Tile Layers Union, Local 19, has jurisdiction extending to 16 counties of Northern California. The remaining defendants are officers and members of defendant union. Upon affidavits and brief oral testimony preliminary injunction was issued. Defendants appeal from that injunction and the order granting it.

[*Contract Provision—Picketing*]

Association and union were parties to a collective bargaining agreement which was

to expire March 31, 1956. The agreement between union and Peninsula, by its terms, was to continue into 1957. However, it was reopened a year before its expiration date, and the parties then added a provision that "in order to protect the public from failures resulting from inferior installations, no tile will be applied in any shower, tub back, or other area exposed to water unless setting beds are first installed in mortar backing by qualified tile layers." In its negotiations with association, the union sought a comparable provision, which association refused. Picketing of respondents' business places began, and this action was commenced.

[*Merits of Methods*]

It appears that the "conventional" method of installing ceramic tile is in mortar. In recent years, a method of installing tile by use of mastic adhesives has been developed. This method permits use of gypsum and plasterboard backings. Many pages of the affidavits in this case are devoted to the respective merits of the two methods. Appellants do not object to the use of mastic, but contend that affixing of tile to plasterboard and gypsum backings result in "failures" because the backings deteriorate when water reaches them. Respondents assert that, when properly used, this method results in fewer failures than does the mortar backing method. Each side insists it is serving the public interest, appellants in preventing the falling of the homeowner's shower tile, and respondents in saving him money while preventing the addition of tile to his bathwater. It would seem that this issue should be determined by the building codes or in the market, rather than the courts. However, to the extent that it is relevant, the issue has been determined against appellants in the trial court. Under long established rules, it is the trial, rather than the appellate, court which resolves the fact issues.

[*Right to Injunctive Relief*]

The statute here in question prohibits "a combination of capital, skill or acts . . . to create or carry out restrictions in trade or commerce" (Bus. & Prof. Code, § 16720, subd. (a)), and authorizes civil action by "any person who is injured in his business or property" by such combination (Bus. & Prof. Code, § 16750). Although the act does not specifically provide for injunctive relief, such relief is available to one injured by a violation of the Cartwright Act (*Kold Kist, Inc. v. Amalgamated Meat Cutters etc., Local No. 421* [1950-1951 TRADE CASES ¶ 62,695], 99 Cal. App. 2d 191 [221 P. 2d 724]).

[*Trade Restriction*]

In the case at bar, there is some evidence that it was Peninsula which sought and secured the contract provision limiting use of mastic adhesives upon plasterboard or gypsum backings. There is also some evidence that respondents compete with the members of Peninsula, and that their competition will be restricted if they are unable to use the assertedly cheaper method of plasterboard backing. On appeal from granting of a preliminary injunction, we do not have the benefit of findings. There was evidence contradicting that summarized above, but we must assume that the trial court resolved the conflict in respondents' favor. The evidence, thus viewed, could warrant an inference that appellants' combination was formed to restrict trade.

[*Cartwright Act*]

Appellants argue that the restriction here is merely upon the use of mastic adhesives, and not upon trade or commerce in them. They cite federal cases (*Industrial Association v. United States*, 268 U. S. 64 [45 S. Ct. 403, 69 L. Ed. 849]; *United States v. Bay Area Painters etc. Committee*, 49 F. Supp. 733) for the rule that restriction of the use of a commodity is not restriction upon its sale. But those cases deal with the federal antitrust acts, and hold that limitation upon local use of a product manufactured outside this state is not a restriction upon interstate trade in the product. Here the gravamen of the complaint is not the limitation of sales of mastic adhesives, but is the restriction of use of a construction method in the building of houses. The business of installing tile is itself trade or commerce. The Cartwright Act embraces far more than the mere sale of tangible commodities (*Speegle v. Board of Fire Underwriters* [1946-1947 TRADE CASES ¶ 57,493], 29 Cal. 2d 34 [172 P. 2d 867]).

Of course, whether that trade or commerce is restricted turns upon fact issues.

Appellants also argue that the Cartwright Act does not apply to a combination of laborers for the purpose of improving conditions of employment. "[L]abor . . . is

not a commodity" within the meaning of the act (Bus. & Prof. Code, § 16703). Full freedom of employees to associate to negotiate the terms and conditions of their employment is the declared policy of this state (Lab. Code, § 923). These provisions have been held to except from the operation of the Cartwright Act combinations of laborers for the purpose of furthering their interests (*Schweizer v. Local Joint Executive Board* [1953 Trade Cases ¶ 67,620], 121 Cal. App. 2d 45 [262 P. 2d 568]), and this exception is recognized where the object of the labor combination is reasonably related to wages, hours, or conditions of employment (*C. S. Smith Met. Market Co. v. Lyons*, 16 Cal. 2d 389 [106 P. 2d 414]; *Los Angeles Pie Bakers Assn. v. Bakery Drivers* [1954 Trade Cases ¶ 67,657], 122 Cal. App. 2d 237 [264 P. 2d 615]).

There is evidence that the use of mortar setting beds in tile laying requires more time than the use of board backings and mastic adhesives. The federal rule appears to be that it is a legitimate labor objective to oppose the use of time-saving devices which will reduce employment (*United States v. Bay Area Painters, supra*, 49 F. Supp. 733; *United States v. Carrozzo*, 37 F. Supp. 191 [affirmed without opinion in *United States v. International Hodcarriers*, 313 U. S. 539 (61 S. Ct. 839, 85 L. Ed. 1508)]). However, the particularly strange anomaly of this case is that respondents plead and offer proof that the union's objection is based upon the theory of preserving work time, while appellants plead and offer proof to the contrary. We can only asssume that the trial court decided the issue in favor of respondents, although against their contention. Appellants do argue that their purpose is to improve the quality of tilework afforded to the public, that this is a legitimate labor objective, and that thus this agreement is excepted from the operation of the Cartwright Act. The cases cited for this view do not appear to support it. *Minkoff v. Jaunty Junior, Inc.*, 36 N. Y. S. 2d 507, upheld a collective bargaining contract which provided for contributions from employers and union to support an advertising campaign to increase public use of garments manufactured in the New York area. *Bay Area Painters etc. Committee v. Orack* [1950-1951 Trade Cases ¶ 62,774], 102 Cal. App. 2d 81 [226 P. 2d 644], upheld an agreement of employers for the purpose of policing their industry to assure that contractors lived up to the terms of their collective bargaining agreements. Neither situation is comparable to that presented here. In any case, the evidence was in conflict as to the relative advantage to the purchaser of the two methods, and this conflict was resolved against appellants.

[*Trial Court's Discretion*]

Upon appeal from the granting or denial of a preliminary injunction, not only is the trial court's determination of fact issues binding, if supported by substantial evidence (*Palm Springs etc. Co. v. Kieberk Corp.*, 37 Cal. App. 2d 642 [100 P. 2d 346]), but a broad discretion is vested in the trial court as to the action to be taken upon the facts it finds (*People v. Gordon* [1950-1951 Trade Cases ¶ 62,916], 105 Cal. App. 2d 711 [234 P. 2d 287]; *People v. Black's Food Store* [1940-1943 Trade Cases ¶ 56,058], 16 Cal. 2d 59 [105 P. 2d 361]). Still further, the burden is upon the appellant to make a clear showing of abuse of that discretion (*Remillard Brick Co. v. Dandini*, 47 Cal. App. 2d 63 [117 P. 2d 432]; *People v. Gordon, supra*). In the light of these principles, reversal is not warranted here. Of course, nothing herein contained is to be construed as expressing any view as to the weight of the evidence, or as to the proper ultimate disposition of the action.

The ultimate rights of the parties are not determined by granting or denial of a preliminary injunction (27 Cal. Jur. 2d 114). Appeal from such granting or denial can settle little in a case where the trial court's exercise of its discretion rests in any substantial part upon the determination of fact issues. In the end, the case is returned to the trial court for the full trial which has not yet been had, with the prospect of still another appeal from that judgment. In view of the priority accorded such actions, the case could be disposed of in the trial court and be well on the way to final disposition long before the appeal relating to the preliminary stages is completed. The value of injunctive relief as a means of settling labor disputes has been doubted (*Park & T. Import Corp. v. International etc. of Teamsters*, 27 Cal. 2d 599, 608-609 [165 P. 2d 891, 162 A. L. R. 1426]).

[*Legitimate Objective Claimed*]

Appellants also contend that their demand for restriction of use of plasterboard backings is a legitimate labor objective because of a proposed contract provision that defects must be repaired by the workman on his own time. But the only fair construction of this provision is that it applies only where the workmanship is faulty, and where the material is inadequate. Thus the burden on the employee is unrelated to the backing used.

[*Scope of Injunction*]

Appellants also assert that the injunction issued is too broad in its scope. On its face, the injunction would prohibit any strike or picketing by appellant union, even for objectives wholly unrelated to the issue here in dispute. The prohibition should be limited to such strike or picketing as is for the purpose of securing or enforcing the disputed section 2(a) of the proposed agreement (*Park & T. Import Corp. v. International etc. of Teamsters, supra*). Also, the injunction bars the union and Peninsula from enforcing the agreement now in effect between them. That agreement is not the subject of attack in this action. Indeed, respondents allege that it is the extension of like provisions to them which will diminish competition, and the inference is inescapable that enforcement of the existing agreement will have the opposite effect. Thus respondents are not parties injured by the Peninsula agreement, if it be not extended to them. This prohibition should be eliminated.

The preliminary injunction is modified in the respects just outlined. As so modified, the injunction and the order granting it are affirmed. In accordance with stipulation on file each party shall bear his own costs.

KAUFMAN, P. J., and DOOLING, J., concurred.

[¶ 68,892] In Re: Petroleum Industry Investigation.

In the United States District Court for the Eastern District of Virginia, at Alexandria. Dated December 23, 1957.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Grand Jury Proceedings—Production of Documents—Subpoena *Duces Tecum*—Motion To Quash or Modify.—A motion to quash or modify a subpoena *duces tecum* directing a petroleum company to produce records before a grand jury investigating alleged violations of the antitrust laws in the petroleum industry was granted to the extent that the court found that the universality of descriptions rendered certain subpoena items oppressive and unsustainable. The court found that, in other items of the subpoena, this fault was avoided by connecting the demand, through reference, to a certain product or aspect of the business.

In considering a motion to quash or modify a subpoena *duces tecum* served in a grand jury investigation, the court can be guided only by general principles. "With the inquiry plainly within the province of the grand jury, the guides of the court are these: the papers sought must be relevant to the inquiry, they must be 'particularly' described, and the demand must not impose an 'unreasonable' burden upon the citizen." "Particularly" is "a commensurate term—not absolute—with its breadth never greater than the purpose and knowledge of the inquisitor require."

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8021.625.

For the United States: Gordon V. Spivack and John E. McDermot, Jr., Department of Justice, Washington, D. C.

For the petitioner: John J. Wilson, Washington, D. C., and Amzy B. Steed, New York, N. Y., for The Texas Co.

For a prior opinion of the U. S. District Court, Eastern District of Virginia, see 1957 Trade Cases ¶ 68,774.

Memorandum by the Court on Motion of the Texas Company To Quash Subpoena *Duces Tecum*

ALBERT V. BRYAN, District Judge [*In full text*]: The subpoena *duces tecum* directed to The Texas Company and returnable before the grand jury on December 13, 1957 is assailed by the respondent as in part unreasonably broad, hence oppressive. It calls for documents under twenty-eight headings. A motion to quash the subpoena, or in the alternative to restrict its sweep, in regard to fourteen of the items, details the objections and invokes the Fourth Amendment. Rule 17(c) Federal Rules of Criminal Procedure.

Compliance with these items, Texas says, would entail a search of so wide a field, and require an examination of such a vast number and volume of records, that the task would noticeably impede the conduct of regular business. The fourth subpoena against the Company, this one spans more than eight years. Counsel estimates that the documents to be canvassed would run into the thousands. The great expense of the undertaking is avouched as an additional element of the subpoena's oppressiveness. Some 35,000 papers, counsel asserts, have on the previous demands in this case been produced by Texas. This, he says, necessitated the inspection of hundreds of thousands of documents.

[*Policy Considerations*]

Uncommon difficulties arise in the consideration of a motion of this kind. The court must maintain a counterpoise between freedom of inquiry for the grand jury and security from unreasonable search for the citizen; yet, unlike, proceedings in its open forum, the court does not know the immediate aim and object of the grand jury's quest. Interrogation of the grand jury to the point is hardly practicable. Additionally, it might violate the policy of privacy long accorded a grand jury inquest.

[*General Principles*]

In this limited light the court can be guided in decision only by general principles. By analogy these would seem to be, *mutatis mutandis,* those prescribed by the Fourth Amendment for a valid search. With the inquiry plainly within the province of the grand jury, the guides of the court are these: the papers sought must be relevant to the inquiry, they must be "particularly" described, and the demand must not impose an "unreasonable" burden upon the citizen. *Hale v. Henkel,* 1906, 201 U. S. 43, 76; *Wilson v. United States,* 1911, 221 U. S. 361, 376; *Okla. Press Pub. Co. v. Walling,* 1946, 327 U. S. 186, 209. Of course, "particularly" is here a commensurate term—not absolute —with its breadth never greater than the purpose and knowledge of the inquisitor require.

[*Grand Jury Inquiry*]

The inquiry before the grand jury is whether the Federal antitrust laws have been violated. As outlined in the warrants of the Deputy Attorney General to the attorneys appearing for the Government before the grand jury, the inquiry is especially directed to "the manufacture, distribution, purchase, sale, processing and storage of petroleum and petroleum products." While the grand jury is not tethered to that exploration, it is indisputably the issue by which relevancy here must be judged.

[*Generality of Subpoena*]

Generality is the first ground of the attack of The Texas Company's motion. It charges that the designation of the papers adopted in items 13-19, 21-26 and 28 of the subpoena is so expansive that it infolds utterly irrelevant records. Without foregoing its objection of oppressiveness, Texas suggests that if the call were more specific, the hardness of the subpoena would be eased. It points out that its business has multiple phases not within the ambit of the inquiry, such as tires, real estate, advertising, office supplies, personnel, employees' equipment and a myriad of other categories. Initially the court required production of Texas' master file index, but Texas explains that even the indication of the documents by index number is not sufficiently explicit. The reason is that all of the Company's lines of endeavor as they affect a single subject are referenced under the title or number of that topic, thus placing thereunder files of numerous fields in no wise akin to the theme of the investigation.

[*Government's Contentions*]

Counsel for the Government, in equal earnestness and sincerity, believes that the subpoena is as particular, and as considerate of the respondent, as the compass of the inquiry will allow. He emphasizes

that the designation now used proved quite effectual in the subpoena of July 15, 1957, which for a briefer period asked for records on the same subjects as now listed. Texas readily admits that it did not demur to the previous call, mainly because of the relative reasonableness of the period—twelve months. But it cites that experience as demonstrating both the irrelevance and oppression of the instant subpoena—the irrelevance appearing from the paucity of germane documents found among the thousands embraced by the descriptions, the oppression evidenced by the tremendous time and effort required for the answer. *A priori,* Texas contends, the burden of an eight-year space of discovery would be unbearable.

[*Ruling*]

Whether, rid of this irrelevance, the subpoena would not be unfairly onerous is not now decided. At present the court rules only that the universality of their descriptions renders subpoena items 13-19, 21-26 and 28 oppressive and unsustainable. In other items this fault has been avoided by connecting the demand, through reference, to a certain product or aspect of the business. No reason appears why more precise language cannot be employed in the disputed sections, conceding that only reasonable and relative exactitude of description is required. Each of the designations in question should be suitably limited. The wanted material should be related to crude petroleum or certain of its products and, at the same time, related to some activity of The Texas Company immediately a part of, or some conduct directly affecting, "the manufacture, distribution, purchase, sale, processing and storage" of crude petroleum or the product or products named. To this extent the motion of Texas will be granted.

[¶ 68,893] E. L. Bowen and Company, Incorporated v. American Motors Sales Corporation, Hudson Motor Division, Successor in title to Hudson Sales Corporation.

In the United States District Court for the Eastern District of Virginia, Norfolk Division. Civil Action No. 2088. Filed July 9, 1957.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Monopolies—Refusal to Renew Automobile Dealer Franchise—Legality.—An automobile dealer's action charging, among other things, that an automobile sales company cancelled its dealer franchise, not during the term of the franchise, but at the termination of the franchise in violation of the Clayton and Sherman Antitrust Acts was dismissed on the authority of *Schwing Motor Co., Inc. v. Hudson Sales Corp., et al.,* 1956 TRADE CASES ¶ 68,564, 68,292.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785; Monopolies, Vol. 1, ¶ 2610.720; Exclusive Dealing, Vol. 1, ¶ 4009.

For the plaintiff: LeRoy T. Canoles, Jr., Norfolk, Va., and Goldblatt & Lipkin, Norfolk, Va.

For the defendant: Williams, Cocke, Worrell & Kelly, Norfolk, Va.

Memorandum

[*Causes of Action—State Law*]

WALTER E. HOFFMAN, District Judge [*In full text except for omissions indicated by asterisks*]: The complaint filed herein by an enfranchised dealer in Hudson automobiles alleges six causes of action against defendant as successor in title and interest to Hudson Sales Corporation. From 1937 until September 30, 1953, plaintiff was known as a "Master Dealer" handling new and used cars in the City of Portsmouth, Virginia, and surrounding areas, under annual contracts, the last of said contracts continuing the franchise from September 24, 1952, to September 30, 1953. Summarizing the allegations of the complaint and the motion to dismiss, it appears:

1. *As to first cause of action:*

A. Plaintiff claims damages for cancellation of the franchise, not during the term of said contract, but at the termination thereof, in alleged violation of § 46-534(3) of the Code of Virginia, 1950, as amended, which reads as follows:

"It is unlawful for any manufacturer, factory branch, distributor or distributor branch, or any field representative, officer, agent or any representative whatsoever of any of them:

. . .

"(3) Unfairly, without due regard to the equities of a dealer and without just provocation, to cancel the franchise of such dealer."

Plaintiff states that by reason of the violation of the quoted statute said cancellation occurring contemporaneously with or subsequent to the termination of the contract on September 30, 1953, plaintiff lost future profits, good will, equipment and fixtures purchased in furtherance of its dealership, and has, in effect, been put out of business. The cancellation is alleged to be without just provocation in that defendant's predecessor, Hudson Sales Corporation, acted unlawfully, maliciously, wilfully, wantonly and unfairly, without due regard to the equities of the dealer.

* * *

2. *As to second cause of action:*

A. Incorporating by reference the allegations of the first cause of action, plaintiff asks damages for defendant predecessor's unlawful, malicious, wilful and wanton acts in coercing, or attempting to coerce, plaintiff to accept delivery of automobiles, parts and accessories, not ordered by plaintiff, in violation of § 46-534(1) of the Code of Virginia, 1950 (the first paragraph of which has been heretofore quoted and will not be repeated); § 46-534(1) reading:

"(1) To coerce, or attempt to coerce any dealer to accept delivery of any motor vehicle or vehicles, parts or accessories therefor, or any other commodities, which shall not have been ordered by such dealer."

* * *

3. *As to third cause of action:*

A. Again incorporating by reference all prior allegations, plaintiff alleges that defendant's predecessor unlawfully, maliciously, wilfully and wantonly threatened to cancel plaintiff's franchise unless it accepted delivery of vehicles, parts, accessories and other commodities not ordered by plaintiff, in violation of § 46-534(2) of the Code of Virginia, 1950 (the first paragraph of which has been heretofore quoted and will not be repeated); § 46-534(2) reading:

"(2) To coerce, or attempt to coerce any dealer to enter into any agreement with such manufacturer, factory branch, distributor or distributor branch, or representative thereof, or do any other act unfair to such dealer, by threatening to cancel any franchise existing between such manufacturer, factory branch, distributor, distributor branch or representative thereof and such dealer."

* * *

It will be noted that the foregoing three causes of action are grounded upon the Virginia statutes referred to above.

The fourth cause of action, after incorporating all prior allegations, alleges certain acts of defendant's predecessor allegedly having taken place during the period of the contract where lists of plaintiff's customers and prospective customers were submitted to other dealers by Hudson Sales Corporation, and advertising data was sent to said customers and prospective customers in behalf of plaintiff's competitors; all of which is alleged to be in violation of the final contract between the parties. Plaintiff seeks a recovery under this cause of action for loss of profits, loss of value of equipment and fixtures, loss of value of good will, and loss of value of its repair shop and used car trade, allegedly by reason of defendant's unlawful, malicious, wilful and wanton acts. * * *

In the fifth cause of action, after incorporating by reference all prior allegations, plaintiff asks damages by reason of the alleged failure of defendant's predecessor to repurchase parts, accessories and special tools as allegedly provided by the final contract between the parties. * * *

[*Alleged Antitrust Violations*]

The sixth cause of action, after incorporating by reference all prior allegations, is grounded upon the alleged violations of the Sherman Anti-Trust Act, 15 U. S. C., § 1-7 and the Clayton Anti-Trust Act, 15 U. S. C., § 1-27, relating to a conspiracy in restraint of trade and the creation of a monopoly.

[*Motion to Dismiss Granted*]

The defendant's motion to dismiss the sixth cause of action is well founded. The factual situation is substantially similar to *Schwing Motor Co. v. Hudson Sales Corp.* [1956 TRADE CASES ¶ 68,292], 138 F. Supp. 899, affirmed per curiam by the United

States Court of Appeals for the Fourth Circuit [1956 TRADE CASES ¶ 68,564], 239 F. (2d) 176. But for the provisions of the Virginia law as referred to in the first three causes of action, *Schwing* would be authority for the dismissal of all except the fourth and fifth causes of action in this controversy.

* * *

* * * Under authority of *Schwing Motor Co. v. Hudson Sales Corp., supra,* the motion to dismiss the sixth cause of action will be granted.

* * *

[¶ 68,894] General Electric Co. v. Two Guys From Massapequa, Inc.

In the New York Supreme Court, New York County, Special Term, Part I. 138 N. Y. L. J., No. 122, page 4. Dated December 24, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Violation of Injunction—Contempt.—A fair trader's motion to punish a corporate defendant for making retail sales below the agreed price in violation of an injunction was held in abeyance and the matter referred to a referee where there was a conflict in facts as to whether the corporation was the proper party defendant, whether the sales were made with its knowledge, and whether the fair trader, if the corporation was the wrong party, had knowledge of that fact.

See Fair Trade, Vol. 1, ¶ 3380.34.

[*Contempt Proceeding*]

CONLON, Justice [*In full text*]: In this matter the plaintiff seeks an order to punish the defendant for contempt for making retail sales below the agreed price, in violation of an injunction heretofore entered by this court. The defendant by order to show cause moves to vacate the prior order of the court which vacated a stay of payment of a fine and directed payment forthwith. They contend that the corporate defendant is the wrong party defendant and that the proper defendant is an unincorporated firm doing business under a similar name. From the papers submitted a sharp conflict of fact is indicated as to whether the proper party defendant was the corporation, whether the sales were made with its knowledge, consent and under its authority, control and supervision, and whether the plaintiff, if the defendant is the wrong party, had knowledge of that fact. These matters should not be decided on affidavits; accordingly, they are referred to Hon. Jacob Marks, official referee, to hear and report together with his recommendations. The motions will be held in abeyance pending said report. Settle order.

[¶ 68,895] United States v. Morris Wolf, also known as Pete Wolf doing business as Wolf & Co.; John P. Godchaux; George H. McFadden & Bro.; Geo. H. McFadden & Bro., Inc.; Weil Brothers-Cotton Incorporated; A. Campdera & Co., Inc.; J. A. Baker & Co.; E. F. Creekmore Co., Inc.; Sternberg-Martin & Company, Inc.; R. L. Dixon & Bro., Inc.; Crespi & Company; and Pell Cotton Company.

In the United States District Court for the Eastern District of Louisiana, New Orleans Division. Civil Action No. 5858. Filed December 26, 1957.

Case No. 1281 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Bidding Practices—Preventing Competition—Cotton Merchants.—Cotton merchants were prohibited by a consent decree from entering into any understanding to fix prices on bids or to allocate bids for the purchase of Commodity Credit Corporation cotton; to submit bids, fix bid prices, or allocate bids for the purchase of such cotton by or through a defendant cotton broker or any other person; or to prevent any person from engaging in the cotton catalogue business. Each of the merchants was prohibited from disclosing to

any person the price bid (other than in open auction situations) or to bid for Commodity Credit Corporation cotton prior to the expiration of the time specified by the Commodity Credit Corporation for the filing of bids; suggesting to or determining for any other person the prices to be bid for such cotton; submitting bids on such cotton through or for any other person; actively preventing any person from engaging in the cotton catalogue business; or utilizing any persons to give advice as to the price to be bid on specific Commodity Credit Corporation cotton where such person is at the time engaged in giving similar advice to another merchant, broker, or other person eligible to bid.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.503, 2005.660, 2011.065.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Action Directed by United States (Commodity Credit Corporation)—Bona Fide Transactions.—A consent decree entered against cotton merchants provided that the terms of the decree should not be construed to prevent any of the merchants from taking action, or refraining from taking action, affirmatively directed by the United States Government in connection with the purchase or sale of Commodity Credit Corporation cotton. Also, specified bona fide transactions by the cotton merchants were not prohibited by the decree.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.48, 8421.

Department of Justice Enforcement and Procedure—Consent Decrees—Modification by Defendants.—A consent decree entered against cotton merchants provided that, in the event that any regulation or ruling of the United States Government, in connection with the purchase or sale of Commodity Credit Corporation cotton, operates to cause any merchant undue hardship as a result of compliance with the decree, such merchant may apply to the court for a modification or termination of any terms of the decree to the extent necessary to eliminate such hardship.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8361.37.

Department of Justice Enforcement and Procedure—Consent Decrees—Applicability of Provisions of Decree—Intra-Company Activities.—A consent decree entered against cotton merchants provided that the provisions of the decree should not apply to transactions solely between any defendant and its officers, directors, agents, employees, subsidiaries, affiliates, successors, and assigns or any of them.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8241.15.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; M. Hepburn Many, United States Attorney; and W. D. Kilgore, Jr., Baddia J. Rashid, Max Freeman, Charles L. Beckler, Lewis J. Ottaviani, Charles H. McEnerney, Jr., and William P. Cassedy, Attorneys, Department of Justice.

For the defendants: Ashton Phelps and Taggart Whipple for Geo. H. McFadden & Bro. and Geo. H. McFadden & Bro., Inc.; Louis Oberdorfer and Lloyd N. Cutler for Weil Brothers-Cotton Inc.; Robert R. Ritchie for A. Campdera & Co., Inc.; Harry B. Kelleher for J. A. Baker & Co., E. F. Creekmore Co., Inc., R. L. Dixon & Bro., Inc., and Crespi & Co.; Morris I. Jaffe for Sternberg-Martin & Co., Inc.; and Saul Stone for Pell Cotton Co.

Final Judgment

J. Skelly Wright, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on May 17, 1956, and each of the defendants signatory hereto having appeared and filed an answer herein denying the material averments of the complaint, and asserting its innocence therein, and the plaintiff and the said defendants, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without admission by any party in respect to any such issue;

Now, Therefore, before any testimony or evidence has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties signatory hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I.

[*Sherman Act*]

This Court has jurisdiction of the subject matter of this action and of the parties

signatory hereto. The complaint states a claim for relief against the defendants signatory hereto under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to any defendant signatory hereto shall apply to each such defendant and to its officers, directors, agents, employees, subsidiaries, successors and assigns, and to all persons in active concert or participation with any defendant who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to transactions solely between any such defendant and its said officers, directors, agents, employees, subsidiaries, affiliates, successors and assigns or any of them.

III.

[*Definitions*]

As used herein:

(A) "CCC cotton" shall mean cotton owned and which is offered for sale by the Commodity Credit Corporation;

(B) "Cotton merchant" shall mean a person engaged in the business of buying, selling or otherwise trading in cotton;

(C) "Cotton merchant defendants" shall mean all defendants, except defendants Morris Wolf and John P. Godchaux, and each of them;

(D) "Cotton catalogue business" shall mean the collecting, compiling, publishing, disseminating or communicating of any list or catalogue setting forth or listing CCC cotton available for sale by the Commodity Credit Corporation, indicating quantities and location of each grade and staple;

(E) "Person" shall mean an individual, partnership, firm, association, corporation or any other business or legal entity, other than a common or contract carrier;

(F) "Subsidiary" shall mean in respect of any company, a corporation, 50 per cent or more of whose stock entitled to vote for the election of directors is owned or controlled directly or indirectly by that company;

(G) "Affiliate" shall mean a person which is, directly or indirectly, through one or more intermediaries, controlled by, or under common control with, another person, control for the purpose of this subsection being ownership in a corporation of 80 per cent or more of the stock entitled to vote for the election of directors, or an interest in a partnership of 80 per cent or more.

IV.

[*Collusive Bidding Practices*]

Each defendant signatory hereto is enjoined and restrained from entering into, participating in, adhering to or maintaining, directly or indirectly, any contract, combination, concert of action, agreement, understanding, plan or program between such defendant and any other defendant, any broker or any other person eligible to buy CCC cotton to:

(A) fix prices on bids to be submitted for the purchase of CCC cotton;

(B) allocate bids between or among any persons for the purchase of CCC cotton;

(C) submit bids, fix bid prices or allocate bids between or among any persons for the purchase of CCC cotton by or through Morris Wolf or any third person;

(D) prevent or deter, or attempt to prevent or deter, any person from entering into or engaging in the cotton catalogue business.

V.

[*Disclosure of Bid*]

Each defendant signatory hereto is enjoined and restrained from disclosing or transmitting to any person (other than Commodity Credit Corporation) the price bid (other than in open auction situations) or to be bid for CCC cotton prior to the expiration of the time specified by Commodity Credit Corporation for the filing of bids.

VI.

[*Individual Bidding Practices*]

Each defendant signatory hereto is enjoined and restrained from:

(A) suggesting to or determining for any other person the prices to be bid for CCC cotton;

(B) submitting bids on CCC cotton through or for any other person;

(C) actively preventing or deterring any person from entering into or engaging in the cotton catalogue business;

(D) utilizing any person to give advice as to the price to be bid on specific CCC cotton where such person is at the time engaged in giving similar advice to another cotton merchant, broker or other person eligible to bid.

VII.

[*Transactions Not Prohibited*]

The terms of this Final Judgment shall not be construed to prohibit bona fide transactions:

(A) With respect to "rights" to purchase CCC cotton. For the purposes of this section VII(A), a bona fide transaction in "rights" shall mean a transaction in which a cotton merchant submits, or directly causes to be submitted, a bid for specific CCC cotton at a price disclosed to, agreed to, or suggested or determined by, any person from or to whom such cotton merchant has bought or sold, contracted to buy or sell, or assigned the "right" to bid upon and purchase from Commodity Credit Corporation, CCC cotton in a quantity equal to a quantity of substitute cotton exported in foreign commerce;

(B) In which a cotton merchant submits or causes to be submitted for a customer a bid for specific CCC cotton at a price disclosed to, agreed to, suggested or determined by, such customer;

(C) In which a defendant signatory hereto submits or causes to be submitted a bid, not contrary to any Commodity Credit Corporation regulation or announced policy, for specific CCC cotton at a price disclosed to, agreed to, or suggested or determined by, the defendant and either (1) one other cotton merchant who shares in the profits and losses on the purchase and sale of such CCC cotton, neither of whom would otherwise have bid for such CCC cotton, or (2) one other person not a cotton merchant (excluding from the meaning of the term cotton merchant a person primarily engaged in the spinning or ginning of cotton who buys or sells cotton incidentally thereto) who shares in the profits and losses on the purchase and sale of such CCC cotton.

VIII.

[*Government Action—Modification*]

(A) The terms of this Final Judgment shall not be construed to prevent any defendant signatory hereto from taking action, or refraining from taking action, affirmatively directed by the United States Government in connection with the purchase or sale of CCC cotton.

(B) In the event that subsequent to the entry of this Final Judgment, any of the regulations or rulings of the United States Government in connection with the purchase or sale of CCC cotton operate to cause any defendant signatory hereto undue hardship, with respect to the bidding for CCC cotton, as a result of its compliance with this Final Judgment, such defendant may apply to this Court, with ten days' notice thereof to the plaintiff, for a modification or termination of any of the terms of this Final Judgment to the extent necessary to eliminate such hardship; provided that the burden of establishing that this Final Judgment so operates shall be on the defendant making such application; and provided further that the plaintiff reserves the right to oppose such application.

IX.

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant signatory hereto made to its principal office, be permitted, subject to any legally recognized privilege, (a) access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Final Judgment; and (b) subject to the reasonable convenience of any defendant, and without restraint or interference from it, to interview officers and employees of such defendant who may have counsel present, regarding any such matters; and upon such written request, any such defendant shall submit such written reports with respect to any of the matters contained in this Final Judgment as may be reasonably necessary for the purpose of enforcement of this Final Judgment. No information obtained by the means permitted in this section IX shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department except in the course of legal proceedings

for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

X.

[*Jurisdiction Retained*]

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement or compliance therewith and for the punishment of violations thereof.

[¶ 68,896] Winfield Drug Stores, Inc. v. Needleman.

In the New York Supreme Court, New York County, Special and Trial Term, Part XX. 138 N. Y. L. J., No. 115, page 8. Dated December 13, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Injunctive Relief—Person Who May Maintain Suit—Retailer.—A drug store was entitled to an injunction restraining a competing store from selling fair traded merchandise below its established prices.

See Fair Trade, Vol. 1, ¶ 3330.34.

[*Injunction*]

COLEMAN, Justice [*In full text*]: The defendants on many occasions, as disclosed in the affidavits on the motion for a temporary injunction, and also last month sold merchandise in their store at prices below those fixed by prevailing fair trade contracts with manufacturers—a store which was in competition with the plaintiff's store. The plaintiff is entitled to a decree, with costs, enjoining the defendants from continuing their practice. Settle decree.

[¶ 68,897] Dox Drug Co. Inc. v. Loblaws Inc.

In the New York Supreme Court, Monroe County. Dated November 18, 1957.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Indirect Methods of Price Violation—Trading Stamps—Stipulation—Permanent Injunction.—A plaintiff was entitled to a permanent injunction restraining a retailer from giving trading stamps with the purchase of fair traded articles where the retailer violated a stipulation with the plaintiff that it would discontinue the giving of trading stamps with the purchase of fair traded articles.

See Fair Trade, Vol. 1, ¶ 3294.34.

For the plaintiff: Ark, Brennan & Centner, by Jacob Ark, Rochester, N. Y.

For the defendant: Chamberlain, D'Amanda, Bauman & Brundage, by Arthur V. D. Chamberlain, Rochester, N. Y.

Decision

[*Trading Stamps*]

ROBERTS, Justice [*In full text*]: This action was brought by the plaintiff for a permanent injunction restraining the defendant from giving trading stamps, coupons, rebates or other allowances on certain fair traded items.

[*Stipulation*]

When the action was reached for trial before Mr. Justice Brasser at an Equity Term of this Court on September 25, 1957 the parties entered into a stipulation which so far as is here pertinent, provided as follows:

"Mr. Chamberlain: This is an action brought by the plaintiff to restrain the

defendant Loblaws Inc., from alleged violation of the Fair Trade Act, it being claimed that certain fair-traded articles were being sold at a discount.

"The particular procedure complained of was the issuance of trading stamps on certain articles. The defendant has discontinued the issuance of trading stamps on all fair-traded articles, and it is stipulated on the record that they will permanently discontinue the said use of fair-traded articles.

"With that understanding, the plaintiff, as I understand it, is willing to discontinue and withdraw the action with this understanding, that the action shall not die, but shall remain alive, and in the event that Loblaws again resume this practice, that the plaintiff may apply for and have a permanent injunction upon notice to us of the making of such application.

"The Court: What proof would be required or would be submitted to suffice the granting of permanent injunction?

"Mr. Chamberlain: Proof by affidavit and a notice on us giving us an opportunity to investigate the truth of the allegations will be sufficient. We would have no objection to an injunction under those circumstances."

[*Permanent Injunction*]

The present motion was made returnable before me at an Equity Term of this court on the 14th day of November, 1957 and on that day adjourned to November 18, 1957. The motion is by the plaintiff for a permanent injunction based upon the claim that the defendant has not discontinued, or has resumed, the practice of giving trading stamps in violation of the terms of said stipulation. The affidavits submitted by the plaintiff in support of the motion indicate that subsequent to the making of the stipulation on September 25, 1957 purchases of fair traded items were made at various stores of defendant on October 4, October 24, November 5, November 6 and November 16, and on each occasion trading stamps were given with the purchase. These various purchases were made at seven different stores of the defendant. None of the facts set forth in the moving affidavits are denied by the defendant and no affidavits on behalf of said defendant have been submitted in opposition to this motion. Counsel for the defendant on the argument of the motion did hand to the Court a notice dated October 8, 1957 and a memorandum dated November 13, 1957 which he stated had been issued by the defendant instructing its employees that the giving of trading stamps on certain items be discontinued.

The Court on this motion is not concerned with the good faith of the defendant but must determine merely whether there has been a violation of the stipulation which entitles the plaintiff to an injunction. The stipulation is very definite that "The defendant has discontinued the issuance of trading stamps on all fair-traded articles, and it is stipulated on the record that they will permanently discontinue the said use on fair-traded articles." The evidence presented by the affidavits is undisputed that the practice of giving the stamps still continues although more than a month and a half has elapsed since the making of said stipulation. Pursuant to said stipulation plaintiff is entitled to judgment without costs permanently enjoining the defendant from giving trading stamps on fair traded articles.

Motion is granted without costs. Settle proposed judgment on two days' notice.

[¶ 68,898] Herman Schwabe, Inc. v. United Shoe Machinery Corp.

In the United States District Court for the District of Columbia. Misc. No. 33-57. Dated November 23, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Subpoena *Duces Tecum*—Production of Grand Jury Minutes—Jurisdiction of Court. —A subpoena *duces tecum,* served by a defendant in a private antitrust action, directing the Attorney General to produce a copy of grand jury minutes in his custody in the District of Columbia was vacated by the District Court for the District of Columbia for lack of jurisdiction, where the grand jury proceeding had taken place in the District of Massachusetts. Rule 6(e) of the Federal Rules of Criminal Procedure, which forbids all disclosure of matters occurring before a grand jury unless so directed or permitted by the court,

should be construed as meaning that only the court that has jurisdiction over the grand jury may direct or permit a disclosure of the grand jury minutes. "Obviously, the Court that has jurisdiction over the grand jury is in a better position to determine whether there should be a disclosure of the grand jury minutes than any other court." The mere fact that a copy of the minutes happened to be in the Attorney General's office in the District of Columbia was purely a fortuitous circumstance that should not affect the situation.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8021; Private Enforcement and Procedure, Vol. 2, ¶ 9013.975.

For the plaintiff: James N. Mallory, Boston, Mass.

For the defendant: Ralph M. Carson, New York, N. Y., and Paul F. McArdle, Washington, D. C.

For the United States: Marshall C. Gardner and Worth Rowley, both of the Department of Justice, Washington, D. C.

Opinion

[*Grand Jury Minutes*]

Alexander Holtzoff, District Judge [*In full text*]: This motion involves a question of novel impression concerning the construction of Rule 6(e) of the Federal Rules of Criminal Procedure. The defendant in a private action under the antitrust laws seeks a right to inspect the grand jury minutes containing the testimony given before a grand jury some years ago by the president of the plaintiff corporation.

[*Subpoena—Motion to Quash*]

It is sought to attain this objective by service of a subpoena *duces tecum* on the Attorney General in whose custody there is a copy of the original grand jury minutes. The action is pending in another district, but in aid of the action it is sought to take the depositions of the Attorney General, or his representatives in this District, and a subpoena *duces tecum* for the production of the minutes in question at the taking of the deposition has been issued. The Government moves to quash and vacate the subpoena.

[*Issue*]

The grand jury proceedings at which the president of the plaintiff corporation testified were had in the United States District Court for the District of Massachusets. The question of procedure is whether the District Court for any other district than that for the district which had jurisdiction of the grand jury has authority to direct the disclosure of the grand jury minutes. Rule 6(e) forbids all disclosure of matters occurring before a grand jury unless so directed by the Court or permitted by the Court. The specific point to be determined is whether the words "The Court" as used in Rule 6(e) are limited to the Court having jurisdiction of the grand jury, or include any United States District Court to which an application may be made.

[*Secrecy*]

In approaching the construction of this rule it must be borne in mind that the secrecy of grand jury proceedings is one of the keystones of the grand jury system. Disclosure and inspection of grand jury minutes is not favored, and is rarely permitted, and then only on a strong, affirmative showing that this course is in the interest of justice, and only under the circumstances stated in Rule 6(e).

[*Proper Court*]

Obviously, the Court that has jurisdiction over the grand jury is in a better position to determine whether there should be a disclosure of the grand jury minutes than any other Court. It might lead to conflicts and possibly to chaos if any one of the ninety or more United States District Courts could direct the disclosure of the minutes of a grand jury sitting in any other District. The mere fact that a copy of the minutes happens to be in the Attorney General's office in this District is purely a fortuitous circumstance that should not affect the situation.

The Court is of the opinion that Rule 6(e) should be construed as meaning that only the Court that has jurisdiction over the grand jury may direct or permit a disclosure of the grand jury minutes. Accordingly, the motion to vacate the subpoena is granted solely on the ground of lack of jurisdiction,

without expressing any opinion on the merits, and without prejudice to an application to the United States District Court for the District of Massachusetts.

[¶ 68,899] United States v. Maine Lobstermen's Association and Leslie Dyer.

In the United States District Court for the District of Maine, Southern Division. Criminal Action No. 57-35. Dated December 20, 1957.

Case No. 1362 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Sufficiency of Indictment—Elements of Offense.—An indictment charging that a lobstermen's association and its president conspired to fix the prices for live lobsters sold to lobster dealers contained all of the allegations necessary to charge a violation of Section 1 of the Sherman Act and sufficiently stated facts constituting a criminal offense against the United States; therefore, a motion to dismiss the indictment on the ground that it was insufficient was denied. An indictment is sufficient if, when construed as a whole, it informs the accused of the nature of the charges against him so that he can prepare a defense and plead double jeopardy in a second prosecution for the same offense. Also, the indictment contained a plain, concise, and definite statement of the essential facts constituting the offense charged. It contained more than a mere statement of the offense in the terms of the Sherman Act.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.570.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Indictment—Defendants' Motion for Bill of Particulars.—A motion by a lobstermen's association and its president for a bill of particulars was denied where the court found that the defendants were adequately informed of the crime with which they were charged and were in a position to plead to the indictment, to prepare their defense, to avoid undue surprise and to be protected against a second prosecution for the same offense. The indictment informed the defendants of the specific crime with which they were charged, that is, a conspiracy to fix prices of live Maine lobsters in violation of Section 1 of the Sherman Act, and of the specific conspiracy with which they were charged, including the time of the conspiracy, the persons involved, and the terms of the conspiracy. A motion for a bill of particulars under an indictment charging a conspiracy in violation of the Sherman Act must be tested by principles singular to such cases, since in antitrust prosecutions overt acts need not be pleaded or proved, so long as the conspiracy itself is sufficiently charged and established. Matters which are essentially evidentiary need not be set forth.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.800.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Indictment—Joinder of Defendants—Severance for Prejudicial Joinder.—In an action charging that an association and its president engaged in a conspiracy to fix prices, the president's motion that the indictment against him and the association be severed for the reason that the joinder of the causes is prejudicial to him was denied on the ground that the president did not substantiate his claim of prejudice. A joint trial would not prejudice the president. The indictment charged a continuing conspiracy between the defendants, and it would seem to follow that substantially the same evidence would be used to prove the charges against both of the defendants. If a separate trial were allowed, the only result would be two trials of almost identical content, which would unreasonably burden the court without providing any relief from prejudice to the defendant. In conspiracy cases, it has been held that a severance should not be granted except for strong and cogent reasons.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025, 8029.750.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Immunity from Prosecution—President of Association—Production of Association's Records Before

Grand Jury—Production of Evidence or Testimony Under Oath.—In a criminal action charging that an association and its president engaged in a conspiracy to fix prices, the president of the association was not immune from prosecution by reason of his having, pursuant to a grand jury subpoena *duces tecum* directed to the association, produced records of the association before the grand jury and answered, not under oath, certain questions concerning the identification of the records. The Immunity of Witness statute provides that immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence under oath. The president, in his appearance before the grand jury, neither gave testimony nor produced evidence under oath. The court, while not ruling upon, noted its concurrence with the Government's further contention that the president merely acted as a representative of the association in producing, before the grand jury, the documents belonging to the association which were called for by the subpoena; that his testimony was limited to the identification of such documents; and that under such circumstances, the president was not entitled to immunity.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8029.

For the plaintiff: Peter Mills, U. S. Attorney, Portland, Me.; and John J. Galgay and Alan L. Lewis, Antitrust Division, Department of Justice, New York, N. Y.

For the defendants: Stanley P. Tupper, Augusta, Me.; Philip F. Chapman, Jr., Portland, Me.; A. Alan Grossman, Rockland, Me.; and John L. Knight, Rockland, Me.

Opinion and Order of the Court

[*Indictment*]

EDWARD T. GIGNOUX, District Judge [*In full text*]: On October 15, 1957, an indictment was returned in the United States District Court for the District of Maine, charging the Maine Lobstermen's Association, and Leslie Dyer, its president, with a violation of Section 1 of the Sherman Act (26 Stat. 209, 15 U. S. C. Sec. 1). The indictment alleged that the defendants combined and conspired with each other, and others, to fix and establish a minimum selling price for live Maine lobsters sold to lobster dealers; to refrain from catching lobsters until such minimum price was obtained; and to induce and compel all Maine lobstermen, including non-members of the defendant Association, to adhere to the terms of the conspiracy charged, all in unreasonable restraint of the interstate trade and commerce in live Maine lobsters.

[*Motions*]

On October 25, 1957, the defendants filed five motions and a document entitled "Interrogatories," as follows:

1. Motion to Dismiss by both defendants on the ground that the indictment does not state facts constituting a criminal offense against the United States.

2. Motion to Dismiss by the defendant Dyer on the ground that he had obtained immunity.

3. Motion for Relief for Prejudicial Joinder by the defendant Dyer.

4. Motion for Bill of Particulars by both defendants.

5. Motion to Dismiss by the defendant Association on the ground that it had obtained immunity.

6. A document entitled "Interrogatories" filed by both defendants.

Hearing on the aforesaid motions and document was held before this Court on December 3, 1957, all parties being represented by their respective attorneys. At the hearing the attorneys for the defendant Association requested permission to withdraw its motion to dismiss on the ground that it had obtained immunity, and the attorneys for both defendants requested permission to withdraw the document entitled "Interrogatories." Both requests were granted by this Court, and argument was limited to the four remaining motions, which the Court will now consider in the order in which they are listed above.

I. The Defendants' Motion To Dismiss on the Ground that the Indictment Does Not State Facts Constituting a Criminal Offense Against the United States

Rule 7 (c) of the Federal Rules of Criminal Procedure provides that the indictment "shall be a plain, concise and definite written statement of the essential facts constituting

the offense charged." Although it has been stated that an antitrust indictment may be subject to dismissal if the defendant is charged only in terms of the Sherman Act, *Frankfort Distilleries, Inc. v. United States* [1944-1945 TRADE CASES ¶ 57,286], 144 F. 2d 824, 830 (10th Cir. 1944), *reversed on other grounds,* [1944-1945 TRADE CASES ¶ 57,338] 324 U. S. 293 (1945), it is fundamental that an indictment is sufficient if, when construed as a whole, it informs the accused of the nature of the charges against him so that the defendant can prepare a defense and plead double jeopardy in a second prosecution for the same offense. *United States v. Northeast Texas Chapter, National Electrical Contractors Ass'n* [1950-1951 TRADE CASES ¶ 62,596], 181 F. 2d 30 (5th Cir. 1950); *United States v. Josephson,* 165 F. 2d 82 (2d Cir. 1947), cert. denied 333 U. S. 838 (1948); *Wilson v. United States,* 158 F. 2d 659 (5th Cir. 1947), cert. denied 330 U. S. 850 (1947); *United States v. Armour & Co.* [1940-1943 TRADE CASES ¶ 56,288], 137 F. 2d 269 (10th Cir. 1943).

This Court is satisfied that the instant indictment contains all the allegations necessary to charge a violation of Section 1 of the Sherman Act and meets the requirements of Rule 7(c) and the additional requirements established by judicial decision for Sherman Act cases.

The indictment only contains one count, the essential allegations with respect to the conspiracy being set forth in Paragraphs 12, 13 and 14. In Paragraph 12 the defendants are charged in the generic language of the statute with having from on or about June, 1957, to the date of the return of the indictment:

> ". . . engaged in a combination and conspiracy to fix, stabilize and maintain the prices for live Maine lobsters sold by both MLA member and nonmember lobstermen to lobster dealers, in unreasonable restraint of . . . trade and commerce . . . in violation of Section 1 of the . . . Sherman Act. . . ."

In Paragraph 13 of the indictment the elements of the alleged combination and conspiracy are specified in the following language:

> "13. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action among the defendants, the co-conspirators described herein, and other persons to the Grand Jury unknown, the substantial terms of which have been and are that the defendants and the co-conspirators agree:
>
> "(a) To fix and establish a minimum selling price for live Maine lobsters sold to lobster dealers;
>
> "(b) To refrain from catching lobsters until said minimum price was obtained;
>
> "(c) To induce and compel all Maine lobstermen, including non-members of MLA, to adhere to the terms of the conspiracy hereinbefore charged."

In Paragraph 14 of the indictment it is further alleged that:

> "14. During the time covered by this indictment the defendants and the co-conspirators, by agreement, understanding and concert of action, have done those things which, as hereinbefore charged, they conspired and agreed to do."

In *United States v. Minneapolis Electrical Contractors Ass'n.,* 99 F. Supp. 75 (D. C. Minn. 1951), *appeal dismissed,* 207 F. 2d 782 (8th Cir. 1953), the court upheld an indictment under Section 1 of the Sherman Act for conspiracy to restrain trade which was substantially identical to the indictment in the present proceeding. The court pointed out that, as in the instant indictment, the indictment not only charged an offense in the language of the statute, but also set forth the substantial terms of the alleged unlawful conspiracy and agreement and the purpose which was sought to be accomplished. The court held that the indictment was sufficient, saying (at p. 78):

> "Although an antitrust indictment may be subject to dismissal if the defendant is charged only in the terms of the Sherman Act, *Frankfort Distilleries, Inc. v. United States* . . . it is fundamental that the indictment need not be detailed or evidentiary . . . The allegations go far past the mere words of the statute and apprise the defendants of the agreements charged against them so that they can recognize what the Government claims were the terms of the conspiracy and what conspiracy was involved. To require the indictment to contain the detail now sought by defendants would render the indictment considerably evidentiary and would make purposeless the rules permitting the bill of particulars which defendants also seek . . . ."

To the same effect see *Las Vegas Merchant Plumbers Ass'n. v. United States* [1954 TRADE CASES ¶ 67,673], 210 F. 2d 732 (9th Cir. 1954), cert. denied, 348 U. S. 817 (1954); *American Tobacco Company v. United*

States [1944-1945 TRADE CASES ¶ 57,317], 147 F. 2d 93, 117 (6th Cir. 1944), *aff'd.* [1946-1947 TRADE CASES ¶ 57,468], 328 U. S. 781 (1946); *cf. United States v. Employing Plasterers Ass'n. of Chicago* [1954 TRADE CASES ¶ 67,692], 347 U. S. 186 (1954).

In view of the plain language of Rule 7(c) and the decisions testing indictments brought under the Sherman Act, this Court is of the opinion that the indictment in this proceeding contains all the allegations necessary to charge a violation of Section 1 of the Sherman Act and sufficiently states facts constituting a criminal offense against the United States. Accordingly, the defendants' motion to dismiss on the ground that the indictment does not state facts constituting a criminal offense against the United States is denied.

II. The Defendant Dyer's Motion to Dismiss on the Ground That He Had Obtained Immunity

Defendant Dyer in his motion to dismiss the indictment on the ground that he had obtained immunity states that he "was compelled under process of subpoena issued by this Honorable Court to appear and give evidence to the Grand Jury for their proceedings and deliberations which said deliberations resulted in this said indictment against your defendant."

This representation by the defendant is not true, and the claimed immunity is clearly without any legal basis. The Government requested and, with the consent of counsel for the defendants, was granted permission to file with the Court the affidavit of John J. Galgay, Esq., trial attorney in the Antitrust Division of the United States Department of Justice, disclosing the facts and circumstances surrounding Dyer's appearance and testimony before the Grand Jury. As appears from this affidavit, a subpoena *duces tecum*, dated August 14, 1957, directed to the "Maine Lobstermen's Association, 427 Main Street, Rockland, Maine," was served on the same date by a Deputy United States Marshal at the indicated address upon Dyer, president of the Association, who accepted such service on behalf of the Association. The subpoena *duces tecum* directed the Association to produce certain documents relating to the Association's organizational structure and membership activities. On August 20, 1957, Dyer appeared at the United States Courthouse, Portland, Maine, and informed government counsel that he had in his possession the documents called for in the subpoena. He was, thereupon, called into the Grand Jury room to produce the subpoenaed material before the Grand Jury. He was not placed under oath. While in the Grand Jury room, he was asked his name and address; he was asked if he appeared pursuant to a subpoena served on the Association and if the subpoena called for the production of certain Association documents, to both of which questions he replied in the affirmative. After starting to enumerate the various documents, he was asked whether the folder which he held in his hand contained all of the documents requested and demanded by the subpoena, and he replied that it did. He, thereupon, handed the folder containing the documents to Government counsel, and the folder was marked by the Grand Jury reporter as "Grand Jury Exhibit No. 1." No further questions were asked of Dyer, and he was thereupon excused.

Counsel for this defendant raise no issue as to the factual correctness of the above-mentioned affidavit and in their brief specifically concede that Dyer "was not administered the oath when he was interrogated before the Grand Jury concerning the documents which he had produced." At the hearing before this Court, however, Dyer's counsel filed with the Court an affidavit of Dyer stating, in substance, his understanding and belief that the subpoena *duces tecum*, although directed to the Association, was served upon him personally; that he appeared before the Grand Jury believing that he was a witness and was entitled to the "immunities as held out by the United States Attorneys through the Press"; and that in appearing and producing documents before the Grand Jury he believed that he was "subject to the penalties of perjury."

His counsel contend that under these circumstances the defendant Dyer is entitled to the protection of the Immunity of Witness Statute, 15 U. S. C. A., Sections 32 and 33, specifically relating to the Sherman Act.

The relevant language of the Immunity of Witness Statute is as follows:

> "Section 32. No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1-7 of this title . . .

"*Provided,* that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

"Section 33. Under the immunity provisions in Section 32 of this title, immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."

It is evident from a simple reading of this statute, that the claim of the defendant Dyer for immunity is without legal justification. Section 33 specifically provides that the immunity granted by Section 32 shall extend only to a natural person who "in obedience to a subpoena gives testimony *under oath* or produces evidence, documentary or otherwise, *under oath*" (Emphasis supplied). In the instant case it explicitly appears from the Government's affidavit and is conceded by the defendant's counsel that Dyer in his appearance before the Grand Jury neither gave testimony nor produced evidence, documentary or otherwise, *under oath.* Under these circumstances, it is clear from the plain and inescapable language of the statute that Dyer received no immunity, and the motion to dismiss the indictment as against the defendant Dyer on the ground that he obtained immunity must be, and hereby is, denied.

In view of the foregoing ruling, it is unnecessary to pass upon the further contentions of the Government with respect to the non-application of the immunity statute to a natural person whose appearance before a Grand Jury is in obedience to a subpoena directed to an association, or other distinct legal entity, of which the natural person is an officer, when the sole purpose of such appearance is to deliver documents belonging to the association, and testimony is limited to the identification of the documents thus produced. The Court will note, however, its concurrence with the position of the Government that in the instant case Dyer merely acted as a representative of the Association in producing before the Grand Jury the documents and papers belonging to the Association which were called for by the subpoena directed to it; that this testimony was limited to the identification of such documents; and that under these circumstances the defendant was not entitled to the immunity provided by the statute. See *United States v. Monia* [1940-1943 TRADE CASES ¶ 56,251], 317 U. S. 424, 430 (1943); *Lumber Products Ass'n, Inc. v. United States* [1944-1945 TRADE CASES ¶ 57,281], 144 F. 2d 546, 553 (9th Cir. 1944), *reversed on other grounds sub nom, United Brotherhood of Carpenters and Joiners of America v. United States* [1946-1947 TRADE CASES ¶ 57,545], 330 U. S. 395 (1947); *United States v. Detroit Sheetmetal & Roofing Contractors Ass'n., Inc.* [1953 TRADE CASES ¶ 67,596], 116 F. Supp. 81, 90 (E. D. Mich. 1953); *United States v. Greater Kansas City Retail Coal Merchants Ass'n.* [1948-1949 TRADE CASES ¶ 62,480], 85 F. Supp. 503, 513 (W. D. Mo. 1949). See also, *United States v. White,* 322 U. S. 694 (1944); *Brown v. United States,* 276 U. S. 134 (1928).

III. The Defendant Dyer's Motion for Relief for Prejudicial Joinder

Rule 14 of the Federal Rules of Criminal Procedure provides, in part, that

"If it appears that a defendant . . . is prejudiced by a joinder . . . of defendants in an indictment or information or by such joinder for trial together, the court may . . . grant a severance of defendants or provide whatever other relief justice requires." [1]

Apparently acting under Rule 14, the defendant Dyer, in his motion for relief for prejudicial joinder, requests that the indictment against him and the defendant Association be severed "for the reason that the joinder of said causes is prejudicial" to him.

A motion for relief from prejudicial joinder is addressed to the sound discretion of the trial court. *Opper v. United States,* 348 U. S. 84 (1954); See 4 Barron, *Federal Practice and Procedure,* Section 2011 (Rules Ed. 1951). And in conspiracy cases it has been frequently stated that a severance should not be granted except for strong and cogent reasons. See *United States v. Lebron,* 222 F. 2d 531, 535 (2d Cir. 1955); *United States v. Brandt,* 139 F. Supp. 367, 369 (N. D. Ohio 1955); *United States v.*

[1] Rule 8(b) of the Federal Rules of Criminal Procedure provides for the joinder of defendants, as follows:

"(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Silverman, 129 F. Supp. 496, 500 (D. C. Conn. 1955).

In *United States v. Atlantic Commission Co., Inc.,* 45 F. Supp. 187 (E. D. N. C. 1942), the Court specifically applied the foregoing rule in a criminal prosecution under the antitrust laws and denied a motion for severance, saying (at p. 190):

> ". . . the general rule is that it is inadvisable to split a case into many parts, to be disposed of piecemeal, in the absence of very strong and cogent reason therefor. This is especially true in conspiracy charges."

In *United States v. Silverman, supra,* the court thus stated the prevailing law (at p. 500):

> ". . . In a conspiracy case where the charge against all the defendants may be largely proved by the same evidence and results from a similar series of acts, as is alleged here, a severance should not be granted except for strong and cogent reasons. . . . Moreover, evidence relating to acts and declarations of all the conspirators in furtherance of the conspiracy are admissible against all whether or not each defendant is tried alone or jointly . . . ."

The defendant Dyer, in his motion, does not attempt to substantiate his claim of prejudice. He has submitted no affidavits in support of his contentions, nor were his counsel able to suggest for the Court's consideration in what respects he might be prejudiced by a joint trial with the defendant Association.

After careful consideration of the arguments presented by counsel in support of this motion, this Court is unable to find that the defendant Dyer will be prejudiced by a joint trial. The indictment charges a continuing agreement and conspiracy between the defendants, and it would seem to follow that substantially the same evidence will be used to prove the charges against them both. A severance could in no way lessen the evidence against Dyer or remove from the jury's consideration the Government's evidence against the Association. If the defendant were to be allowed a separate trial, the only result would seem to be two trials of almost identical content, which would unreasonably burden the court without providing any relief from prejudice to the defendant.

No definite situation having been presented for the Court's consideration to substantiate this defendant's claim of prejudice, the motion for relief for prejudicial joinder must be, and hereby is, denied.

IV. The Defendants' Motion for Bill of Particulars

In their motion for a bill of particulars, the defendants state that the gist of the criminal offense alleged in the indictment is contained in paragraphs numbered 12, 13 and 14, and that the statements and allegations contained in said paragraphs are "vague, indefinite and uncertain, and represent conclusions rather than factual statements relating to transactions," because of which the defendants cannot be fairly apprised of the crimes alleged against them so that they can adequately prepare their defense and plead to the indictment. The defendants request that the government be directed to furnish them with particulars relating to the indictment, setting forth with certainty and definiteness the matter of "times and places, events and things" allegedly constituting the conspiracy charged.

Rule 7(f) of the Federal Rules of Criminal Procedure provides that "The Court for cause may direct the filing of a bill of particulars." Such a motion is addressed to the sound discretion of the trial court. *Wong Tai v. United States,* 273 U. S. 77, 82 (1927); *American Tobacco Company v. United States, supra,* 117.

The fundamental purpose of a bill of particulars is to inform the accused of the charges against him with sufficient definiteness to permit him to prepare for trial, to prevent undue surprise and to protect him against a second prosecution for the same offense. *Wong Tai v. United States, supra; United States v. General Electric Co.,* 40 F. Supp. 627, 632 (S. D. N. Y. 1941). And it has been frequently stated that a motion for a bill of particulars under an indictment charging a conspiracy in violation of the Sherman Act must be tested by principles singular to such cases, since in anti-trust prosecutions overt acts need not be pleaded or proved, so long as the conspiracy itself is sufficiently charged and established. *United States v. Aluminum Co. of America,* 41 F. Supp. 347 (S. D. N. Y. 1941); *United States v. General Electric Co., supra,* 632. See also in this regard *United States v. Socony-Vacuum Oil Co., Inc.* [1940-1943 TRADE CASES ¶ 56,031], 310 U. S. 150, pp.

225 N. and 252 (1940); *Nash v. United States,* 229 U. S. 373, 378 (1913).

In *United States v. General Petroleum Corp. of California,* 33 F. Supp. 95 (S. D. Cal. 1940) these general principles were applied to a motion for particulars under an indictment charging a violation of the Sherman Act. In denying the motion, the court there stated (at p. 97):

> "As we believe it is merely surplusage to enter into a minute discussion of the office of a bill of particulars in a criminal case, we will briefly state our reasons for refusing to require the government to amplify the allegations of the indictment except as hereinafter ordered. Because the demands of defendants for enlargement of an accusation of a criminal offense cannot be considered or dealt with in the abstract, the applicability of this form of pretrial criminal procedure must be viewed in the light of the specific case as it is laid in the indictment that is immediately before the court for consideration. This is especially true in charges of conspiracy to violate the anti-trust laws of the United States. In such prosecutions, if the indictment, considering the record history of the case, adequately states the alleged unlawful combination or conspiracy so as to enable all accused to clearly understand it, to properly prepare for trial within a reasonable time, and to avoid prejudicial surprise at the trial, a court order requiring detailed enlargement or expansion of the essential ultimate facts sufficiently pleaded may operate to cripple and nullify the established national policy of prohibiting or treating as illegal all contracts or combination of individuals or corporations substantially restrictive of free competition, or to fix prices of commodities, in the channels of interstate business."

Examining the instant indictment in light of the fundamental purposes of a bill of particulars, with particular reference to anti-trust prosecutions, as hereinabove stated, this Court is satisfied that these requirements are met and that the defendants are sufficiently informed of the charges against them for every purpose enumerated above.

In Paragraph 12 of the instant indictment the defendants are informed that they are charged with a combination and conspiracy among themselves, the co-conspirators (identified in Paragraph 4 of the indictment as the remaining officers, delegates, executive council and members of the Association), and other persons to the Grand Jury unknown, to fix, stabilize and maintain the prices for live Maine lobsters in unreasonable restraint of interstate trade and commerce, in violation of Section 1 of the Sherman Act. The conspiracy is alleged to have commenced on or about June, 1957, and to have continued to the date of the return of the indictment, which was October 15, 1957.

Paragraph 13 of the indictment further sets forth the substantial terms of the combination and conspiracy, involving an agreement: (a) to fix and establish a minimum selling price for live Maine lobsters sold to lobster dealers; (b) to refrain from catching lobsters until said minimum price was obtained; and (c) to induce and compel all Maine lobstermen, including non-members of the Association, to adhere to the terms of the conspiracy.

In Paragraph 14 of the indictment the defendants are informed that they are charged with having in fact done those things which they are charged with having conspired and agreed to do.

Paragraphs 12, 13 and 14 of the indictment thus inform the defendants of the specific crime with which they are charged, to wit: a conspiracy to fix prices of live Maine lobsters in violation of Section 1 of the Sherman Act, and of the specific conspiracy with which they are charged, including the time of the conspiracy, the persons involved, and the terms of the conspiracy. It is the opinion of this Court that the defendants are thereby adequately informed of the crime with which they are charged and are in a position to plead to the indictment, to prepare their defense, to avoid undue surprise, and to be protected against a second prosecution for the same offense. Further particulars as to "times and places, events and things" allegedly constituting such conspiracy would require the specification of matters which are essentially evidentiary, would unduly hamper and restrict the Government in the presentation of its case, and are wholly unnecessary for any legitimate purpose which the defendants might have either in pleading to the indictment or in preparing their defense for trial.

For the reasons stated, after careful consideration of the arguments presented by the defendants, the Court is satisfied that in the exercise of its sound discretion the defendants' motion for a bill of particulars must be, and it hereby is, denied.

[¶ 68,900] **United States v. Maine Lobster Co., Inc.; Benson Lobster Company; Willard-Daggett, Inc.; E. C. Palmer Inc.; Samuel L. Armstrong; Charles E. Olsen; and John E. Willard, Jr.**

In the United States District Court for the District of Maine, Southern Division. Criminal Action No. 57-36. Dated December 20, 1957.

Case No. 1364 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Grand Jury Proceeding—Dismissal of Grand Juror on Occupational Grounds—Effect on Indictment.—A motion to dismiss an indictment against lobster dealers on the ground that one of the members of the grand jury which returned the indictment was dismissed from participation in the grand jury proceedings because he was a lobster fisherman was denied. The defendants' contention that the dismissal of the juror constituted an intentional exclusion from the grand jury of a class of workers and was prejudicial to the defendants' interests was rejected. Good cause was shown for the discharge of the juror, and there was no abuse of discretion by the court. At the time, the grand jury was about to investigate charges that lobster dealers had conspired to victimize lobster fishermen and charges of a price fixing conspiracy among lobster fishermen themselves. Also, the grand jury had returned an indictment against a lobster fishermen's association. There was no systematic exclusion of all lobster fishermen at the time of the organization of the grand jury. More than the requisite number of twelve grand jurors concurred in the finding; therefore, even if the discharge had been improper, there having been no systematic exclusion of a class, it would not have vitiated the indictment.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8021.

For the plaintiff: Peter Mills, U. S. Attorney, Portland, Me.; and John J. Galgay and Alan L. Lewis, Antitrust Division, Department of Justice, New York, N. Y.

For the defendants: Jacob Agger, Philip G. Willard, and Frank P. Preti, all of Portland, Me.

Opinion and Order of the Court

[*Indictment*]

EDWARD T. GIGNOUX, District Judge [*In full text*]: On October 15, 1957 an indictment was returned in this court charging the four corporate and three individual defendants with a violation of Section 1 of the Sherman Act (26 Stat. 209, 15 U. S. C. Sec. 1). It charged that the defendants combined and conspired with each other, and others, including various Maine lobster dealers located in Portland and Rockland, Maine, to fix and establish a maximum price at which they shall purchase live Maine lobsters during the shedder season; to adopt, maintain and adhere to the maximum purchase price so fixed; and to invite, solicit and induce other lobster dealers in the Rockland, Maine area to join in the combination and conspiracy, all in unreasonable restraint of the interstate trade and commerce in live Maine lobsters.

[*Motion to Dismiss*]

On December 6, 1957 the defendants filed a motion to dismiss the indictment for the reason that Leroy Ames, of Vinalhaven, Maine, a regular and otherwise qualified member of the Grand Jury which returned the indictment, was dismissed from all participation in the proceedings on the sole ground that he was, by occupation, a lobster fisherman. The defendants contend that, Ames being the only member of the Grand Jury engaged in the lobster industry, his dismissal constituted an intentional exclusion from the Grand Jury of a class of workers and was prejudicial to the defendants' interests.

Hearing on the aforesaid motion was held before this Court on December 16, 1957, all parties being represented by their respective attorneys, and written briefs and oral arguments were presented for the consideration of the Court. Filed with the

Government's brief was the affidavit of Richard B. O'Donnell, Esquire, trial attorney in the Anti-Trust Division of the United States Department of Justice, setting forth the circumstances surrounding the discharge and excuse of Grand Juror Ames from the Grand Jury. At the hearing the defendants introduced in evidence the testimony of Morris Cox, Esquire, Clerk of this Court with reference to Ames' discharge.

[*Discharge of Grand Juror*]

On the basis of Mr. O'Donnell's affidavit, Mr. Cox's testimony and the records of this Court relating to these proceedings, this Court finds that the facts concerning Grand Juror Ames' discharge from the Grand Jury, are substantially without dispute and are as follows:

1. Grand Juror Ames was duly impaneled as a member of the Grand Jury drawn for service at the April, 1957 Term of this Court and sat as a member of this Grand Jury from April 15, 1957 until formally excused from service by the Clerk of this Court on August 15, 1957. During the period of his service Ames participated in the deliberations of the Grand Jury on various matters submitted to it, but he did not participate in the Grand Jury deliberations which led to the return of the indictment in the instant proceeding.

2. Ames was listed on the Grand Jury roster as a lobster fisherman at Vinalhaven, Maine, and he was in fact such at the time of his excuse.

3. On August 15, 1957 Mr. O'Donnell, who was duly authorized to conduct Grand Jury proceedings in the District of Maine, conferred with the United States Attorney for the District of Maine and Mr. Cox regarding the presentation to the Grand Jury of evidence of possible violations of the antitrust laws in the lobster industry. Learning that Ames was on the roster of the Grand Jury, Mr. O'Donnell asked John J. Galgay, Esquire, one of his associates, so to inform the Honorable George C. Sweeney, United States District Judge for the District of Massachusetts, who had been duly designated to act as a United States District Judge for the District of Maine. Mr. Galgay thereupon telephoned Judge Sweeney, who was on vacation in Wolfsboro, New Hampshire. He informed him of the proposed investigation of the lobster industry, reported the presence of a lobster fisherman on the Grand Jury and called to Judge Sweeney's attention that under Rule 6(g) of the Federal Rules of Criminal Procedure a grand juror could be excused by the court for cause shown.

4. After hearing Mr. Galgay's statement of the problem, Judge Sweeney discussed the matter by telephone with Mr. Cox and instructed him to verify Ames' occupation, and if he were in fact a lobster fisherman, to excuse him from further Grand Jury duty. Mr. Cox verified Mr. Ames' occupation by telephone conversation with Mrs. Ames on the same day and through Mrs. Ames notified Mr. Ames that he was excused from Grand Jury duty. This was confirmed by letter on August 16, 1957.

5. Evidence concerning possible violation of the anti-trust laws in the lobster industry was presented to, and heard by, the Grand Jury between August 20 and October 15, 1957. On October 15, 1957 the Grand Jury returned the indictment in the instant case, in which various corporate and individual lobster dealers are named as defendants. On the same date it returned a second indictment charging the Maine Lobstermen's Association, an association of lobster fishermen, and Leslie Dyer, its President, with an illegal conspiracy to fix and maintain a minimum price for live Maine lobsters, in violation of the anti-trust laws. (*United States of America v. Maine Lobstermen's Association, et al.,* United States District Court for the District of Maine, Criminal No. 57-35).

6. The records of this Court show that more than twelve Grand Jurors concurred in the finding of the indictment in the instant proceeding.

[*"Good Cause"*]

In the opinion of this Court the defendants' contention that the dismissal of Grand Juror Ames because he was a lobster fisherman "constituted an intentional exclusion from the Grand Jury of a class of workers and was prejudicial to the defendants' interest" is wholly without warrant. Rule 6(g) of the Federal Rules of Criminal Procedure specifically provides that "At any time for cause shown the court may excuse a (grand) juror either temporarily or permanently . . .". From the circumstances

as herein above stated concerning Judge Sweeney's excuse of Grand Juror Ames, it can only be concluded that he believed there was "good cause" which warranted the discharge or excuse of this juror from the Grand Jury. See also 28 U. S. C. A. Sec. 1863.

One of the circumstances involved was that the Grand Jury was about to investigate charges that lobster dealers, including those later named as defendants in this case, had conspired to victimize lobster fishermen by fixing the prices at which they would purchase live lobsters from the fishermen. As a lobster fisherman, it was reasonable to suspect that Grand Juror Ames might have been one of the aggrieved parties against whom the alleged conspiracy was directed, a position from which bias or prejudice might well be presumed. Another circumstance involved was that the Grand Jury was also about to investigate an alleged price-fixing conspiracy among the lobster fishermen themselves. As a lobster fisherman, it was reasonable to suspect that Grand Juror Ames might have been at least a possible prospective defendant, an intolerable position in which to place any juror.

Rule 6(g) vests a broad discretion in the court with respect to the excuse of a Grand Juror, particularly where the interests of fair and impartial administration of justice are concerned, and this Court cannot conclude that Judge Sweeney's excuse of Grand Juror Ames in the instant proceedings constituted an abuse of this discretion. In the opinion of this Court Judge Sweeney's action was wholly within both the letter and the spirit of Rule 6(g).

[*No Systematic Exclusion*]

The defendants, in supporting their contention that Ames' discharge constituted "an intentional exclusion from the Grand Jury of a class of workers" rely on such cases as *United States v. Foster,* 80 F. Supp. 479, 483 (S. D. N. Y. 1948), where the court speaks of "a systematic exclusion of all working people and all members of the colored race from the Grand Jury" at the time of the organization of the grand jury. These cases condemn any such systematic exclusion. The present case, however, in no way parallels such cases. In order to bring the present case within the reasoning of the *Foster* case, the defendants would have to show a systematic exclusion of all lobster fishermen at the time of the organization of the grand jury. There is nothing in the circumstances surrounding the dismissal of Grand Juror Ames to support such a theory. See also *United States v. Dennis,* 183 F. 2d 201, 216 (2d Cir. 1950); *Mamaux v. United States,* 264 Fed. 816 (6th Cir. 1920); *United States v. Fujimoto,* 102 F. Supp. 890, 894 (D. C. Hawaii 1952).

[*Possibility of Prejudice*]

There appear to be two controlling cases relating to the discharge of a grand juror and the effect on the subsequent indictment returned by the remaining grand jurors. *United States v. Mitchell,* 136 Fed. 896 (C. C. D. Oregon 1905) establishes that if a grand juror has been discharged "for good cause shown to the court," and if the requisite number of grand jurors concurred in the indictment, then the defendants cannot speculate on any possible prejudice to them from such discharge. The court there stated (at p. 904):

> "The record shows that these jurors were discharged 'for good cause shown to the court'. Since there was necessarily an affirmative vote of 12 jurors to find a bill, the absence of these jurors could not have affected the result. It was suggested that they might, if present, have influenced a change in the affirmative vote by persuasion, but it goes without saying that there is no presumption against the indictment that these jurors would have endeavored to exert such influence, or would have succeeded in so doing; and, before the court can consider any objections made, it must at least appear, not from the belief expressed, but from the facts stated, that the defendant has suffered some impairment of a substantial right or some prejudice, or that the things complained of violate the requirements of a positive statute. Moreover, the power of the court to discharge a juror for good cause shown is undoubted, and the possible or probable effect of the absence of such a juror on the subsequent proceedings of the grand jury does not admit of inquiry."

And, even assuming that the discharge of a grand juror had been improper, the court in *Jones v. United States,* 162 Fed. 417 (9th Cir. 1908) thus stated the applicable law (at p. 421):

> "It has been many times decided that the improper discharge of a juror will not vitiate an indictment, provided that the number necessary to find it remain. *U. S.*

v. Belvin (C. C.) 46 Fed. 381; *Gladden v. State,* 12 Fla. 623; *Smith v. State,* 19 Tex. App. 95; *Portis v. State,* 23 Miss. 578; *State v. Wilson,* 85 Mo. 134; *Commonwealth v. Burton,* 4 Leigh (Va.) 645, 26 Am. Dec. 337.

See also *United States v. Fujimoto, supra,* 896.

As has been noted, more than the requisite number of twelve grand jurors, required by Rule 6(f) of the Federal Rules of Criminal Procedure concurred in the finding of the instant indictment. Thus, even if the discharge of Grand Juror Ames had been improper, there having been no systematic exclusion of a class, it would still not have vitiated the indictment.

[*Motion Denied*]

For the foregoing reasons the defendants' motion to dismiss the indictment must be, and it hereby is, denied.

[¶ 68,901] Sunbeam Corporation v. Masters, Inc.

In the United States District Court for the Southern District of New York. No. 57-54. Filed December 30, 1957.

McGuire Act and New York Fair Trade (Feld-Crawford) Act

Fair Trade—Selling Below Fair Trade Prices—Sales by Subsidiary from Non-Fair Trade Jurisdiction to Fair Trade Jurisdiction—Violation of Injunction Against Parent Organization—Scope of Federal and State Fair Trade Laws.—A New York retailer did not violate an injunction prohibiting it from selling a fair trader's products below their established prices in violation of the New York Fair Trade Act by organizing a subsidiary mail order company in the District of Columbia (a non-fair trade jurisdiction) which sells the fair trader's products below their established New York fair trade prices to New York residents. An application to adjudge the retailer in contempt was denied on the authority of *General Electric Co. v. Masters Mail Order Co. of Washington, D. C., Inc.,* 1957 TRADE CASES ¶ 68,715, wherein, in an action by another fair trader against the above District of Columbia mail order company, it was held that sales below New York fair trade prices by the District of Columbia mail order company to New York residents were not violative of the New York Fair Trade Act and that the McGuire Act did not extend to such interstate transactions. The scope of the ruling in the *General Electric Co.* case was such that there was no basis upon which to bottom a contempt by reason of the organization of the subsidiary and the sales made by it and participated in by the retailer. The New York Fair Trade Act is necessarily limited by the McGuire Act with respect to interstate transactions where the sale is consummated in a non-fair trade jurisdiction. The New York law derives its authority from the Federal McGuire Act, and, in any conflict between the two, the Federal law prevails.

See Fair Trade, Vol. 1, ¶ 3262.34, 3262.75, 3262.80.

Fair Trade—Enforcement of Fair Trade Prices—Violation of Injunction—Contempt.—In denying an application to adjudge a defendant in contempt for violation of a fair trade injunction, the court noted that, in determining whether or not the injunction was violated, it must be kept in mind that the injunction is limited to those activities which violate the state fair trade law, and, if the conduct charged as a contempt does not violate that law, the conduct is not within the prohibition of the injunction.

See Fair Trade, Vol. 1, ¶ 3380.34.

For the plaintiff: Rogers, Hoge & Hill (George M. Chapman, of counsel), New York, N. Y.

For the defendant: Arnold, Fortas & Porter (Norman Diamond, of counsel), Washington, D. C., and Joseph F. Ruggieri, Brooklyn, N. Y.

For prior opinions of the U. S. District Court, Southern District of New York, see 1954 Trade Cases ¶ 67,841 and 1950-1951 Trade Cases ¶ 62,824, 62,653.

Opinion

[*Contempt Action*]

EDWARD WEINFELD, District Judge [*In full text*]: Reference is made to the Court's earlier opinion on an application by the plaintiff to punish the defendant for contempt of court for violation of the injunctive provisions of a final decree, entered by consent, which enjoined the defendant from selling or offering for sale plaintiff's products in violation of New York State's Fair Trade Law.[1] *Sunbeam Corporation v. Masters, Inc.* [1954 TRADE CASES ¶ 67,841], 124 F. Supp. 155.

As the opinion indicates a factual conflict existed as to the circumstances of the organization by the defendant of a wholly owned subsidiary in the District of Columbia, a non-fair trade jurisdiction, and also the circumstances under which sales were made by it to New York residents and participated in by the defendant. Accordingly, final decision was withheld pending an inquiry into these matters and in particular into the circumstances of sales to New York residents by the subsidiary, Masters Mail Order Co. of Washington, D. C.

The parties in a desire to avoid hearings before a special master on the factual issues, agreed to stipulate the facts; it took almost two years before they reached an accord.

[*Action Against Subsidiary*]

In the meantime, our Court of Appeals had under consideration, and has since decided, an action brought against the subsidiary. *General Electric Co. v. Masters Mail Order Co. of Washington, D. C.* [1957 TRADE CASES ¶ 68,715], 2 Cir., 244 F. 2d 681, cert. denied 26 U. S. Law Week 3114. The facts there presented are substantially identical with those presented on the instant application. The very mail order house operation shown here, including the present defendant's participation therein to the extent, and in the manner, stated in the stipulation of facts entered into by the parties herein, was passed on in that case. It was urged there, as it is here, that this operation was a mere device conceived to circumvent the New York Fair Trade Law. The Court of Appeals rejected this contention and held that the critical and operative acts took place in the District of Columbia, a free trade jurisdiction, and were, therefore, beyond the reach of the New York Law. In short, the Court held that the acts complained of were not violative of New York State's Fair Trade Law with respect to goods moving in interstate commerce where the sales were consummated in a non-fair trade jurisdiction such as the District of Columbia; that the McGuire Act granting certain exceptions to Sherman Act prohibitions against resale price maintenance agreements did not extend to such interstate transactions.

The *General Electric* case is thus an authoritative determination that the activities of the mail order house as revealed in the record now before the Court, do not violate the New York Fair Trade Law. The plaintiff insists, however, that notwithstanding the lawful character of these activities, nevertheless the defendant in so far as it furthered them, violated the injunction herein. It is true that the defendant, the parent corporation, Masters, Inc. was not a party to the General Electric suit. However, the close relationship with its subsidiary, the mail order house, was fully established, and, as already mentioned, heavily relied on by General Electric in support of its position. The absence of the parent corporation, the defendant herein, as a formal party in the General Electric suit cannot obliterate the plain fact that this defendant's part in the mail order house operation was taken into account and was held not to alter the legal effect of that operation.

[*Injunction Not Violated*]

The injunctive provisions of the final decree are to be read in context. It must not be forgotten that the original action was brought to enforce the plaintiff's rights under the New York Fair Trade Law. The relief sought and given within the framework of that law was the supression of acts forbidden, not of those permitted, by it. So construed, the injunction must be held limited to those activities which violated the New York Fair Trade Law. It having been determined that the conduct here charged as a contempt does not violate that law, it follows that it is not within the prohibition of the injunction. An injunction framed in terms of the statute upon which it is based adds nothing to the command of the statute.[2] This is particularly so in a

[1] N. Y. General Business Law, §§ 369-a *et seq.*

[2] *Douds v. I. L. A.*, 2 Cir., 224 F. 2d 455, 460, cert. denied 350 U. S. 873.

contempt proceeding.[3] As the Supreme Court has said:

"In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought and the facts found must constitute a plain violation of the decree so read".[4]

The scope of the holding in the *General Electric* case is such that I am of the view there is no basis upon which to bottom a contempt of this Court's decree by reason of the organization of the subsidiary and the sales made by it and participated in by the defendant upon which the plaintiff's present motion was founded—activities found not to offend New York State's Fair Trade Laws. This conclusion avoids the anomaly of a ruling that acts which could not have been enjoined in the first instance may nonetheless be adjudged violative of the injunction herein and punished as a contempt.

[*McGuire Act*]

The plaintiff has urged the case of *Eastman Kodak Co. v. Masters, Inc.* [1956 TRADE CASES ¶ 68,351], 153 N. Y. S. 2d 433, wherein under substantially the same facts as here presented, it was held that mere advertising and offering for sale was a violation of an identical decree of the New York State Supreme Court. However, the authority of the case is undermined by the holding in the *General Electric* case that the New York statute is necessarily limited by the McGuire Act with respect to interstate transactions where the sale is consummated in a free trade jurisdiction. Plaintiff urges the continuing authority of the *Eastman Kodak* case on the ground that jurisdiction in the instant case rests upon diverse citizenship and accordingly, the federal court is bound by the state court interpretation of a state statute. However, the state statute derives its authority from the federal statute, the McGuire Act, and in any conflict between the two the federal law prevails. The limitation the McGuire Act places on state fair trade laws is not determined by the state courts; on the contrary on this issue federal law is supreme.[5] It is also noted that Judge Clark in the *General Electric Co.* case was of the view that apart from the controlling effect of the McGuire Act, the Courts of the State of New York would reach the same result by application of the conflicts rule.[6]

Whatever loopholes now exist in so far as enforcement of state trade fair laws are concerned is a subject for the legislature and not for the courts. Indeed, the McGuire Act was enacted in an effort to close the gap in the Miller-Tydings Law, which followed the ruling in *Schwegmann Bros v. Calvert Distilleries Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384.

[*Application Denied*]

The application to adjudge the defendant in contempt is denied.

[¶ 68.902] **United States v. Central States Theatre Corporation, Center Drive-In Theatre Co., Midwest Drive-In Theatre Co., and Frank D. Rubel (Additional Defendant).**

In the United States District Court for the District of Nebraska. Civil No. 0117. Dated December 5, 1957.

Case No. 1276 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Motions and Defenses—Pretrial Determination of Defenses.—Government motions for a hearing and a determination before trial of defenses, relating to service of process and jurisdiction of the court over the defendants and subject matter of the action, were denied. Rule 12(d) of the Federal Rules of Civil Procedure provides for a pretrial determination of such defenses, but whether or not such a procedure should be pursued in a particular

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[3] *Terminal R. R. Ass'n v. United States,* 266 U. S. 17; *Douds v. Local 1250,* 2 Cir., 173 F. 2d 764, 768; *Star Bedding Co. v. Englander Co.,* 8 Cir., 239 F. 2d 537.

[4] *Terminal R. R. Ass'n v. United States,* 266 U. S. 17, 29.

[5] *Gibbons v. Ogden,* 9 Wheat. 1; *Testa v. Katt,* 330 U. S. 386; *Sola Electric Co. v. Jefferson Electric Co.* [1940-1943 TRADE CASES ¶ 56,245], 317 U. S. 173.

[6] 244 F. 2d at 686.

case rests in the court's discretion, which should be judicially exercised with due regard to the circumstances of the case.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8229.

For the plaintiff: Earl A. Jinkinson and Francis C. Hoyt, Chicago, Ill., and William C. Spire, United States Attorney, Omaha, Neb.

For the defendants: Yale C. Holland (Kennedy, Holland, DeLacy & Svoboda), Omaha, Neb., for Central States Theatre Corp. and Frank D. Rubel.

For a prior opinion of the U. S. District Court, District of Nebraska, see 1957 Trade Cases ¶ 68,662.

Memorandum

[*Nature of Action*]

Delehant, District Judge (Retired, serving by assignment) [*In full text*]: This action to obtain injunctive relief was brought by plaintiff under Section 4 of the Sherman Act, Title 15 U. S. C., section 1 *et seq.*, on account of, and to obtain the termination of, alleged violations of section 1 of the Act in the way of an alleged combination and conspiracy in restraint of interstate trade and commerce. The present ruling is made only in relation to a preliminary procedural step in the case.

[*Answers*]

In its answer to the complaint (filing No. 16), defendant Central States Theatre Corporation, among other things, in paragraph I

> "denies that it transacts business in the District of Nebraska, and that it is found in the District of Nebraska, and alleges that valid service of summons cannot be made and has not been made in this action upon defendant in the District of Nebraska."

and in paragraph VIII,

> "alleges that the averments of plaintiff's complaint are insufficient to state a claim upon which the relief prayed for herein could be granted. And defendant alleges that the court is without jurisdiction over the person of this defendant and is without jurisdiction to grant the relief herein prayed for."

The quoted portions of such answer in part respond to and dispute allegations touching the same subject matter of plaintiff's complaint.

Similarly, though not identically, defendant, Frank D. Rubel, also responding to allegations against him in the complaint, as amended and supplemented, in paragraph VII of his answer (filing No. 37):

> "alleges that the averments of plaintiff's complaint are insufficient to state a claim upon which the relief prayed for herein against this defendant could be granted. Defendant alleges that this court is without jurisdiction over the person of this defendant and is without jurisdiction to grant the relief prayed for."

[*Government Motions*]

Those answers having been served and filed, plaintiff served and filed the motions which precipitate this ruling. The earlier of these (filing No. 21) asks that, within Rule 12(d) hearing be had, and determination before trial made, upon the following defenses asserted in the answer of Central States Theatre Corporation, namely:

> "the defense of insufficiency of service of process appearing in paragraph I of said answer;" and
>
> "the defense of lack of jurisdiction of the person and of the subject matter appearing in paragraph VIII of said answer."

Similarly, the motion later filed (filing No. 39), aimed at the answer of defendant, Frank D. Rubel, prays for like hearing and determination on:

> "the defenses of lack of jurisdiction over the person and of the subject matter appearing in paragraph VII of said answer."

Those two motions have been submitted upon oral arguments of counsel and typewritten briefs. Both orally and in their briefs, counsel saw fit to argue not so much the appropriateness, or imprudence, as the case may be, in the present setting of a pretrial adjudication upon the tendered special defenses, as the course upon the merits which any such determination should take. The court understands that the answering defendants, especially Central States Theatre Corporation, do not directly resist, in fact, probably invite, such pretrial determination. And defendant, Central States Theatre Corporation has filed certain affidavits by way of a showing which it considers

to support its position on the merits of the special defenses tendered by it. Plaintiff has made no countershowing.

[*Pretrial Hearing Discretionary*]

But despite the probable willingness of the litigants to have a pretrial hearing and determination upon those issues, whether such hearing and determination shall be had and made has to be—and is being—decided by the court. It retains control over its own calendar and administrative course.

Without unnecessary quotation, it may be observed that Rule 12(b) allows certain identified defenses, including those asserted by the present defendants, to be made either by answer or by motion. They are here tendered as parts of the answers of the affected defendants. It is then provided by Rule 12(d) that:

> "The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion . . . shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial."

Thus, the course which plaintiff urges upon the court is by rule made available, and even accorded a recommended status. But it is not made imperative. Whether it should be pursued in a particular case rests in the court's discretion, which should be judicially exercised with due regard to the circumstances of such case. *Montgomery Ward & Co. v. Schumacher* (D. C. Cal) 3 F. R. D. 368; *S. Hepworth Co. v. Western States Machine Co.* (D. C. NY) 3 F. R. D. 493; *Equitable Life Assurance Society of the United States v. Saftlas* (D. C. Pa.) 35 F. Supp. 62.

In the exercise of such discretion the court, in this instance, is persuaded that it should deny and overrule each of the motions of the plaintiff for pretrial determination, and affirmatively order that the hearing and determination of the tendered defenses be deferred until the trial. An order is being made and given accordingly. With no attempt at exhaustiveness or adequacy, some of the reasons supporting that action are now mentioned.

[*Reasons for Denial*]

While legal considerations are, and will be, involved in the eventual determination of the defenses upon which pretrial rulings are sought, the issues tendered are basically factual. Moreover, they involve, in part at least, the denial by each of the defendants, Central States Theatre Corporation and Frank D. Rubel, of averments against it or him, as the case may be, made by plaintiff in its complaint as modified and supplemented. Now, the court is not under the impression that issues thus arising may not possibly be tried and determined in advance of the final trial of an action upon its merits. Such a motion would be mistaken. But the court is persuaded that, in this particular case, the pretrial determination to which it is invited by the motions under consideration would be expensive both in money and in time, and administratively indiscreet and unwise. The whole evidence available upon the disputed points, in whatever form it may eventually be available, should be before the court, and the determination should be made upon it with consequent finality.

If the court were to proceed to a pretrial determination upon the issues tendered in the answers, and already pointed out, the factual background for the determination would have to be provided in either of two ways, (a) by affidavits and counter affidavits, or (b) by evidence and testimony in like manner as upon a regular trial.

Towards the former of those methods, the writer hereof acknowledges his entertainment of a considerable inhospitality. Factual submissions in that manner too frequently degenerate into "an ex parte swearing match," a matching of skills as between the contesting attorneys who prepare the showings. The result is a ruling based, not on testimony and evidence in any realistic sense, but on legal craftsmanship. And the showings made are almost invariably characterized by opinion, conclusion, hearsay and argument. It is a notoriously unsatisfaction [unsatisfactory] method of coming by a firm finding respecting disputed facts.

The court in the present controversy is strongly disposed to require its solution on the basis of evidence presented in the usual way. And, that being true, and the matters in dispute having at least partially to do with factual allegations of the complaint, it appears to be highly desirable to receive such evidence only once and that during the regular trial of the action. Any other course would involve two trials, in both of which, to some extent and probably

in considerable measure, the same evidence would be offered. A duplication of trial sessions, especially of the presentation of the same evidence, is intolerably costly in time and money. A court generally acts prudently when it resolves to "take only one bite at the cherry." Lastly, there is greater assurance of finality in a judgment—even upon a jurisdictional issue—made and given after all possible evidence is before the court, and the evidentiary record is unquestionably closed. One entered by way of a pretrial determination is exposed to the hazard of the reception in the final trial of further evidence which may substantially discredit—even though it may not compel the vacation of—the judgment rendered along the way towards the eventual trial.

[¶ 68,903] United States v. Owens-Illinois Glass Company.

In the United States District Court for the Northern District of Ohio, Western Division. No. 7686 Civil. Filed December 16, 1957.

Case No. 1310 in the Antitrust Division of the Department of Justice.

Clayton Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Pretrial Procedures—Interrogatories.—In an action charging that a container manufacturer violated Section 7 of the Clayton Act by acquiring a competitor, Government objections to certain interrogatories propounded by the manufacturer were sustained on the ground that some of the interrogatories were premature and on the ground that one of the interrogatories, if answered, would require the Government to present its case in advance of trial.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225.260.

For the plaintiff: Donald F. Melchior, Antitrust Division, Department of Justice, Washington, D. C.

For the defendant: Fred E. Fuller and Ross W. Shumaker, Toledo, Ohio.

Memorandum of the Court Re Plaintiff's Objections to Defendant's Interrogatories

[*Merger*]

FRANK L. KLOEB, District Judge [*In full text*]: On August 10, 1956, an agreement of merger was entered into between defendant and National Container Corporation. The merger became effective on October 4, 1956. On December 4, plaintiff filed its complaint, in which it seeks divestiture, injunction and other relief. It appears that, beginning about July 10, 1956, general counsel for defendant was in correspondence with plaintiff with respect to the proposed merger and was then engaged in supplying certain information concerning it.

[*Interrogatories*]

On June 27, 1957, defendant propounded 46 interrogatories of plaintiff and, on August 19, plaintiff filed its objections to interrogatories Nos. 21 to 33, both inclusive, and Nos. 44 and 46. On August 20, plaintiff answered the remaining interrogatories.

A memorandum was filed in support of plaintiff's objections to the above numbered interrogatories and, on October 10, defendant filed its memorandum opposing plaintiff's objections. On November 15, plaintiff filed its reply to defendant's memorandum and, on November 18, plaintiff answered defendant's interrogatory No. 46.

On October 18, and prior to the filing of plaintiff's reply to defendant's memorandum, a pretrial conference was held, at which time counsel supplemented their memoranda with oral argument on the objections to the interrogatories.

The Court has carefully studied the memoranda and the transcript of the oral arguments offered at pretrial.

[*Rulings on Objections*]

It is felt that the objection to interrogatory No. 44 ought to be and is sustained on the ground that, if answered, plaintiff would be required to itemize the evidence and enumerate each fact upon which it relies in support of its various allegations. In other words, it would, in effect, be required to present its case in advance of trial.

The objections to interrogatories Nos. 21 to 33, both inclusive, are at this time sustained on the ground that, considering the nature of this action, they are premature. The Court so concludes, without passing upon the objection that they call for conclusions. It would seem that, in all fairness and in the public interest, plaintiff should have ample opportunity for discovery before committing itself by way of answers to these interrogatories. This does not preclude plaintiff from voluntarily furnishing answers to some or all of these interrogatories at a future date and when it is in a position to do so, nor does it preclude defendant from renewing these interrogatories at a future date and after plaintiff has been afforded a reasonable opportunity to pursue its discovery proceedings.

An order may be drawn accordingly.

[¶ 68,904] H. A. Sprowls v. Texas Gas Transmission Corporation.

In the United States District Court for the Southern District of Indiana, Terre Haute Division. No. TH 56-C-49. Filed December 6, 1957.

Clayton and Sherman Antitrust Acts

Private Enforcement and Procedure—Suit for Treble Damages—Defenses—Statute of Limitations—Applicability of Federal and State Statutes—Nature of Treble Damage Action.—An Indiana two-year statute of limitations, covering actions for the recovery of statutory penalties, was held applicable to a treble damage action brought in a United States District Court in Indiana. The Federal four-year statute of limitations for treble damage actions does not apply to actions previously barred by applicable state statutes. The instant action was barred by the Indiana statute prior to the effective date of the Federal statute of limitations. In determining the applicable Indiana statute of limitations, the District Court found that the Indiana courts have consistently regarded as penal a statute which permits a recovery in excess of the amount of damage actually sustained and would regard an action for treble damages and attorney's fees as in the nature of a statutory penalty within the meaning of the Indiana statute. The court noted that the Indiana antitrust law provides for the recovery of "*a penalty* of three-fold the damages which may be sustained together with the costs of suit and attorney's fee."

See Private Enforcement and Procedure, Vol. 2, ¶ 9010, 9010.100.

For the plaintiff: Dix, Dix, Patrick & Ratcliffe, Terre Haute, Ind., and Noll, Traynor & Hendricks, Springfield, Ill.

For the defendant: Barnes, Hickam, Pantzer & Boyd, Indianapolis, Ind.

Opinion

[*Motion to Dismiss*]

WILLIAM E. STECKLER, District Judge [*In full text except for omissions indicated by asterisks*]: The above entitled cause came before the Court upon the defendant's motion to dismiss the action and each court thereof because the complaint fails to state a claim against the defendant upon which relief can be granted. The ground upon which dismissal is sought is that it appears upon the face of the complaint that both counts were barred by the applicable provisions of the limitations statute at the time the action was commenced.

[*Count I—Antitrust Claim*]

Count I is an action for treble damages under 15 U. S. C. 15. It alleges in substance that in 1941 plaintiff, an individual residing in Vincennes, Indiana, together with associates whose interest he later acquired, entered into a contract with a group of individuals residing in Illinois, designated as the Phebus Group. Plaintiff and his associates agreed to assign to the Phebus Group an interest in certain leaseholds in Illinois believed to contain natural gas. The latter group undertook to furnish the financing to develop natural gas wells. The arrangement, referred to in the complaint as the "Phebus Project," also contemplated, if the development was successful, the obtaining of a Certificate of Public Convenience from the Federal Power Commission for the building of a pipeline to Vincennes, Indiana, and the execution of a contract to supply such gas to a distributing company serving that area. Such a Certificate was

obtained in 1941 for a period expiring October 3, 1949, unless renewed, and a contract with the distributing company was entered into and gas was supplied thereunder for several years.

It is also alleged that defendant is an interstate natural gas company which, as a result of a merger in 1948, became the successor company of three predecessors, and that since 1941 and prior to the merger, one of such predecessors, and the defendant thereafter, have engaged in a course of conduct for the purpose of destroying the Phebus Project and monopolizing the interstate transportation and sale of natural gas in the Vincennes area in violation of the Sherman Act. Among other things, defendant is alleged to have caused the Phebus group to organize the Phebus Pipe Line Corporation to which their interest in the project was transferred, and defendant then acquired the stock of such corporation. By various acts and by means of the control so acquired defendant is alleged to have terminated the transmission of gas by Phebus to Vincennes, and to have permitted the Certificate of Public Convenience to expire in 1949 without attempting to renew it. On November 14, 1952, no gas having been supplied by Phebus for more than three years, defendant entered into a total requirements contract with said distributing company. The execution of the contract is alleged to have completed defendant's monopoly and destroyed the only market available to Phebus.

[*Stautes of Limitation*]

Prior to the enactment of 15 U. S. C. Section 15b on July 7, 1955, effective six months thereafter, there was no applicable federal limitation period for treble damage actions, and when such an action was barred depended upon the laws of the state in which the action was commenced. Section 15b provides a four year limitation period for such actions, but by its terms does not apply to actions previously barred by applicable state statutes. Burns' Ann. Stat., Section 2-602 provides that actions for the recovery of statutory penalties must be commenced within two years after their accrual date. If applicable to actions for treble damages and attorney's fees, the claim alleged in Count I was barred prior to the effective date of the federal four-year statute it accrued not later than November 14, 1952.

[*Nature of Treble Damage Action*]

The question of whether such an action is one to recover a statutory penalty within the meaning of the Indiana limitations statute has not been previously decided. The Court of Appeals for this Circuit has decided that the similar provisions of the Illinois and Wisconsin statutes apply to treble damage actions brought in those states, but since the basic question is how Indiana would classify such an action, these decisions are not controlling. They are important, however, in that they indicate certain principles upon which the proper solution of the problem depends.

[*Decisions in General*]

In *Chattanooga Foundry & Pipe Works v. City of Atlanta* (1906), 203 US 390, it was held on the basis of *Huntington v. Attrill*, 196 US 657, that an action for treble damages under the Sherman Act was not an action to recover a penalty within the meaning of the federal five-year statute, and that the Tennessee two-year statute, similar to Section 2-602, for actions for statutory penalties was also inapplicable. The Supreme Court recognized, however, that in the absence of an applicable federal statute, the question was what limitation period the particular state would determine to be applicable, and that the answer must be sought in the state court decisions.

In *Hoskins Coal & Dock Co. v. Truax Traer Coal Co.* (7 Cir.) [1950-1951 TRADE CASES ¶ 62,925], 191 F 2d 912, cert. den. 342 US 947, it was held that the Illinois two-year limitation provision for actions to recover statutory penalties was applicable to treble damage actions under 15 U. S. C. 15 brought in Illinois. In reaching that conclusion the Court of Appeals made use of two distinct lines of Illinois decisions. One line represented by *C. B. & Q. R. Co. v. Jones*, 149 Ill. 361, 37 NE 247, had held that actions for treble damages and attorneys' fees under an Illinois statute giving such an action to railroad shippers who had been charged more than the rates fixed by law, were barred by the Illinois two-year statutory penalty limitation provision. Neither Indiana nor Wisconsin appears to have a similar decision.

However, the Court of Appeals also cited *Vestal v. Robertson*, 277 Ill. 425, 115 NE 629, to the statement that

> "When the object is clearly to inflict a punishment on a party for violating the statute, it is penal in character, and the circumstance that in punishing, remedy is likewise afforded to those having an interest in the observance of the statute is unimportant."

Vestal v. Robertson was an action against corporate directors under a statute making them responsible for all debts of the corporation upon a failure to comply with a requirement of the corporation law that the capital stock be fully subscribed before the corporation assumed to act as such. The two-year limitation period for actions for statutory penalties was held applicable.

In *Schiffman Bros. Inc. v. Texas Co.* (1952) [1952 TRADE CASES ¶ 67,270], 196 F 2d 695, where an unsuccessful effort was made to persuade the Court of Appeals that the *Hoskins* decision was erroneous, the court said:

> "It is to be observed that Illinois has specifically refused to follow the limited definition of penalty prescribed by *Huntington v. Attrill,* 146 U. S. 657 . . ., but rather has held that a statutory recovery of damages not actually sustained but permitted in addition to accrued damages is not compensatory but in the nature of a statutory penalty within the meaning of the Illinois statute. Thus, in *M. H. Vestal Co. v. Robertson,* 277 Ill. 425, 115 N. E. 629, the court held that an action to recover damages for failure to perform certain statutory duties is within the two-year limitation."

It is clear from the foregoing statement that the Court of Appeals regards decisions such as *Vestal Co. v. Robertson,* as evidencing a refusal to follow the limited definition of the term "statutory penalty" prescribed by *Huntington v. Attrill,* and as a holding instead that a statutory recovery of damages not actually sustained, but permitted in addition to accrued damages, is not compensatory but in the nature of a statutory penalty within the meaning of a statute such as Section 2-602.

In *Sun Theatre Corp. v. R. K. O. Radio Pictures, Inc.* (7 Cir. 1954) [1954 TRADE CASES ¶ 67,722], 213 F 2d 284, where a further attempt was made to persuade the Court of Appeals to reconsider the *Hoskins* and *Schiffman* cases, the plaintiff attempted to avoid the bar of the two-year statute by limiting the prayer to actual damages. It was held, however, that an action under 15 U. S. C. 15 is not an action to recover compensatory damages plus a penalty, but to recover a single penalty measured by trebling the actual damage. The principles stated in the foregoing decisions are important in considering the pertinent Indiana cases.

[*Indiana Decision and Statutes*]

In *Brown v. Clow,* 158 Ind. 403, the Supreme Court of Indiana held that an action based upon a statute requiring the subscribed capital stock of a corporation to be paid into the treasury within eighteen months from the incorporation, and making the directors liable in the event of a violation whereby the corporation was rendered insolvent, for all debts contracted after the violation, was an action for a statutory penalty within the meaning of Section 2-602. It was said since the liability imposed did not exist at common law, and does not attach to the directors as an ordinary incident of their office, it is a penalty or punishment for violation of the duties with which they are expressly charged. A prior decision of the court *American etc. Co. v. Ellis,* 156 Ind. 212 which held certain other sections of the corporation act remedial, and not penal, was distinguished on the ground that under such sections the actions were founded upon fraud and deceit which the creditor was required to allege and prove, and that recovery was expressly limited to the amount of the damages sustained.

There is no substantial difference either between the statutes involved, or the conclusions reached by the Supreme Courts of Indiana and Illinois, respectively, in *Brown v. Clow, supra,* and *Vestal v. Robertson, supra,* and there is no basis for giving them a different significance with respect to the meaning of actions for statutory penalties as used in the respective statutes of limitations of those states. There are no later Indiana cases which in any respect overrule, modify, or even question *Brown v. Clow.*

As previously stated the Court of Appeals reached the same result as to the meaning of the term "statute penalty" in the Wisconsin statute. *Grengs v. Twentieth Century Fox Film Corp.* (1956) [1956 TRADE CASES ¶ 68,318], 232 F 2d 325, cert. den. 352 US 871. Not only was there no Wisconsin decision holding that actions for treble damages and attorneys' fees are actions for statutory penalties within the meaning of

the Wisconsin statute, but Wisconsin apparently had no case involving a statute such as that held to create an action for a statutory penalty in *Vestal v. Robertson* and *Brown v. Clow.* The *Grengs* opinion does not discuss the Wisconsin cases and it is necessary to examine the briefs in that case to determine the basis for the holding that treble damage actions are actions for statutory penalties within the meaning of the Wisconsin limitations statute. Wisconsin has multiple damage statutes of various types and the Wisconsin courts have been required to determine for various purposes (not including the applicable limitations provision) whether they are penal or remedial. They have consistently held them penal where the issue was whether they should be strictly or liberally construed.

Burns' Ann. Stat. 1952 Repl., Section 40-102 provides that when wages are wrongfully withheld an action may be brought for the amount due, together with an additional amount as "liquidated damages" equal to 10% per day of the unpaid amount not exceeding double the amount of wages due. After the expiration of 20 days the permitted recovery would be treble the amount of the unpaid wage. Notwithstanding the legislative characterization of the amount in excess of the actual wage due as "liquidated damages," and notwithstanding the amount actually due is included in the recovery, and furnishes a yardstick in measuring the total recovery just as in treble damage actions under 15 U. S. C. Section 15, the Indiana courts have consistently held such statutes to be penal and consequently subject to strict construction. *Standard Liquors v. Narcovich,* 121 Ind. App. 600, trans. den.; *U. S. Reduction Co. v. Neusbaum,* 112 Ind. App. 330, trans. den.; Cf. *Superior Laundry Co. v. Rose,* 193 Ind. 138.

It is also of some significance that Indiana has a state antitrust statute which contains a provision for treble damage actions obviously modelled after 15 U. S. C. 15 (Ch. 243, Section 7, Acts of 1907, Burns' Ann. Stat. 1950 Repl. Sect. 23-122) and the recovery provided is *"a penalty* of three-fold the damages which may be sustained together with the costs of suit and attorney's fee." Since the issue in what the Indiana Legislature meant when it used the term "statutory penalty" in the Indiana limitations statute, the fact that it has expressly characterized a recovery of the same nature as that afforded by 15 U. S. C. 15 as a "penalty" is an indication of the legislative understanding of the meaning of the term.

[*Dismissal Granted*]

For the reasons stated the Court has concluded that the Indiana courts have consistently regarded as penal a statute which permits a recovery in excess of the amount of damage actually sustained, and would regard an action for treble damages and attorney's fees as in the nature of a statutory penalty within the meaning of Burns' Sect. 2-602, and that provision is therefore applicable. This conclusion makes it unnecessary to determine whether Count I would be barred under Burns' Ann. Stat. Sect. 2-606, or whether the claim alleged therein accrued prior to November 14, 1952 and more than four years before the commencement of the action as defendant also contends. The motion to dismiss Count I must be sustained for the reasons stated.

[*Count II—Cause of Action*]

Count II alleges substantially the same facts as Count I and charges that defendant and Phebus Pipe Line Company wrongfully and maliciously conspired and combined to destroy the Phebus Project, terminate its contract with the distributing company, and deprive plaintiff of a livelihood and earnings derived therefrom, and that as a direct and proximate result plaintiff has been damaged by the loss of his share of the profits of the enterprise. No violation of the antitrust laws is claimed. * * *

* * *

[¶ 68,905] Eastern Fireproofing Co., Inc. v. United States Gypsum Company and National Gypsum Company.

In the United States District Court for the District of Massachusetts. Civil Action No. 57-938-A. Dated December 27, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Interrogatories—Priority.—Where a defendant, prior to filing its answer, served interrogatories on a plaintiff, and, subsequently, the plaintiff served interrogatories on the defendant, the plaintiff and defendant were required to file their sealed answers to each other's interrogatories with the clerk of the court on or before a specified date, and the court would then notify the parties to serve their answers on each other, unless the answers appeared plainly inadequate. In view of the circumstances of the case, the court did not follow the general disposition rule that the one who first serves notice has priority. The only material advantage that the defendant could gain from examining the plaintiff's answers before filing its own would be to learn how much the plaintiff knows or does not know. Since antitrust violations are normally secret as well as difficult to prove, this would not be an advantage to be fostered.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.875.

For the plaintiff: Endicott Peabody and Joseph M. Koufman, of Peabody, Koufman & Brewer, Boston, Mass.

For the defendants: G. D'Andelot Belin, Conrad W. Oberdorfer, Maurice H. Richardson, and Robert Proctor, Boston, Mass., for U. S. Gypsum Co.; and Leonard Wheeler, Frank B. Wallis, and Walker B. Comegys, Jr., Boston, Mass., for Natl. Gypsum Co.

Opinion

[*Interrogatories*]

ALDRICH, District Judge [*In full text*]: This is a private treble damage action for violation of Sections 1 and 2 of the Sherman Act. The complaint, alleging damages in the amount of $975,000, (single), was filed on September 24, 1957. On October 9 the time to answer or otherwise plead was extended by the court, on consent of the plaintiff, to December 2nd. On November 7 the defendant* filed extensive interrogatories to the plaintiff. On November 13 plaintiff filed interrogatories to the defendant. On November 18 plaintiff filed extensive objections to defendant's interrogatories, and on November 22 defendant filed objections to plaintiff's. On consent of the parties the court has ordered that the interrogatories which were not objected to need not be answered until further order of court. Such further order has not yet been made. On December 9 the court heard the objections of both parties, and took them under advisement. They have been passed on this day. There is now pending a motion by plaintiff that all answers of both parties be filed and exchanged simultaneously. The court has express power under Rule 30(b) to grant such a motion. The defendant opposes, on the ground that it should not lose the advantage of the priority in time it had gained by its "diligence."

[*Priority*]

I confess that my first reaction with regard to plaintiff's motion was to deny it, on the analogy of the generally-recognized "first served, first come" deposition rule. But on reflection it seems to me that each case must be considered in relation to its own problems. Normally only one deposition can proceed at a time, and it is logical that the one who first serves notice should be the one to have the priority. But what advantage should defendant here receive from having first served interrogatories? Obviously it is not speed in disposing of the case. Nor am I impressed by its self-styled diligence. What defendant did was to obtain a courtesy from the plaintiff to extend for seven weeks what was otherwise its obligation to do, and employ that time to beat plaintiff to the draw by six days in the preparation of interrogatories.

* Only the defendant United States Gypsum Company is involved in this opinion.

Plaintiff's interrogatories to defendant do not appear such that plaintiff's answers to defendant's interrogatories are substantially needed to enable defendant to reply. Without in any way implying that this is its purpose, the only material advantage that it seems to me defendant could gain from examining plaintiff's answers before filing its own would be to learn how much plaintiff presently knows, or does not know. Having in mind that anti-trust violations are normally secret, as well as difficult to prove, this would not be an advantage to be fostered.

[*Ruling*]

Under the circumstances it is ordered that both parties shall answer all interrogatories to which objections have not been sustained, on or before January 31, 1958, and file the answers with the clerk in sealed envelopes, without serving copies on the other side. When both parties have answered I will open the envelopes and, unless the answers appear plainly inadequate, notify the parties to make service.

[¶ 68,906] United States v. Gulf Coast Shrimpers and Oystermans Association, Louis Simmons, Leon Strong, and Walter McVeay.

In the United States District Court for the Southern District of Mississippi, Biloxi Division. Criminal Action No. 7192. Dated October 18, 1957.

Case No. 1158 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Convictions—Prison Sentences—Probation.—The execution of nine-month prison sentences imposed on two defendants who were found guilty of violating the Sherman Act was suspended where the court found that society and the welfare of the defendants would be best subserved by the suspension of such sentences. The court, in placing the defendants on probation for a period of nine months, noted that a large number of testimonials indicated that the defendants were not criminals in the acceptation of that term, but were, of course, guilty of the violations of law charged to them.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8029.700.

For the plaintiff: Henry M. Stuckey, Special Assistant to the Attorney General, Washington, D. C.; and Robert E. Hauberg, United States Attorney, Jackson, Miss.

For the defendants: Howard A. McDonnell, Biloxi, Miss.; C. Paul Barker, New Orleans, La.; and Albert Sidney Johnston, Jr., Biloxi, Miss.

For a prior decision of the U. S. Court of Appeals, Fifth Circuit, see 1956 Trade Cases ¶ 68,469.

[*Petition for Probation*]

S. C. MIZE, District Judge [*In full text*]: This matter comes on before the Court upon a petition of Louis Simmons and Walter McVeay, Jr., to grant them probation and suspend the execution of the sentence of nine months that was heretofore imposed upon the defendants by this Court. After the conviction of the defendants they were sentenced by the Court to serve a term of nine months in prison. The case was appealed [to] the Court of Appeals and was affirmed by the Court of Appeals, and upon application for certiorari the application was denied. The mandate has now come back to this court to put into effect the sentence that was imposed.

The defendants, not having entered upon the service of their sentence up until this time, have timely filed the petition to suspend the execution of the sentence and place them upon probation.

[*Hardships*]

The defendants have filed a large number of letters testifying to the good character of the defendants and to the present cordial relationship existing between the packers and the union, and to the hardships that would be imposed upon the defendants if they are required to serve the sentence and if probation should be denied them.

The defendant Walter McVeay, Jr. is the father of eleven children, some of whom are

dependent upon him for support, and also has an aged mother to whose support he contributes and gives his personal attention to her welfare. The defendant Louis Simmons has a family consisting of his wife and three children who are dependent upon him for support; and at this time there is a mortgage upon his home for a substantial amount which he probably would lose if he is required to serve the sentence. The petition for suspension of sentence has been supported by letters from several of the packers, by prominent business men, City officials and County officials; and upon careful and thorough consideration the Court is of the opinion that justice would better be subserved by suspending the execution of the sentence and granting the defendants probation.

The Government has interposed an objection to the suspension of the sentence and the Court has taken that into consideration; but considering all of the facts and circumstances I am of the opinion that society first would be best subserved by granting the suspension, and undoubtedly the welfare of the defendants would be better subserved. The large number of testimonials indicate that the defendants are not criminals in the acceptance of that term, but were, of course, guilty of the violations of law charged to them.

[*Suspended Sentence*]

An order may therefore be drawn suspending the execution of the sentence that was imposed heretofore upon them and that they be placed upon probation for a period of nine months, and that they shall follow out the instructions of the Probation Officer.

[¶ 68,907] Electric Pipe Line, Inc. v. Fluid Systems, Incorporated.

In the United States Court of Appeals for the Second Circuit. No. 29—October Term, 1957. Docket No. 24536. Argued November 12, 1957; decided December 30, 1957.

Appeal from the United States District Court for the District of Connecticut, Robert P. Anderson, Judge.

Sherman Antitrust Act

Combinations and Conspiracies—Patents—Combination Patent—Required Purchase of Unpatented Components from Patentee.—In reviewing the method by which damages were computed for the infringement of a combination patent covering a thermal electric system, the court rejected the infringer's contention that the patentee must apportion profits resulting from the sale of the system to exclude revenues derived from the unpatented component parts since, to do otherwise, was tantamount to saying that the patentee was entitled to use the patent to compel its customers to buy the unpatented components from it. The court noted that this was precisely what it previously had held (*Electric Pipe Line, Inc. v. Fluid Systems, Inc.,* 1956 Trade Cases ¶ 68,300) the patentee could do and not violate the antitrust laws.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.500.

For the plaintiff-appellant: James E. Nolan, Washington, D. C. (T. Clay Lindsey and John Prutzman, of Lindsey & Prutzman, Hartford, Conn., on the brief).

For the defendant-appellee: Edmond M. Bartholow, of Rockwell & Bartholow, New Haven, Conn.

For a prior opinion of the U. S. Court of Appeals, Second Circuit, see 1956 Trade Cases ¶ 68,300, affirming a decision of the U. S. District Court, District of Connecticut, 1955 Trade Cases ¶ 68,043.

Before: Clark, Chief Judge, Moore, Circuit Judge, and Leibell, District Judge.

[*Appeal*]

Electric Pipe Line, Inc., appeals from a judgment against it, D. C. Conn., 146 F. Supp. 262, for damages for infringement of Lines Patent, No. 2,224,403, belonging to Fluid Systems, Incorporated, and from a determination that its five modified fuel transportation systems also infringe this patent. Affirmed.

[*Patent Infringement—Damages*]

CLARK, Chief Judge [*In full text except for omissions indicated by asterisks*]: Plaintiff, Electric Pipe Line, Inc., originally instituted this action for a declaratory judgment that its system for reducing the viscosity of heavy fuel oils did not infringe defendant's patented system designed for the same purpose. Plaintiff also maintained that defendant's patent, Lines No. 2,224,403, was invalid. Defendant counterclaimed for infringement, asking for damages and injunctive relief. The district court upheld the validity of the patent, determined that plaintiff's system was infringing, enjoined plaintiff from further use of its system, and referred the issue of damages to a Special Master for hearing and report. *Electric Pipe Line v. Fluid Systems,* D. C. Conn. [1955 TRADE CASES ¶ 68,043], 132 F. Supp. 123, affirmed 2 Cir., [1956 TRADE CASES ¶ 68,300] 231 F. 2d 370. During the pendency of the damages proceeding, plaintiff devised five modifications of its infringing system which it claims do not infringe defendant's patent. This issue was also referred to the Special Master, who fixed damages for the original infringement and held that the five modified systems also infringed defendant's patent. The district court adopted the Special Master's report in substance, and plaintiff appeals from the resulting judgment awarding defendant $22,538.43, together with injunctive relief, interest, and costs.

* * *

[*Antitrust Defense*]

The business of the parties is to furnish plans and parts for fuel transportation systems. A substantial portion of their profits results from the sale of the parts. These parts include transformers, thermostats, tank assemblies, insulated flanges, control panels, and electric immersion heaters. Many of these items have separate uses outside the systems and can be purchased separately for other purposes. In the original infringement action plaintiff maintained that defendant violated the antitrust laws by requiring that its customers purchase all these items from it. We rejected this contention, finding that "the sale of unpatented components is incidental to the sale of the system as a whole, even though Fluid's revenue is derived from the sale of the components." *Electric Pipe Line v. Fluid Systems,* 2 Cir. [1956 TRADE CASES ¶ 68,300], 231 F. 2d 370, 372. We went on to say that "[w]here the owner of a combination patent designs the installation and guarantees its performance, it is not an unreasonable use of the patent to insist that the components of the patented system be obtained from it." *Ibid.* Now plaintiff renews its argument under a new guise. It contends that defendant must apportion profits resulting from the sale of the system to exclude revenues derived from the unpatented component parts. To do otherwise, says plaintiff, is tantamount to say that Fluid Systems was entitled to use the patent to compel its customers to buy their accessories from it. But this is precisely what we held Fluid Systems could do and not violate the antitrust laws. Therefore, the inclusion of profits from the sale of all the components seems proper, because Fluid Systems' revenues would have reflected these sales had it not been for Electric Pipe's infringement.

Further, the patent here involved gave value to the components which otherwise would have been useless for the purposes involved and would not have been sold by Electric Pipe or anyone else. As Judge Anderson said, D. C. Conn., 146 F. Supp. 262, 263, 264: "The facts and circumstances of this case come under the rule that where the entire marketable value of the thing sold is dependent on the patent, its entire value is included in computing infringement damages." *The Goulds Mfg. Co. v. Cowing,* 105 U. S. 253; *Hurlbut v. Schillinger,* 130 U. S. 456; *Wales v. Waterburg Mfg. Co.,* 2 Cir., 101 F. 126, certiorari denied 177 U. S. 693; *Westinghouse v. New York Air Brake Co.,* 2 Cir., 140 F. 545, certiorari denied 201 U. S. 648. Defendant was under no duty to apportion profits, and the component parts properly were included in the computation of lost profits.

Judgment affirmed.

[¶ 68,908]. Scientific Living, Inc. v. Federal Trade Commission.

In the United States Court of Appeals for the Third Circuit. No. 12,265. Dated August 12, 1957 and September 3, 1957.

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Unfair Practice Proceeding—Compliance with Cease and Desist Order—Enforcement of Subpoena *Duces Tecum*—Timeliness of Appeal.—An appeal from a Federal District Court order requiring a corporation to comply with a subpoena *duces tecum* served on the corporation by the Federal Trade Commission, in the course of an investigation to ascertain whether or not the corporation was complying with a cease and desist order issued against it under the Federal Trade Commission Act, was dismissed for want of timely prosecution.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8741, 8741.10, 8741.20, 8741.55.

Dismissing an appeal from a judgment of the U. S. District Court, Middle District of Pennsylvania, 1957 Trade Cases ¶ 68,673, ordering compliance with a Federal Trade Commission subpoena in Dkt. 6099.

[Order of August 12, 1957]

Present: BIGGS, Chief Judge, and GOODRICH and KALODNER, Circuit Judges.

BIGGS, Chief Judge [*In full text*]: And now, to wit, this 12th day of August, 1957 it is

Ordered that the motion of the appellee to dismiss the appeal for want of timely prosecution be and the same hereby is granted and the appeal hereby is dismissed.

[Order of September 3, 1957]

Present: BIGGS, Chief Judge, and GOODRICH and KALODNER, Circuit Judges.

BIGGS, Chief Judge [*In full text*]: Upon consideration of the motion by appellant, filed August 19, 1957, to vacate the order of this Court dismissing the above entitled appeal, to reverse the judgment of the district court, and to restrain and enjoin the Federal Trade Commission from any further interference with appellant.

It is Ordered that the motion be and it is hereby denied.

[¶ 68,909] Radiant Burners, Inc. v. American Gas Association, Inc., et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 57 C 1167. Dated December 20, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments to State Cause of Action—Restraint of Interstate Commerce—Public Injury.—A manufacturer's complaint charging that gas utility companies, gas burner manufacturing suppliers, and a trade association engaged in a conspiracy, pursuant to which the association refused to approve its gas burner and the utilities consequently refused to supply gas for its burners, was dismissed on the ground that the complaint failed to allege any restraint on interstate commerce and any injury to the public. The only commerce referred to as restrained was the business of the plaintiff manufacturer, and there was no allegation that it was interstate. While there was an allegation that the defendants were engaged in interstate commerce, there was no allegation, nor was it probable, that they were restraining their own business. Also, there were no allegations from which it could be inferred that there was an injury to the public. The antitrust laws were not intended to promote the vindication of purely private wrongs.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.475, 9009.600.

For the plaintiff: Joseph Keig, Sr., Chicago, Ill.

For the defendants: Ross & O'Keefe; James J. Gaughan; Haft, Shapiro & Davis; and Jesse Holland, all of Chicago, Ill.

Memorandum

[*Motion to Dismiss*]

PHILIP L. SULLIVAN, District Judge [*In full text*]: This complaint charges defendants with violations of the Sherman Act, citing Sections 1, 15 and 26 of Title 15 U. S. C. Defendants have moved to dismiss the complaint on the ground that it fails to state a cause of action. Since this motion will be allowed it is not necessary to consider other motions made by defendants.

[*Complaint*]

The complaint alleges that: Plaintiff "is an Illinois corporation and is in the business of manufacturing, selling and distributing gas burners for space heating in homes and commercial and industrial places of business." Defendants are gas utility corporations and gas burner and appliance manufacturing suppliers, some of whom are engaged in interstate commerce, and the American Gas Association, Inc., a trade association of which the other defendants are members. The Association, which tests and approves gas burner appliances, has capriciously and wrongfully refused to approve plaintiff's burner. As a consequence of the absence of this approval, various of the defendants have refused to provide gas for plaintiff's burner, and have withdrawn certification of dealers who sell plaintiff's product. All this has been pursuant to a conspiracy among the defendants, and resulted in the loss to plaintiff of "substantial profits which it otherwise would have obtained."

[*Interstate Commerce*]

The complaint patently fails to state a cause of action. The gist of an action under the Sherman Act must be the "restraint" or "monopolizing" of "trade or commerce among the several states" (Title 15 U. S. C. § 1 and 2). There is no allegation here from which it can be deduced that any interstate commerce was restrained. (*Cf. Robinson v. Lull* [1956 TRADE CASES ¶ 68,521], 145 F. Suppl. 134, 137 (N. D. Ill. 1956.) The only commerce referred to as restrained is the business belonging to the plaintiff, and there is no allegation that it is interstate. Although the plaintiff's brief emphasizes the allegation that defendants are engaged in interstate commerce, there is no allegation, nor is it probable, that they were restraining their own businesses.

[*Public Injury*]

By the same token, there is no allegation from which it can be inferred that there has been any injury to the public, and this is an essential element (*Fedderson Motors Inc. v. Ward* [1950-1951 TRADE CASES ¶ 62,579], 180 F. 2d 519 (C. A. 10, 1950). The anti-trust laws, providing as they do the harsh penalty of triple damages, were not intended to promote the vindication of purely private wrongs, but to protect the public and the economy of the country from the crippling effects of monopoly.

[*Dismissal*]

The complaint fails to state a cause of action, and it will be dismissed.

[¶ 68,910] Carney, et al. v. Liebmann Breweries, Inc., et al.

In the New York Supreme Court, New York County, Special Term, Part I. 138 N. Y. L. J., No. 63, page 5. Dated September 27, 1957.

New York Antitrust (Donnelly) Act

Combinations and Conspiracies Under State Laws—Procedure—Examination of Defendants Before Trial—Bill of Particulars—Priority.—In an action charging that brewers of beer formed an organization to fix prices in violation of the New York antitrust law, the plaintiffs were permitted to examine the defendants before trial and such examinations were to take place prior to the service of bills of particulars. If a price fixing arrangement

was effected, only the defendants would know all of the details concerning such an arrangement. In the interest of orderly procedure, the plaintiffs should not be required to furnish bills of particulars until after the examination of the defendants. To require a bill of particulars in advance of obtaining the necessary information is futile.

See Combinations and Conspiracies, Vol. 1, ¶ 2425.34.

For a prior opinion of the New York Supreme Court, New York County, see 1956 Trade Cases ¶ 68,556.

[*Motion*]

McGivern, Justice [*In full text*]: On this motion the plaintiffs request an examination before trial of the defendants, together with the production of books and documents, and further seek an order vacating or modifying several demands for bills of particulars, or if not vacated, that said bills be served after the plaintiffs have completed their examinations of the defendants.

In opposition thereto one of the defendants, Piel Brothers, objects on the ground that the branch of the motion to vacate or modify is untimely as to them because they had refused to extend the time by stipulation; the other defendants do not urge this as they had consented to extensions of time. This contention of Piel Brothers, predicated on the timeliness of the plaintiffs' motion to vacate or modify the demand in the bill, is rejected.

[*Cross-Motions*]

By cross-motions, the defendants ask for an examination before trial of the plaintiffs, prior to their examination before trial of the defendants, but after service of the bills of particulars by plaintiffs.

In general opposition to plaintiffs' motion, the defendants argue that all of plaintiffs' objections to defendants' demands for particulars should be overruled, that plaintiffs be required to serve their bills prior to any examinations before trial, and that the defendants are entitled to priority of examinations in these cases. While the plaintiffs have challenged the propriety of various items of the demands for particulars and the requested examinations, the defendants have not questioned items, but do assert that the entire examinations of them should be denied.

[*Antitrust Claim*]

The action on which these motions and cross-motions are based charges a violation of section 340 of the General Business Law. It is alleged that six of the defendants, brewers of beer, entered into an arrangement to form an organization, the seventh defendant, Metropolitan Brewers Institute, to fix prices in restraint of trade and monopoly; injunctive relief and damages are demanded. The defendants deny the material allegations, particularly as to the alleged price-fixing arrangement, and set up defenses consisting of the statute of limitations.

Rule XI, paragraph 8, of the New York County Supreme Court Rules states "Where a party to be examined has made a timely demand or motion after joinder of issue for a bill of particulars, the party seeking the examination will generally be required to serve his bill of particulars before proceeding with the examination of the adverse party." It is recognized this is subject to the discretion of the court, and may for good cause be disposed of otherwise. The amended complaint, which has successfully withstood attack by the defendants, contains twenty-nine paragraphs and nine demands for judgment. The defendants' answers contain fifteen paragraphs, and each has six separate and partial defenses. The individual demands for bills of particulars contain from 13 to 19 items with as many as 7 subdivisions, in all a total of approximately 225 items.

[*Examination of Defendants*]

The plaintiffs have asked for an examination of all defendants as to 31 items and argue that the items are material and necessary due to the nature of the case, i.e., illegal monopoly, knowledge of which is allegedly within the singular possession of the defendants and of which the plaintiffs have no information. The defendants state that after exhaustive investigations, there is no basis for the charges made in the complaint and that the defendants have no facts within their knowledge concerning said charges. They do not question the individual items of the examination except to state in their brief that items A, B, and C, relating to the production of papers, indicate a "fishing expedition," as they are unlimited in both time and subject matter. However, the professed lack of knowledge

of a party does not bar an examination nor does a denial of the charges contained in the complaint; neither does the plaintiffs' lack of knowledge; in fact, it may be a strong supporting reason for allowing an examination of defendants before trial (*Evenga v. Herrick,* 3 App. Div., 2d, 110, 112). The court is of the opinion that the plaintiffs are entitled to the examinations before trial, and that said examinations should be had prior to the service of the bills of particulars.

The rules of this court state that generally a bill must be served before the opposite party may have an examination. Also, the court may direct that a bill be served before the examination (and the plaintiffs state under oath that they do not have the knowledge at this time) and permit the service of a further bill after completion of the examination (*Schlank v. East River Savings Bank,* 272 App. Div., 56). It is clear that most of the information sought herein is within the defendants' knowledge and control, and no useful purpose would be served by requiring plaintiffs to serve the bills sought prior to the examinations (*Zelboorg v. Zelboorg,* 131 N. Y. S., 2d 192). Since conspiracy, if it does exist, is generally the result of a secret agreement between the conspiratorial parties it is not likely that others may know all the details. The court, from the papers submitted, believes that if a price fixing arrangement was effected, only the defendants do in fact know all the details, and in the interest of orderly procedure the plaintiffs should not be required to serve their bills until after the examinations of the defendants (*Lustig v. Longchamps,* 279 App. Div., 928). To require a bill of particulars in advance of obtaining the necessary information is futile (*Weber v. Columbia Amus. Co.,* 154 App. Div., 882). Therefore, upon the termination of the examination, the plaintiffs should be able to furnish an accurate and comprehensive bill of particulars.

[*Procedure*]

Accordingly, the examination before trial of the defendants, pursuant to the notice of motion, shall proceed at Special Term, Part II, of this court, at 10 A.M., on October 8, 1957. The defendants will be examined by such officer, agent, or employee as may possess sufficient knowledge of the facts, and will be examined in the order in which they appear in the title of the action, and they will produce on the examination such books and papers as are necessary pursuant to section 296 of the Civil Practice Act. The examinations before trial of the plaintiffs will take place immediately following the conclusion of the defendants' examinations pursuant to the notice of cross-motions served by the defendants. It is also to be observed that this is an action in equity, and hence comes within subdivision 4 of Rule XI of New York County Supreme Court Rules (*cf. Cornell v. Eaton,* 286 App. Div., 1124) wherein the court stated: "In an equity action no harm can come from a broad examination of a party, and the trial will be materially shortened to the extent that the facts are developed beforehand."

In so far as the plaintiffs' motion seeks to vacate or modify defendants' demands for bills of particulars, it is denied, without prejudice to renewal after the completion of plaintiffs' and defendants' examinations before trial. The plaintiffs are directed to furnish the bills or move in relation thereto within ten days after completion of said examinations. Settle orders consistent with this decision.

[¶ 68,911] The A. L. B. Theatre Corporation v. Loew's Incorporated, et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 56 C 727. Dated December 31, 1957.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Injunctive Relief—Pretrial Procedures—Filing of Amended Complaint—Delay—Prejudice.—A plaintiff was granted leave to file an amended and supplemental complaint for treble damages where the defendants made no showing that they would be prejudiced by the filing of such a complaint and where the plaintiff's relationship with the defendants had changed since the initiation of its original action for injunctive relief. Injunctive relief would no longer have been of any benefit to

the plaintiff because of the change of relationship. The fact that the motion was presented more than a year and a half after the filing of the original complaint did not bar the granting of the motion to amend. Delay, in itself, does not warrant the refusal of leave to amend, and the defendants did not show that they would be prejudiced.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.100, 9026.

For the plaintiff: Seymour F. Simon and Howard Hoosin, Chicago, Ill.

For the defendants: Francis E. Matthews, Robert W. Bergstrom, John F. Caskey, Miles G. Seeley, Bryson P. Burnham, Louis Nizer, Samuel W. Block, Wesley G. Hall, and Arthur A. Goldberg, Chicago, Ill.

Memorandum

[*Amended Complaint*]

JULIUS J. HOFFMAN, District Judge [*In full text*]: The plaintiff, The A. L. B. Theatre Corporation, has moved for leave to file an amended and supplemental complaint under Rule 15(a) of the Federal Rules of Civil Procedure. This motion was presented more than a year and a half after the filing of the original complaint; consequently it was taken under advisement for careful consideration. Nothwithstanding the substantial lapse of time prior to filing of the motion, however, leave to amend is granted.

Under Rule 15(a) a pleading to which a response has been filed may be amended only by leave of court or with the consent of the adverse party. The Rule expresses a mandate that "leave shall be freely given when justice so requires. * * *" A motion to amend is addressed to the sound discretion of the court. *Emich Motors Corp. v. General Motors Corp.* [1956 TRADE CASES ¶ 68,249], 229 F. 2d 714 (7th Cir. 1956); *Arrow Petroleum Co. v. Johnston,* 162 F. 2d 269 (7th Cir. 1947), *cert. denied,* 332 U. S. 817 (1947). Therefore, the decisions cited in the briefs of the parties are advisory only, and the case must rest upon its particular facts. *Armstrong Cork Co. v. Patterson-Sargent Co.,* 10 F. R. D. 534 (N. D. Ohio 1950).

[*Antitrust Claim*]

This action is predicated upon alleged antitrust violations by the defendants resulting in the inability of the plaintiff, operator of the Belmont motion picture theater, to obtain an adequate film supply. On April 20, 1956, the plaintiff filed its original complaint seeking injunctive relief. Since that time the plaintiff has lost its lease on the Belmont Theater. Unprofitable operations caused by inability to obtain pictures from the defendant distributors allegedly resulted in the plaintiff's eviction for failure to pay rent on January 31, 1957.

[*Differences Between Complaints*]

There are three significant differences between the original and amended complaints. The first is that the new complaint seeks treble damages under the Clayton Act instead of injunctive relief as originally prayed. The plaintiff notes that in view of its eviction from the Belmont Theater an injunction against the defendants' practices would no longer be of any benefit to it. The second difference lies in the allegations concerning the nature of the conspiracy with which the defendants are charged. The original complaint asserts that the defendants are engaged in a continuing conspiracy to monopolize and restrain commerce in the licensing of motion pictures in the City of Chicago. It describes the distribution system for films employed by the defendant distributors since about 1947. The amended complaint adds to the former conspiracy allegations assertions that the combination originated prior to 1935; it contains detailed descriptions of the practices of the defendants between 1935 and 1947 and avers that the findings and decrees of *United States v. Paramount Pictures, Inc.,* Civil Action No. 87-273 in the United States District Court for the Southern District of New York, are prima facie evidence of the truth of the allegations concerning this earlier period. The third difference between the complaints is found in the charges concerning the rental prices paid by Balaban & Katz theaters to obtain films from the defendant distributors. These charges as made in the amended complaint are somewhat modified from those originally stated.

[*Prejudice*]

The principal argument advanced by the defendants in opposition to the plaintiff's motion rests upon several cases holding that

leave to amend a pleading will not be granted if the moving party has delayed in presenting its amendment without showing an adequate reason for the delay. See, *e.g.*, *Frank Adam Electric Co. v. Westinghouse Electric and Mfg. Co.*, 146 F. 2d 165 (8th Cir. 1945); *Shick v. Finch*, 8 F. R. D. 639 (S. D. N. Y. 1944). The defendants maintain that the plaintiff could have offered its amendment shortly after its eviction on January 31, 1957; instead, the defendants note, the plaintiff waited about eight months before moving to file the new complaint.

With respect to a similar argument the court stated in *Armstrong Cork Co. v. Patterson-Sargent Co., supra* [10 F. R. D. 534, 535 (N. D. Ohio 1950)] that

> "Some of the above cases plaintiff contends stand for the proposition that delay itself will defeat the motion. The correct rule, however, may be found in *Woldow v. Edgemoor Realty Co.*, D. C., 81 F. Supp. 800, 803, where it was held that: 'The timeliness of motions to amend obviously depends upon the facts of each case and the legal pantomime in getting the case to issue.'
>
> "Time of itself is not important. Other reasons must attach and in this case there is no reason that prevents a favorable ruling on this motion."

The opinions of the Court of Appeals for the 7th Circuit have consistently employed as the criterion for granting or refusing leave to amend a pleading the test of whether the adverse party would be prejudiced by filing of the amendment. See *e.g.*, *Goldenberg v. World Wide Shippers and Movers of Chicago, Inc.*, 236 F. 2d 198 (7th Cir. 1956); *Huse v. Consolidated Freightways, Inc.*, 227 F. 2d 425 (7th Cir. 1955); *Aiken v. Insull*, 122 F. 2d 746 (7th Cir. 1941), *cert. denied*, 315 U. S. 806 (1941). No case in this circuit has been found which holds that delay in itself warrants refusal of leave to amend. In the *Goldenberg* case, *supra*, the district court had permitted an amendment of the complaint two years after the filing of the complaint and two days before trial. The Court of Appeals upheld this ruling on the ground that the defendant was not prejudiced by the plaintiff's delay in offering its amendment. In the *Huse* case, *supra*, prejudice to the adverse party was also employed as the criterion for judging whether an amendment should be accepted. In the *Aiken* case, *supra*, the same criterion was used, and the district court was held in error for denying leave to amend seven years after the original complaint was filed.

In the present case, it must be determined whether the defendants will be prejudiced if leave to amend be granted. In view of the change in the plaintiff's circumstances, justice would seem to require that leave be afforded if the defendants will not be prejudiced thereby.

The defendants do not claim that they will be prejudiced if leave is granted. Rather they rely upon the plaintiff's delay as itself requiring denial of leave to amend. Two points made by the defendants in their brief, however, bear upon the issue of prejudice.

First, it is argued that several portions of the new complaint are legally insufficient. The defendants admit that such insufficiency is not a matter bearing upon the question of whether leave to amend should be granted. *Peterson Steels, Inc. v. Seidmon*, 188 F. 2d 193 (7th Cir. 1951). They state, however, that motions to strike will have to be made if the new complaint is allowed, and that extensive briefs and arguments will be required thereon.

This contention does not establish a ground for refusing leave to amend. If the original complaint were dismissed as moot, the amended complaint, the plaintiff states, would be filed as a new action. The defendants then would be faced with the necessity of raising the same legal arguments which they state they must now present with respect to the amended complaint. The defendants do not assert that insufficient time remains in which to prepare their defense to the new matters raised by the amendment, nor do they argue that their trial preparation will be hampered in any way. Therefore no showing of prejudice is made by the contention that motions to strike are necessitated by the new complaint.

The second point made by the defendants bearing upon the question of prejudice concerns the modification in the new complaint of the charges with respect to film rentals paid by Balaban & Katz theaters. The defendants state that these charges were altered for the purpose of avoiding certain interrogatories propounded by the defendants. They maintain that answering these interrogatories would be embarrassing to the plaintiff, and that the plaintiff should not be allowed to avoid the questions simply

by filing an amended complaint. The defendants do not state in what way the answers to interrogatories would prove embarrassing to the plaintiff. Apparently the defendants mean that the plaintiff's replies would show its inability to substantiate certain aspects of the original charge.

The fact that the plaintiff has abandoned charges which it discovered it could not support is not a ground justifying denial of leave to amend. The defendants are not prejudiced by this modification of the complaint; to the contrary they are spared the trouble of defending the allegations which have been abandoned. If the answers to the interrogatories are relevant to the cause as stated in the new complaint they may still be obtained. However, if they are no longer pertinent to the cause, the defendants can not be prejudiced in their trial preparation by their inability to acquire the information sought.

[*Motion Granted*]

The defendants have made no showing that they would be prejudiced by the filing of the amended and supplemental complaint. For this reason, and in view of the plaintiff's change in circumstances since the initiation of this action, leave to file the amended and supplemental complaint is hereby granted. The defendants are ordered to file responsive pleadings thereto on or before February 14, 1958.

[¶ 68,912] Webster Rosewood Corporation v. Schine Chain Theatres, Inc., et al.

In the United States District Court for the Northern District of New York. Civil Action No. 3679. Dated December 10, 1957.

Sherman Antitrust Act

Combinations and Conspiracies — Practices — Clearance System in Motion Picture Industry — Conspiracy to Deny Exhibitor First Neighborhood Run — Sufficiency of Evidence.—A motion picture theatre owner's complaint charging a conspiracy and monopoly in the distribution of motion pictures was dismissed on the grounds that: (1) the theatre owner had not sufficiently shown that the defendants (chain theatres), by the unlawful use of monopoly buying power of film, and alleged co-conspirators (distributors of films), agreed and conspired during a specified period to arbitrarily deprive the theatre owner of a first neighborhood run or the right to compete for a first neighborhood run in Rochester, New York; (2) the conduct of the parties in the operation of the theatres involved, the circumstances surrounding their operation, and the evidence as a whole rebutted any presumption or inference of a conspiracy afforded by a consent decree entered in a prior government action against the defendants, particularly during the claimed damage period; (3) there was no demand or request by the theatre owner for first run neighborhood pictures, and the evidence indicated a willingness and contentment to follow the claimed favored theatre at the lower rental for the second neighborhood run; and (4) there was no credible evidence that the plaintiff's theatre was clearly a better customer from the distribution point of view than the favored theatre, and that a different pattern of distribution would have been more to the interests of the distributors.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.553.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Evidence Admissible to Prove Violations of Antitrust Laws—Consent Decree in Prior Government Suit—Admissibility of Finding Fact.—In a motion picture theatre's action charging that a chain exhibitor and distributors of motion pictures conspired to deprive it of a first neighborhood run in Rochester, New York, a finding in a Government action that the chain exhibitor was able to monopolize the first neighborhood run in Rochester even though the physical facilities of independents were better was admissible in the instant suit, although a consent decree had been entered in the Government action. In rejecting the contention that the consent decree should not be admitted in evidence in view of the terms of Section 5 of the Clayton Act, the court noted that the section does except decrees entered before any testimony has been taken, but that, in the instant Government action, there was

testimony and findings based on the testimony. The consent decree was entered in a trial court after the finding had been reviewed and allowed to stand by the Supreme Court; therefore, the finding was not left open for determination by the trial court when the case was remanded to it by the Supreme Court. The finding dovetailed into the situation in the instant action, and to reject it because it did not exactly cover the situation in the instant case, would unreasonably minimize the advantage, to be rendered the private litigant, of the prima facie effect of a Government judgment under Section 5 of the Act. However, the decree was admitted as prima facie evidence of the alleged conspiracy only during the period covered in the Government action since the conspiracy alleged by the plaintiff took place after the period of time covered in the Government case.

See Private Enforcement and Procedure, Vol. 2, ¶ 9012.260, 9012.410.

For the plaintiff: Gray, Anderson & Schaeffer (Francis T. Anderson and Cormac J. Malloy, of counsel), Philadelphia, Pa.

For the defendants: Raichle, Tucker & Moore (James C. Moore, Jr., and David C. Diefendorf, of counsel), Buffalo, N. Y.; and Antevil and Antevil (Howard Antevil, of counsel), Gloversville, N. Y.

Memorandum-Decision & Order

[*Nature of Action*]

JAMES T. FOLEY, District Judge [*In full text*]: This action is one under the antitrust laws involving the usual provisions of the Sherman and Clayton Acts (15 U. S. C. A., 1, 2, 15, 16). It involves the motion picture business and by the complaint brings back on the screen the Schine interests, named as defendants, and the eight major distributors named as co-conspirators. Apparently, this type action will rise eternal against these same defense and conspirator players who featured in the court struggles of the 1940's in relation to conspiracy and monopoly government charges in the distribution and exhibition of motion pictures. Of course, the *Schine* decision is the important one in this controversy. (*Schine Chain Theatres, Inc. et al. v. U. S.* [1948-1949 TRADE CASES ¶ 62,245], 334 U. S. 110 (1948), [1944-1945 TRADE CASES ¶ 57,413] 63 F. Supp. 229 (W. D. N. Y. 1945); *U. S. v. Paramount Pictures, Inc. et al.*, [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131, [1948-1949 TRADE CASES ¶ 62,473] 85 F. Supp. 881). The voluminous complaint generally is patterned after the writings in these decisions, but there is not too great resemblance between the complaint and the evidence produced at the trial in behalf of the plaintiff. Although this variance is not at all fatal under our liberal procedures, these catch-all allegations taken from law books without too much regard for the actual circumstances and filed in 1950 in this district court, did not stand too well against actual trial combat in 1957, and the wide range of issues indicated by the complaint narrowed very much. In fairness it should be noted that the draftsmen of the complaint were not the same lawyers who undertook the preparation for trial and tried the case before me for the plaintiff. Complexity is inherent in these cases because of the broad sweep of the antitrust statutes in their terms and established interpretations. The conspiracy element is usually a nebulous thing to tie down because the evidence always tends to range far and wide; at times, in my judgment, with an inclination to outer space unless restricted. However, this situation should be simple in contrast because the plaintiff, except for the impact it urges of the findings and decrees in the *Schine* decisions on the questions of conspiracy and monopoly, limits the dispute we have to the deprivation of a first neighborhood run by reason of such conspiracy and monopoly and wants the comparative theatres limited to two alone, the Webster of the plaintiff and the State of the defendants, both located in the northeastern part of the City of Rochester, New York, three quarters of a mile or six blocks apart. Despite this simplicity of approach taken by the plaintiff, the evidence in its behalf followed again the roving design, and we were taken back to 1927 in an attempt to establish a perpetuity of business villainy on the part of Schine into the damage period claimed here from 1942 to 1950. The chief witness for the plaintiff corporation at the trial, and in fact the leading actor throughout the many years, because of his relationship with the erection and operation of the Webster Theatre, and now the real principal in this lawsuit, because all the stock of the plaintiff is now owned by him and his wife, was Max Fogel.

The import of his testimony, particularly when examined by his own lawyers, was to paint an agonizing picture of a victim crushed in the beginning and never allowed to rise again with his neighborhood theatre, the Webster, throughout the many years, except at the whim of the Schine interests and always bludgeoned by their monopoly and buying power, discussed by the United States Supreme Court in [1948-1949 TRADE CASES ¶ 62,245] 334 U. S. 110, 115, 118. This portrayal, and it was quite interesting, provoked a robust, slam-bang defense at the trial and resulted in lengthy defense briefing and much of the simplicity from the plaintiff's viewpoint began to vanish.

[*Background*]

A general review of the history of the Webster Theatre, the relations of Schine and Fogel with it in its topsy-turvey existence through the years amidst numerous corporate name changes seems important to this decision.* Max Fogel, who had experience in the theatre business from 1921, built the Webster Theatre in 1927 with other investors about six blocks away from the State Theatre, which had been newly built by Schine approximately a year before in 1926. There is little difference in the construction of the State and Webster, but important difference in location. There is an episode at this time of the construction of the Webster Theatre which varies through the years in its description and changes with the retelling, depending on the person who recalls it. It concerns a threat by J. Myer Schine at this time to the persons building the Webster that the location of the Webster was too near the State and he would build a theatre near another theatre, the Murray, owned by them in Rochester, if they persisted. This episode was made a specific finding by Judge Knight. (Finding of Fact 11(h) of the Amended Findings of the District Court, W. D. N. Y., dated March 29, 1946; *U. S. v. Schine Chain Theatres Inc., et al., supra*). The finding is not a very determinative one because it merely states both versions as to the presence or absence of threat and seems to be one of the ambiguous findings allowed to stand by the Supreme Court because of the record as a whole and the support received from other findings to conclude unlawful purpose. (*Schine Chain Theatres, Inc., et al. v. U. S.* [1948-1949 TRADE CASES ¶ 62,245], 334 U. S. 110, page 119). This episode became further enmeshed and confused in the affidavit given by Fogel to the government in 1939 (Exhibit 3) and the recanting affidavit given to Schine in 1940 (Exhibit 4), both in evidence at this trial, concerning which Fogel freely admits now and marks in red on exhibit 4, much he says was false. On the trial in 1957 Fogel elaborated further on this episode in 1927 testifying that J. Myer Schine said, in effect: "You have no right to build the Webster," and that Schine would not only build the other theatre but said he would see that Fogel and his associates would not get pictures for either of their theatres, and that Schine concluded it all by demanding 50% interest in the Webster. (R. 36-40). Whether Fogel and his associates succumbed to the blackjack as he wants believed or whether he followed the old and practical adage: "If you can't beat them, join them," and thought a little monopoly his way would not be too bad, the arrangement was made and Schine took over a 50% interest in the new operating company of the Webster Theatre which continued from 1927 until 1933. In 1933 the Schine interest, as Fogel puts it, "just dropped his part of the theatre, dropped out." (R. 42). Then, to hasten the review of this background, Fogel stayed with the Webster Theatre through varied operating companies, always as manager, with a substantial interest in ownership until 1940. In the Fall of 1940, Schine picked up the mortgage on the Webster and another theatre and came into full control and operation of the Webster until the Spring of 1942. During this period Fogel became an employee of Schine, managing a Rochester theatre of Schine and booking pictures for Schine for theatres in the Rochester area. The picture painted by Fogel is again that this was done under the crushing heel of the Schine monopoly, and he became the poorly paid employee who lost his theatre as a result of continued greed. Such pathos is not too well supported and is seriously contradicted by important evidence in the record of this trial. In any event, in 1942 by reason of a consent order entered in the District Court for the Western District of New York (Exhibit 7), Fogel with others

* R shall denote the references to the transcript of this trial. Plaintiff's exhibits are numbered and defendants' lettered. Transcript of Record is reference to the record in *U. S. v. Schine*, W. D. N. Y. [1944-1945 TRADE CASES ¶ 57,413], 63 F. Supp. 229.

reacquired the Webster from Schine and conducted it with varying degrees of ownership, finally to full ownership by him and his wife at a time during the period of claimed damage, June 20, 1942 to May 10, 1950. Many elements in this sketchy background are not important at all in the disposition of this suit because the narrow question at hand is knowing conspiracy and monopoly between Schine and its alleged co-conspirators in the distribution of motion pictures to deprive the Webster Theatre from first neighborhood run during the years 1942 to 1950 to the financial detriment of the Webster Theatre. There are many specifics in the evidence which apply directly to this limited question and allow reasonable conclusions, and I am old-fashioned enough to attempt to decide the problem on the record made before me, keeping the all-encompassing conspiracy principle within the bounds of the proof submitted.

[*Finding in Government Suit*]

The most turbulent issue in the lawsuit is the offer in evidence, upon which I reserved decision, of the consent decree dated June 24, 1949, signed by Judge Knight and consented to as a judgment by the government representatives and the Schine representatives (Exhibit 12 for Id.). I am sure that few exhibits in the history of litigation have drawn so much discussion and briefing as to its admissibility. The defense is one of depth with much substance at the various barricades as to competence and relevance. Of course, this decree was consented to at a time when a stillness in the Western District of New York existed in the *Schine* litigation and to give it effect and sense under Section 5 of the Clayton Act (15 U. S. C. A. 16) it must be related back to the judicial dispositions in the original government litigation against Schine.

In the amended findings in the government case dated March 29, 1946, Judge Knight found as part of Finding 13: "He (Schine) was able to monopolize the first neighborhood run in Rochester even though the physical facilities of the independents were better." (Vol. 4, page 3219 Transcript of Record). Upon review in 1947, the Supreme Court affirmed the judgment of the District Court in part and reversed it in part and remanded the cause to it for further proceedings in conformity with its opinion. (*Schine v. U. S. supra,* page 130). From my reading of this Supreme Court opinion at page 117, this finding seems to be allowed to stand as one supported by substantial evidence, and therefore, in my judgment, was not left open for determination upon remand and should be accepted as judicially settled. (See *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.* [1954 TRADE CASES ¶ 67,640], 346 U. S. 537, page 543, footnote 11). The finding, in my judgment, dovetails into the situation here and to reject it as the defense argues because the evidence in the case and the finding itself does not blueprint the Webster Theatre would unreasonably minimize the "large advantage" to be rendered the private litigant of the prima facie effect of the criminal judgment under Section 5 of the Clayton Act. (*Emich Motors Corporation v. General Motors Corporation* [1950-1951 TRADE CASES ¶ 62,778], 340 U. S. 558, 568). Even though the *Emich* authority limits such estoppel under Section 5 to questions "distinctly put in issue and directly determined in the criminal prosecution," if the mold of this general finding does not cover our situation because not exact enough, we surely would have, I believe, the "niggardly construction" cautioned against by Chief Judge Clark, dissenting in *Eagle Lion Studios, Inc. et al. v. Loew's Inc., et al.,* 2 Cir., decided September 9, 1957 [1957 TRADE CASES ¶ 68,819]. It seems impossible in the massive cases brought by the government to curb monopoly to itemize every business entity that did suffer from such unlawful monopoly. If such particularization were necessary for the provisions of Section 5 to operate, then the benefits intended by that Section would be definitely curtailed by such reasoning. However, the better reasoning seems clear that such decrees are allowed as prima facie evidence of a general conspiracy with the necessary relation shown to the local area and the particular business interest alleged to be harmed by the impact of the broad, unlawful monopoly. (*Emich v. General Motors, supra; DeLuxe Theatre Corp. v. Balaban & Katz Corp. et al.* [1950-1951 TRADE CASES ¶ 62,790] 95 F. Supp. 983, 986). At least it is clear that in the government case against Schine the "question" of first neighborhood run in Rochester was put in issue and directly determined at least in a general sense by Finding No. 13 of the amended findings by Judge Knight in 1946. Under my reasoning, this consent decree offered seems to be comfortably within the concept of estoppel set forth in Section 5

and should not be disqualified from reception in evidence for that reason.

[*Consent Decree—Admissibility*]

Next, the defense contends that under the terms of Section 5 the decree should not be received because it is entitled "Consent Decree as to Schine Defendants." The statute does except from its operation such form of consent, judgments or decrees "entered before any testimony has been taken." No matter how we blink our eyes or concede the attempt of clever draftsmanship to wipe out the past and let bygones be bygones, surely lengthy testimony remains in existence, and upon such testimony, findings and conclusions were made by the District Court which at least in part received the sanction, and there must be some finality about it, of the highest court in the land. This consent decree recited the previous judgments of the District Court, and in the introductory recital the District Court did not disown the previous parts of its original decree affirmed by the Supreme Court, and it would seem impossible for it to do so. This recital is to the effect only that no testimony was taken upon the issues to be determined upon remand and the consent of the defendants was "without admission by the defendants in respect to any such issue to be determined upon remand." To bar the decree because of its form would allow judicial realities to be circumvented by adroit wording after the issue has been drawn and quartered in the courts. On this contention of defense to the admission of the exhibit I am inclined to the reasoning set forth in *DeLuxe Theatre Corp. v. Balaban & Katz Corp.* [1950-1951 TRADE CASES ¶ 62,790], 95 F. Supp. 983, 986; *Don George, Inc. v. Paramount Pictures, Inc.* [1952 TRADE CASES ¶ 67,294], 111 F. Supp. 458, 468; *Homewood Theatre, Inc. v. Loew's Inc.* [1952 TRADE CASES ¶ 67,333], 110 F. Supp. 398, 409; and the suggestion in footnote 11, page 543 of *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.* [1954 TRADE CASES ¶ 67,640], 346 U. S. 537.

[*Relevancy of Decree*]

However, despite this inclination to receive the decree in evidence, there is serious question involved as to its relevancy because of the time period of the claim. The plaintiff, as it must, limits the period from June 20, 1942 to May 10, 1950, and settles down the money damages requested to an estimate of $132,855.52, to be trebled, lessened by a $28,000 settlement made by the distributors in 1948, making final computation of requested damages in the amount of $370,566.56. The difficulty is present because nothing in the English language could be plainer than that the District Court in the government case against Schine expressly confined its findings to activities prior to May 19, 1942. It was stated thus in the amended findings of the late judge Knight, March 29, 1946:

> 30. "All findings made herein with respect to any acts committed by the defendants or any of them, or any course of conduct pursued which the Court holds to be in violation of the antitrust laws are limited to acts committed or course of conduct pursued prior to May 19, 1942, plaintiff's counsel having stated at the opening of the trial that he would not offer evidence beyond that date."

Surely, this must mean what it says, and makes untenable the plaintiff's contention that the consent decree signed in 1949 stretches the prima facie principle of evidence through the years from 1942. The finding is absolute that such is not to be done. I shall overrule the varied objections of the defendants and admit the decree only as prima facie evidence of the conspiracy covering the Rochester area in relation to first neighborhood runs and existing only during the period involved as specifically set forth in the finding until May 19, 1942. (*Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., supra,* at page 541).

I have labored much on this subject, probably too much, but it is caused by the stress placed upon this issue, particularly by the defense, and the fact that the proposition is such a debatable one in the courts. Also because without it the case of the plaintiff would be hanging in mid-air with little foundation, if any. I am frank to say that if I am in error as to the ground to be covered by the decree as to the time element, I still would be unable if I stretched the prima facie impact and conspiracy background of the decree to 1950 to infer conspiracy directed against the Webster by the defendants and the alleged co-conspirators, the distributors, during the claimed damage period from the evidence developed in the whole record. Such decree as admitted is only prima facie evidence of the alleged conspiracy, not conclusive. *Fifth & Walnut*

v. Loew's, Inc., 2 Cir. [1948-1949 TRADE CASES ¶ 62,453], 176 F. 2d, 587, 590; *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.*, 2 Cir. [1950-1951 TRADE CASES ¶ 62,896], 190 F. 2d, 951, 957-8.

[*Plaintiff's Case*]

The position of the plaintiff is that the Schine interests by the unlawful use of monopoly buying power of films prevented the plaintiff from competing with Schine in the business of exhibiting motion pictures on the first neighborhood run in the City of Rochester. The pivot for this assertion is the undisputed fact that during the years 1942-1950 it is true that the State Theatre of Schine played the pictures for the neighborhood in every instance ahead of the Webster of the plaintiff (Exhibit 13). It is also true that during this period the State made more money than the Webster (Exhibits A, X). From these isolated facts without more, the plaintiff urges that together with the decree, which I have limited, the streamers of conspiracy must flow with no regard to the conduct of the parties or the surrounding circumstances. The motto seems to be: We have the decree, we have the theatre, we do not have as much money as we should, and finally, we must have been hurt by unlawful monopoly. This, to me, is not only bad logic but bad law. Of course, it is difficult in these cases to bring in photographs of the conspiracy in operation, but reliance must be had upon the reasonable inferences drawn from the conduct in the light of the surrounding circumstances, and there must be some relation of the impact of the conspiracy to a particular theatre. (*Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.* [1948-1949 TRADE CASES ¶ 62,467], 176 F. 2d, 594, 596, 598; *Emich v. General Motors, supra,* pages 570, 571; *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp. supra,* page 543). The evidence of the plaintiff will not allow me to draw the inference that a knowing conspiracy continued and existed to deprive the plaintiff of first neighborhood runs in Rochester, but together with this failure of proof of alleged conspiracy and unlawful monopoly there are countless factors in the proof that tend the other way, i. e., that under the circumstances present it was reasonable business practice proven throughout the years that the State as a better customer should run previous to the Webster, and this arrangement was accepted by Max Fogel and his plaintiff corporation with the benefit to them of lower rentals. (*Fanchon & Marco, Inc. v. Paramount Pictures, Inc.* [1950-1951 TRADE CASES ¶ 62,909], 100 F. Supp. 84, 89; affirmed [1954 TRADE CASES ¶ 67,843], 215 F. 2d, 167, cert. denied 348 U. S. 912; *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.*, 2 Cir. [1950-1951 TRADE CASES ¶ 62,896], 190 F. 2d, 951, 957-58, cert. denied 342 U. S. 926).

Formidable among these facts in the evidence is that agreed to by Fogel that when the Webster and State split the first neighborhood run in the 1927-1933 era, when Schine was a partner, the Webster lost money (R. 49, 50; 147, 158, 162, 165), and finally in this period the operating company of the Webster was dispossessed for failure to pay rent. (R. 166). Then, it is clear that when the Schine interests took over the Webster in the 1940-1942 period the arrangement was continued by Schine to have the State play the neighborhood run ahead of the Webster (R. 106-107). To reason with the plaintiff at this time it would be necessary to conclude Schine was conspiring and monopolizing against his own interest. I am not convinced at all that Schine was champing at the bit to get back the Webster in 1940 because the record indicates to me that Fogel, during this period, was always the moving party and persistent in his efforts to interest Schine again in the Webster. (R. 175, 179; Exhibits G, H, I, AA). The temporary order agreed to by the defendants in 1942 (Exhibit 7) with detailed prohibitions to refrain from certain practices, and giving access to their records by the government, together with the same type agreed to by the distributors in 1941, must be given great weight in the consideration of whether these people were bold enough to continue this alleged conspiracy of unlawful monopoly in this small neighborhood of Rochester. At least, it places further burden upon the plaintiff to prove by evidence of quality such situation continued in the face of this government pressure and supervision, with the tremendous power to search for illegality in the corporate records. Such evidence is lacking, and it must be realized that after a period of seven years that this case has been at issue, with the liberal and settled pretrial procedures of discovery and interrogation in this federal court, there is only one letter produced with any significance to the

issue of intentional collaboration and agreement, and that is an equivocal one. (Exhibit 14).

The most striking impression I gain by a review of the record is the attitude of Max Fogel himself as to whether or not he considered, under the circumstances, that the Webster should precede the State in the matter of neighborhood first run. The record does not disclose that he made any protest at all during the 1933-1940 period. From 1942-1950 the impression stands out —and I say it with all charity—that he was sitting on the sidelines with his Webster Theatre waiting to be conspired against and willing to watch his lawsuit grow. If anyone during these years knew the complaint department he did, because he had, according to his own testimony, a most serious and intimate contact when he says he told the government lawyers in Washington that Schine forced him to recant the previous government affidavit and give a false one in order to regain the Webster. He was out of the clutches of Schine after he regained the theatre, he sat through the government case in court against Schine although not called as a witness, and it would be incredible to infer that if he thought he were being wronged by deprivation of first run he would not protest to the nearest government attorney. His testimony that he did make demands upon certain branch managers, which he was allowed to state upon a reopening of his case, was hazy, casual and not too persuasive to me, and I evaluate it in such manner because of the many inconsistencies in other parts of his testimony. (R. 70, 91, 130, 149, 153, 158, 165, 198, 219, 225, 251, 257, 299). Surely a person wronged as Fogel claimed to be during this long period by an arbitrary and unlawful deprivation of first run which he wanted, would have indulged in some letter writing both to Schine and the distributors setting forth his complaint. (See *Milgram v. Loew's, Inc.*, 3 Cir. [1950-1951 TRADE CASES ¶ 62,938], 192 F. 2d 579). All we have is the meaningless Exhibit 14, which was a letter to Fogel from a distributor, to which he made no answer or complaint about the arrangement or other arrangements. Also to be considered on the important attitude of Fogel as to whether he really wanted first run and the increased rental expense is the fact that when he settled with the distributors in 1948 he did not even then request or demand a run ahead of or equal with the State Theatre, but was satisfied with a slight advance in his schedule after the State.

Whether the demand element is as vital to this lawsuit as set forth in *Milwaukee Towne Corp. v. Loew's, Inc.*, 7 Cir. [1950-1951 TRADE CASES ¶ 62,891], 190 F. 2d 561, cert. denied 342 U. S. 909, is not necessary for this decision because I consider the lack of it only as again indicative of the fact that the plaintiff operator himself accepted the first run set-up as it existed without protest, thereby giving good intimation that the arrangement was neither conspiratorial or monopolistic. (See *J. J. Theatres, Inc. et al. v. Twentieth Century-Fox Film Corp.*, 2 Cir. [1954 TRADE CASES ¶ 67,757], 212 F. 2d, 840, 845). *Congress Building Corp. v. Loew's, Inc.*, 7 Cir. [1957 TRADE CASES ¶ 68,725] 246 F. 2d, 587, agreed with the demand requisite as applied in this sense when it elaborated on the *Milwaukee Towne Corporation* case.

[*Defendants' Testimony*]

The testimony of the top men in the distribution part of the movie industry was unhesitatingly to the effect that the State was a better theatre for location and revenue than the Webster and this testimony was also reliable and factual as was that of McKay, then general counsel for Schine, that there was never any agreement or meeting of the minds to deprive the Webster of first neighborhood run if it wanted it. If it is considered important to this decision, the testimony of White, an exceptionally capable manager for Schine, establishes that efficient and warmhearted management can produce higher gross without the priority of first run when matched against a neighborhood theatre; the comparison being the Webster and the Dixie of the Schine interests. (R. 480-518, Exhibit V). Frankly, with my view of the record and the disposition I make I do not think it necessary to go in so deep.

[*Findings*]

This opinion shall constitute my findings of fact, and my conclusion in favor of the defendants is made because: (1) there is not sufficient showing by the plaintiff in the evidence that the defendants, by the unlawful use of monopoly buying power of film, and the alleged co-conspirators, agreed and conspired in the 1942-1950 period to arbitrarily deprive the Webster from first neigh-

borhood run or the right to compete for first neighborhood run in the City of Rochester; (2) the conduct of the parties in the operation of the two theatres, the Webster and the State, and the circumstances surrounding their operation and the evidence as a whole rebuts any presumption or inference of conspiracy afforded by the consent decree in the government case, particularly during the claimed damage period from 1942-1950; (3) there was no demand or request by the plaintiff for first run neighborhood pictures and the evidence indicates a willingness and contentment to follow the State at the lower rental for the second neighborhood run; (4) there is no credible evidence to convince that the Webster was clearly a better customer from the distribution point of view than the State and that a different pattern of distribution would have been more to the interests of the distributors and thus allow an inference of conspiracy. (*Dipson v. Buffalo, supra,* pages 957-958); (5) the proof is not sufficient to infer or conclude as charged in the complaint that the defendants, during the years 1942-50 conspired, combined, or conspired among themselves or with any of the alleged co-conspirators, or with others, to violate the antitrust laws by unlawful restraint and monopoly.

[*Judgment*]

Judgment shall enter in favor of the defendants dismissing the complaint upon the merits. (See *Matteson v. United States of America,* 240 F. 2d, 517).

It is So Ordered.

[*Exhibits*]

The exhibits will be returned to the respective attorneys by whom introduced. The several volumes of the *United States v. Schine* case furnished by the defendants will be retained at Chambers to be called for by the attorneys for the defendants at their convenience.

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